Stakeholder Recommendations for Efficient Water Rights Processing and Effective Water Management

Second Report

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Stakeholder Recommendations for Efficient Water Rights Processing and Effective Water Management

Second Report

Prepared
by
Rebecca J Inman

Water Resources Program
Washington State Department of Ecology
Olympia, Washington

The mission of the Water Resources Program is to support sustainable water resources management to meet the present and future water needs of people and the natural environment, in partnership with Washington communities.

Authorizing Laws

- *RCW 18.104, Water Well Construction Act (1971)*
- *RCW 43.21A, Department of Ecology (1970)*
- *RCW 43.27A, Water Resources (1967)*
- *RCW 43.83B, Water Supply Facilities (1972)*
- *RCW 43.99E, Water Supply Facilities – 1980 Bond Issue (Referendum 38) (1979)*
- *RCW 86.16.035, Department of ecology control of dams and obstructions (1935)*
- *RCW 90.03, Water code (1917)*
- *RCW 90.08, Stream patrolmen (1925)*
- *RCW 90.14, Water rights claims registration and relinquishment (1967)*
- *RCW 90.16, Appropriation of water for public and industrial purposes (1869)*
- *RCW 90.22, Minimum water flows and levels (1969)*
- *RCW 90.24, Regulation of outflow of lakes (1939)*
- *RCW 90.28, Miscellaneous rights and duties (1927)*
- *RCW 90.36, Artesian wells (1890)*
- *RCW 90.38, Yakima river basin water rights (Trust Water) (1989)*
- *RCW 90.40, Water rights of United States (1905)*
- *RCW 90.42, Water resource management (Trust Water) (1991)*
- *RCW 90.44, Regulation of public groundwaters (1945)*
- *RCW 90.46, Reclaimed water use (1992)*
- *RCW 90.54, Water resources act of 1971 (1971)*
- *RCW 90.66, Family farm water act (1977)*
- *RCW 90.80, Water conservancy boards (1997)*
- *RCW 90.82, Watershed planning (1997)*
- *RCW 90.86, Joint legislative committee on water supply during drought (2005)*
- *RCW 90.90, Columbia River basin water supply (2006)*
- *RCW 90.92, Pilot local water management program (Walla Walla) (2009)*

Case law

Washington case law plays a vital role in providing determinations and rulings that also govern water resources management. The Water Resources Program's website on laws, rules, and case law can be found at http://www.ecy.wa.gov/programs/wr/rules/rul-home.html.

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Purpose

In May 2011, the Legislature enacted 2ESHB 1087 and directed Ecology to consult with key stakeholders on statutory barriers to effective water management, and to report those recommendations to the appropriate legislative committees. The bill states:

> *(a) The department shall consult with key stakeholders on statutory barriers to efficient water rights processing and effective water management, including identification of obsolete, confusing, or conflicting statutory provisions. The department shall report stakeholder recommendations to appropriate committees of the legislature by December 1, 2011, and October 1, 2012.*

This is the second report. The first report is available at https://fortress.wa.gov/ecy/publications/SummaryPages/1211001.html.

Introduction

In the 2011 Operating Budget, 2ESHB 1087, the Legislature directed the Department of Ecology to gather and provide comments from key stakeholders and report to the Legislature in 2011, and 2012. The proviso stated:

> *(a) The department shall consult with key stakeholders on statutory barriers to efficient water rights processing and effective water management, including identification of obsolete, confusing, or conflicting statutory provisions. The department shall report stakeholder recommendations to appropriate committees of the legislature by December 1, 2011, and October 1, 2012.*

Process of soliciting comments from key stakeholders

Ecology actively solicited comments by attending meetings, emailing, mailing, and calling stakeholder groups over several months. For this second report, we again posted a web form for comments that has been available to stakeholders since June 2012. The web form contained a drop-down box with several topics listed for stakeholders to provide brief summaries of their recommendations for statutory changes. We also provided the ability for stakeholders to attach a document with additional narrative as needed.

Overview

As with the first report, Ecology received a broad variety of comments, with recommendations to improve the water code and make the administration of Washington State's water resources more effective and efficient. In total, Ecology received comments from:

- Government representatives
- Water utilities
- Water attorneys
- Water consultants
- Municipal water suppliers
- Farm groups
- Tribes
- Conservation groups
- Individual water right holders
- Home builders

Taken as a whole, these recommendations reflect strong historical divisions of opinion on water resource issues. As in the first report, three issues received the most comments: water right processing, permit exempt wells, and relinquishment. Comments received in these three areas

reflect a wide diversity of water perspectives and illustrate why water resource legislation has had such a contentious history in our state.

Report organization

This report to the legislature is organized topically within the following categories:

- Adjudication
- Compliance with Water Laws
- Fees
- Permit-Exempt Wells
- Relinquishment
- Stream flows/Restoration
- Water Banking/Mitigation
- Water Data Management
- Water Rights Processing
- Water Use Efficiency/Conservation
- Watershed Management
- Other

Within each category, comments are listed in alphabetical order by the commenter's last name. We have attached commenter letters where the commenter provided lengthy discussion related to their suggestion.

Next steps

Ecology remains committed to working with stakeholders, governmental entities, and the Legislature to identify and pursue legislative opportunities to remove statutory barriers to efficient water rights processing and more effective water resource management. Over the interim, Ecology solicited additional comments for this December 2012 report and will continue to consider suggestions and proposals from stakeholders who made recommendations in this report.

Stakeholder Recommendations

Adjudication

Doug McChesney

GSI Water Solutions

The schedule of rights produced as the result of a general adjudication of water rights begins to become stale the moment it is issued. The Supreme Court's holding that only the Superior Court can make a determination of the extent and validity of water rights needs to be modified so that, upon the completion of an adjudication, the process of maintaining the schedule of rights and adjudicating any subsequent modifications to (previously) adjudicated water rights is transferred to the administrative authority of Ecology.

I would suggest that a procedure similar to that of Wyoming, where an administrative board, such as possibly the Water Resources Program Manager and the four Regional Water Resources Program Regional Supervisors, would adjudicate all water right decisions made subsequent to a general adjudication, might make a good model for use in Washington and would obviate the need for any additional adjudications in a particular watershed.

Suzanne Skinner

Center for Environmental Policy

In the 1993 decision in Rettkowski v. Pollution Control Hearings Board, the Washington Supreme Court held that Ecology lacks authority to regulate water as between a senior water right claimholder and junior water right permit holders. The Court reasoned that the water code statutes authorize courts, and only courts, to determine the validity of water right claims – a precept to enforcing priorities.

This is a problem because expensive and time-consuming litigation between users or a general adjudication are the only way disputes can be resolved. The current adjudication of the Yakima, Aquavella, has been going on for thirty year and will not resolve groundwater claims. There are 70 petitions pending for adjudication, and another seven incomplete adjudications pending. The adjudication system is woefully inadequate to deal with such an essential resource. Plainly, the system must be reformed. The logical solution is to recognize that Ecology needs the ability to enforce and protect existing water rights, including instream flows.

CELP recommends that the Legislature clarify that Ecology has authority to tentatively determine the validity of all water right claims, certificates, permits and permit-exempt rights in order to regulate as between users and to protect instream flow rights, and grant Ecology the resources to tackle the job. We further recommend that the Legislature establish an appeal process to a specialized water court.

Compliance with Water Laws

Suzanne Skinner

Center for Environmental Policy

Many water users receive grant funds relating to water resources that may not be in compliance with water efficiency, anti-waste, and quantity or other limitations. Individuals or entities should not be eligible for state or federal grants (e.g., pass-through Natural Resource Conservation Services monies to conservation districts, Bonneville Power Authority, Washington Conservation Commission, Salmon Recovery Funding Board, Recreation and Conservation Office, Department of Fish & Wildlife, Ecology, Department of Health) if water rights held by such persons or entities are of dubious validity due to non-use, inefficiency, non-compliance with water right parameters, failure to meter, or other factors indicating non-compliance with Water Code requirements.

CELP recommends that the Legislature require that all grant applicants establish full compliance with state law, namely the Water Code, as a precondition to receiving state or federal grant money.

Fees

Suzanne Skinner

Center for Environmental Policy

1. Washington adopted a water code in 1917, and a groundwater code in 1945, both of which grandfathered in pre-existing water rights. The existence and scope of those pre-existing rights were unknown until 1974, when the state created a Water Claims Registry and required that claims for pre-code rights be filed. It is believed that many of the 165,000 claims filed with the state are duplicates, overstate water use or are otherwise not valid. Under current statute, the only mechanism

to establish validity of claims is to conduct a general stream adjudication.

This matters because, as the Acquavella adjudication demonstrates, general stream adjudications are an unfathomably slow and inefficient means to cull valid water rights and assess what water remains available.

CELP recommends that the Legislature do one of the following:

a) Assess a reasonable quantity-based fee on water users who wish to maintain their claims in the state registry, and use that fee to fund Ecology's efforts to cull invalid claims from the registry.
b) Require claimants to renew their claims within a set period of time, and to provide basic data tentatively supporting their validity.

2. If general funding is not available, CELP recommends passage of SB 5757, which would increase the fee for construction of a new well (which typically costs between $10,000 and $100,000) by $200, and to fund Ecology's essential work to map and assess our ground water supplies for environmental concerns, public health, and to provide sustainable future development.

Permit Exempt Wells

Doug McChesney

GSI Water Solutions

1. Among the many things that need to be resolved regarding application of the ground water exemption, the relationship between local land-use planning and water resources allocation needs to be clarified. The Supreme Court provided some guidance in the Kittitas County case, but as the (now withdrawn) request for an Attorney General's Opinion demonstrates, that relationship is still far from clear.

2. I also think a clearer mandate for local planning authorities and Ecology to work cooperatively, along with adequate funding, would go a long ways towards preventing future conflicts and avoiding situations, such as that in the Upper Kittitas basin, from occurring. The difficulty, as was noted in Rep. Blake's request for an AGO, is that development can continue

indefinitely, with continued modifications to local land-use plans, while water supplies remain largely constant. How to reconcile those two differing objectives, allowing additional development while protecting existing water rights and resources, will continue to pose physical and legal challenges to state and local governments until the Legislature addresses the situation.

Suzanne Skinner

Center for Environmental Policy

1. Permit-exempt wells continue to be constructed around the State without review of impacts to local water resources. At one time it was believed that these wells caused only de minimus impacts due to their small size. We now know this is no longer true because (1) thousands of exempt wells are drilled every year, concentrating impacts and (2) the attorney general has interpreted the exempt well statute to allow unlimited use of groundwater – without a permit – for (a) domestic lawn and garden irrigation and (b) stockwatering, including industrial feedlots and dairies. Controls are needed to prevent over-appropriation of water resources and other negative impacts.

   CELP recommends adoption of a bill similar to SB 5888, introduced during the 2009 session. That bill clarifies that the permit-exemption cannot exceed 5,000 gallons per day and restricts use of permit-exempt wells in areas where groundwater impacts surface waters that are fully appropriated, provide habitat for endangered salmon, otherwise adversely affect public uses. The bill also clarifies the priority date and enforceability of permit-exempt wells.

2. The state's existing real estate disclosure statute gives potential property purchasers the false impression that if they intend to rely on a permit exempt well, they can drill a well irrespective of stream closures, existing rights or other restrictions on availability. Fifteen families in the Skagit River basin are suing the state because they did not realize that the basin where they wish to reside is closed to permit exempt wells.

   CELP recommends that the Legislature adopt HB 2410 from last session to protect consumers and scarce water resources.

Anne Watanabe

Yakima River Mitigation
Water Services LLC

Case law, AG Opinions, and the state of water as we know it today since 1945, lead to the necessity of amending or clarifying RCW 90.44.050. While relevant case law and AG Opinions interpret use of the exemption, they still leave a lot to subjective interpretation on a case-by-case basis. ECY's inconsistent interpretation of the Ground Water Code, associated case law and AG Opinions has only confused the arena of permit exempt wells and made due process even less predictable for the public.

1. More clarity is needed on whether or not a property owner is entitled to one permit exemption per project under the Groundwater Code. The Washington State Supreme Court ruling in Campbell & Gwinn explicitly affirmed the use of one exemption per project. ECY does not have a consistent public message about what is a "project" and when the "project" must be defined for water availability purposes.

   The Ground Water Code limits use of water not to exceed 5,000 gpd and does not limit the use of the exemption to a number of lots, amount of acreage or number of wells. The stated limitation is 5,000 gpd. In 2002, the party to Campbell & Gwinn ended up in Supreme Court because ECY staff gave him conflicting guidance and interpretations of the Ground Water Code. Today, the same lack of consistent understanding of Campbell & Gwinn seems to permeate ECY to the detriment of the public and those making investments in their community.

   Group B Water systems operating under the exemption should be allowed to operate as a Group B under the exemption until such time that the number of connections and water usage exceeds what the exemption can support, i.e., a permit or mitigation water would be obtained for amounts of water use that exceed 5,000 gpd.

Earlier this year the AG accepted and then withdrew questions submitted by Rep. Brian Blake regarding RCW 90.44.050 and WAC 173-539A. Some constituents who opposed obtaining the Opinion stated they thought the questions posed were already answered, while others admitted they prefer the ability to subjectively interpret vague language. We encourage an AG Opinion that will help clarify some of the issues raised above about the current exempt well statute and ECY's implementation of it. An AG Opinion would very likely help guide the WRAC to needed legislative amendments.

2. Amend 90.44.050 to explicitly state that the exemption for a group use is not subject to a specified "build out" period after which water from the exemption cannot be lawfully used. ECY's Upper Kittitas Groundwater Rule (WAC 173-539A) placed this unnecessary restriction on group uses under the exemption such that any group use put to beneficial use before July 16, 2009 (the date of the Upper Kittitas Rule) must acquire mitigation water for any new connections after July 16, 2014. ECY should not be allowed to deny the continued use of an exempt well not to exceed 5,000 gpd, especially after such well is put to beneficial use.

3. Allow water used from an exempt well to be consolidated with an existing Group A water system without having to decommission the exempt well as now required under RCW 90.44.105.

Relinquishment

Sarah Mack

Tupper Mack Wells PLLC

The amendment of RCW 90.14.140 (1) through the passage of HB 1381 provides that "waiting for a final determination from the department of ecology on a change application" will constitute "sufficient cause" for nonuse of a water right to avoid relinquishment. However water right holders should view this amendment with some caution. If narrowly construed, it may well turn out to be a trap for the unwary—instead of a safe harbor from relinquishment.

HB 1381 is a modest reform—a tweak to a statute in need of an overhaul. The State of Washington has yet to conquer the challenge of comprehensive relinquishment reform that protects water right holders, prevents hoarding, and removes disincentives to water conservation. [See the appendix for the full article submitted for further detail on this recommendation.]

Suzanne Skinner

Center for Environmental Policy

Under RCW 90.14.140, water users lose their rights if they fail to use them for more than five years. Over time, the Legislature has adopted a host of exemptions to this statutory relinquishment provision, many of them adopted for special interest purposes.

This is important because water is a scarce resource and rights that have been lost for non-use should return to the public domain to augment instream flows and to be available, where there is sufficient water, for new users or public uses. Failure to acknowledge and enforce relinquishment leads to hoarding and speculation in water rights, a growing problem as water right markets expand in Washington.

CELP recommends that the Legislature eliminate the following statutory exemptions to relinquishment: RCW 90.14.140(1)(g), (h), (j), (k); 90.14.140(2)(a), (c), (d), (f) and (g). CELP further urges the Legislature not to extend the grace period for failure to use rights beyond five years.

Anne Watanabe

Yakima River Mitigation Water Services LLC

1. Clarify "determined future development" under RCW 90.14.140(2) (c).

2. Get rid of the 5 year "use it or lose it" relinquishment provision.

Stream Flows/Restoration

Suzanne Skinner

Center for Environmental Policy

1. CELP recommends that the statutory scheme for instream flow protection be amended to rank instream flows as the first priority under state law. Under this system, state agencies should be mandated to identify the quantity of flows necessary to meet (or at least not impair) Native American treaty obligations, and identify that quantity as the first priority on the stream.

   State-based out-of-stream water rights would then be recognized as subordinate to the instream flow right, but maintain priority as between those rights as established under current state law. [See CELP's letter in the appendix for further detail related to this recommendation.]

2. Instream flows should be quickly adopted for all surface waters in the state (see the following recommendation). The Department of Ecology has only established instream flows for 20 out of 62 designated WRIAs around the state. We are hopeful that after a hiatus of eleven years since the Skagit rule was adopted, the Director may sign the proposed Dungeness

Rule. However, we cannot wait another eleven years for the next instream flow rule. Many rivers and streams are being depleted by permitted and permit-exempt water rights, leaving senior rights, treaty rights, and base flows at risk.

3. CELP recommends that the Legislature authorize Ecology to adopt a blanket or general permit type of instream flow, based on conservative assumptions about water flow and climate impacts on water supply, in order to provide immediate, baseline protection for Washington's waters until such time as site-specific flows are adopted

.

An Instream Flow Rule for the Samish Watershed cannot be completed without reconvening the Planning Team to include the Unaffiliated Caucus which represents the Samish Watershed landowners and farmers. We were involved in previous planning efforts, and contrary to what is being published in the media, the Planning Team did not adopt the proposed instream flow rule, it was rejected by the Unaffiliated caucus and others on the team. You can't just make a new rule and exclude the Planning Team members so that it will go through this time.

Water Banking/Mitigation

Anne Watanabe

Yakima River Mitigation
Water Services LLC

1. ECY should prioritize establishing these banks especially in an area like Upper Kittitas County where, for many residents, the only option for water is to buy water through a water bank. ECY and instigators of the Upper Kittitas Groundwater Rule did not fully anticipate the delays caused by the ECY-USBOR

2. Storage Exchange Contract No. 09XX101700 (Exchange Contract), Section 18(b), Endangered Species Act and Restriction on Water Use.

   During the three years of dealing with the Upper Kittitas County Groundwater Rule and the unanticipated ESA issues, ECY, Kittitas County, WDFW and other Yakima Basin water managers formed the Domestic Water Reserve Program (DWRP). One initial goal of the DWRP was to develop a mitigation program that would allow for out-of-place and out-of-time mitigation and would be reserved for those situations where the ESA burden under the Exchange Contract could not be met without enormous cost to the owner; and where such

on-site mitigation would not yield the most environmental benefits for the cost, nor meet habitat priorities previously identified by the numerous fishery resource managers in the Basin.

In many cases, the ESA criteria identified in the Exchange Contract cannot even be measured because of lack of flow data on small local streams near new proposed uses of groundwater. This lack of data creates huge delays in processing permits and Water Budget Neutral decisions.

This ESA provision should be removed from the Exchange Contract, or the DWRP's efforts should aggressively continue to define acceptable mitigation, including more comprehensive solutions such as establishing a Groundwater Management Area, Aquifer Protection Zone or similar in Kittitas County. There needs to be a better "umbrella" solution so that a local jurisdiction can obtain mitigation on behalf of property owners in the County, or select geographic areas of concern.

3. ECY has provided its own trust water as mitigation for certain new uses of groundwater. ECY should make more of its trust water available as "umbrella" mitigation for new ground water uses in over-appropriated basins.

Water Data Management

Suzanne Skinner

Center for Environmental Policy

1. Ecology must make a determination that water is available when it issues a water right, but the statutes contain no policy directives regarding what that means or how it is to be determined. As a result, sound scientific basis for water right decisions is unfunded and often unavailable. The recent decision of Kittitas County v. Eastern Washington Growth Management Hearings Board, 253 P.3d 1193 (Wash. 2011) affirmed that the counties are obligated to protect water resources and may only authorize new development where water is both physically and legally available—meaning that no impairment of instream or out of stream rights will occur as a consequence.

   The lack of science-based water management makes it very difficult for Ecology to approve new water rights and for counties to approve new development. This bottleneck could

have serious consequences for economic development, particularly, in counties in Eastern Washington and in watersheds where instream flows are not consistently met.

CELP recommends that the Legislature specifically require that Ecology map and assess ground water resources statewide using best available science, and to provide funding for those efforts. That information will greatly assist counties in making development determinations. The Legislature should specifically direct that Ecology engage in rulemaking to establish protocols workable "at the counters" of county building and development departments state-wide.

2. Groundwater is an important source of water for municipal and agricultural usage, but Washington lacks a consistent program to assess and monitor the availability of groundwater for existing and future uses. In some areas of the state, groundwater appears to be in serious overdraft condition.

   CELP recommends that the Legislature enact a groundwater monitoring bill, similar to SB 6593 and HB 2477, introduced in 2008, which establishes a statewide groundwater assessment and monitoring program. If general funding is not available, CELP suggests that the Legislature enact a reasonable fee on holders of existing water rights the proceeds of which would be dedicated to fund this program.

Water Right Processing

Doug McChesney

GSI Water Solutions

The requirements for providing supporting information to Ecology in advance of a water right permitting decision are sufficiently complex, such as with Artificial Storage and Recovery (ASR, or Aquifer Storage and Recovery) projects, that the (up to) three-year period for a preliminary permit (five-year with gubernatorial approval) may not allow enough time to complete the necessary investigative work. For projects with requirements of this type, the time period for a preliminary permit needs to be extended or renewal of the preliminary permit be made a possibility, in either case provided that any application for extension or renewal be accompanied by evidence that ongoing work on the necessary investigations is being conducted.

Suzanne Skinner

Center for Environmental Policy

1. In the 2002 decision in PUD No. 1 of Pend Oreille County v. Ecology, the Washington Supreme Court held that Ecology lacks authority to consider the public interest when it reviews applications to transfer existing surface water rights. The Court reasoned that the language of RCW 90.03.380 does not specifically reference public interest review, as it does for groundwater transfers. The Court did not acknowledge or reference RCW 90.54.020(10), which states that "expressions of the public interest will be sought at all stages of water planning and allocation discussions."

   This problem creates a conflict in state law and undermines precepts of water law deeming water a public resource that originated in Roman Law. Water is a public resource essential not only to our economy but to life—state law should recognize that fundamental fact. Ecology has argued and the PCHB has ruled that the public interest cannot be considered in transfers of surface rights, thus ignoring important impacts associated with surface water transfers.

   CELP recommends that the Legislature explicitly reference the public interest test to ensure that Ecology can consider modern-day problems, such as impacts on endangered species, water quality, and other factors when it reviews proposals to change the place or purpose of use.

2. The Department of Ecology currently operates under a policy that allows water users to engage in self-help in transferring or changing their water rights without obtaining approval as required by RCW 90.03.380 and 90.44.100. Thus, water users may change their place of use, point of diversion or withdrawal, and purpose of use without going through the state change process. As a result, the public and existing water users are unable to review and comment on changes that might affect their interests. This policy, POL 1120 (Section 7) has not been adopted by rule and therefore has never been subject to review.

   CELP recommends that the Legislature adopt a resolution or budget proviso disallowing Ecology's de facto transfer policy.

3. Pursuant to the 2003 Municipal Water Law, changes in place of use for municipal water rights are now accomplished through water system planning and approved by the Department of Health, rather than the Department of Ecology's water right transfer process.

This process runs afoul of all-important transparency in government decision making and is contrary to the public interest and protection of existing rights, since neither the public nor water right holders have an opportunity to become aware of or contest the change.

CELP recommends that the Legislature amend RCW 90.03.386(2) to require that changes in place of use of municipal water rights be subject to public notice and comment as required for all other changes and transfers of existing rights.

Anne Watanabe

Yakima River Mitigation
Water Services LLC

1. ROE/Cost Reimbursement: Allow applicants to prepare or contract independently outside of the Cost Reimbursement program to prepare ROEs for Ecology's review and approval. This can be a faster, more efficient and cost effective process for applicants. ECY should be able to review and process these more expeditiously without starting the investigation of extent and validity from scratch.

2. Permit Extensions: Allow automatic permit extension of 5-10 years for any permit with a development schedule set to expire before 2014.

3. Water Conservancy Board Decisions: ECY should not be allowed to re-invent the entire extent and validity analysis nor should it discount one legitimate methodology over another if the evidence supports the water duty and consumptive use quantities; and the analysis is done by a licensed hydrologist and hydrogeologist. Non-licensed ECY staff should not be allowed to make technical modifications to an ROE.

Water Use Efficiency/Conservation

Suzanne Skinner

Center for Environmental Policy

In the 1993 decision in Grimes v. Ecology, the Washington Supreme Court ruled that water right holders are required to exercise reasonable efficiency in the use of their rights. "Reasonable efficiency" has never been defined.

This matters because Washington has no standards to define efficiency and no program to enforcement against water waste. When water users say that relinquishment causes them to use

water they do not actually need, they are essentially wasting water – an unacceptable practice. “Reasonable efficiency” standards for all classes of water use are necessary to ensure that water is used wisely, and that unused water may be returned to the public.

CELP recommends that the Legislature adopt a general definition of reasonable efficiency and direct the Department of Ecology to adopt rules defining efficiency for differing classes of water uses.

Anne Watanabe

Yakima River Mitigation
Water Services LLC

1. The legislature and the agencies should institute a process to review water use efficiency and irrigation requirements by senior water right holders and major claimants in the Acquavella adjudication. A daunting task, but within irrigation districts, portions of the irrigable acreage is now converted to non-irrigated lands. Perhaps the irrigation districts should be required to re-assess their water needs for water that can be placed in Trust and used as mitigation.

2. ECY and DOH need better policy coordination to approve, enforce and expand Group water systems. For private group systems operating under a permit and the Muni Law, both agencies should be actively reviewing the amount and status of a water system’s inchoate water, water use and conservation practices. DOH has allowed some large private water systems to operate without adequate water system plans and use water at a rate that far exceeds DOH’s guidelines for maximum daily demands namely because of leaky systems and lack of conservation practices.

   Some systems will not be able to physically build out and put all its water rights to beneficial use, yet the inchoate water will remain protected from relinquishment under the Muni Law. The legislature and agencies should not allow these water systems to “hoard” inchoate water that will not be used.

   The legislature and agencies should provide strong incentives for existing water systems to expand their service area so the inchoate water can be used by others; and also incentivize expansion if a 3rd party brings new water rights to support the new connections on an existing system. Existing private Group A water systems seem to resist expansion and appear to have no incentive to do so. Amendments to the water system plan for service area expansions should be streamlined, efficient and cost effective.

Watershed Management

Jon Culp

Conservation Commission

Allow new water allocations out of mainstem rivers when they are not flow limited by offsetting the allocation with fish and flow enhancement projects in its tributaries.

Other

Diane Freethy

Skagit Citizens Alliance for Rural Preservation

Before the Department of Ecology becomes "too big to fail," we would recommend that the Legislature study the feasibility of separating the Water Resources Division from Ecology and creating an independent agency similar to the Department of Natural Resources. The director of the new agency would be a publicly elected official, supported by a publicly elected "stewards commission" to represent the people's interest in managing their water resources. [See letter in appendix for further detail related to this recommendation.]

Kelly McLain

WA Dept of Agriculture

WSDA's comment relate to the general structure, organization, and language of the statutes. Title 90 would be more efficient if it were reorganized (chapters and sections) to reflect the current application of the law. In addition, updating the language would improve readability, and updating all the chapters to reflect case law would make the Title's implementation more easily understood. Also, where possible, group like items and try to avoid "miscellaneous" chapters (i.e. 90.28).

Suzanne Skinner

Center for Environmental Policy

Stevens Treaty Tribes located within Washington's boundaries hold rights to instream flows in rivers throughout the state in order to provide habitat for treaty fisheries. These rights were recognized by the Washington Supreme Court in the Yakima general adjudication (Acquavella) proceedings, but have not been quantified for most of the Tribes.

This matters because tribal water rights are senior to all other state-based water rights, but many streams and aquifers in Washington are already fully or over-appropriated, thus posing risk of substantial litigation.

CELP recommends that the Legislature recognize that tribal instream rights exist and establish a Water Compact Commission, similar to the commission established in Montana, to work with the Tribes to give effect to those rights.

Margaret Wiggins

Northshore Utility District

My concern is with the time table King County is using to build in added control at the combined sewer overflow (CSO) sites in Seattle. Getting the overflows down to one a year sounds great, but the cost at this time on top of the expensive Brightwater plant ($1 billion over the original price) is causing HUGE double digit rate increases during a very tough economic time for our state and our ratepayers. Can the county WTD be given credit for the highly reduced pollution coming from the new plant to allow for an extension on the CSO time frame? Even a decade could make a big difference in smoothing out the rates.

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Statutory Barriers to Efficient Water Rights Processing and Effective Water Management

OVERVIEW: Washington Water Law is intended to serve the people of the State. Instead it has become a smorgasbord of legal loopholes that feed water management "professionals" and zealous attorneys. Barring a conscientious effort by the Legislature to secure the fundamentals of time-honored water law, special interests with deep pockets will continue to undermine the rights of common folk who depend on their elected representatives to manage their water resources in a fair and judicious manner.

Our organization has followed the adoption and implementation of the Skagit River Instream Flow Rule for more than a decade. And, as an original member of the Skagit River Water Resources Advisory Committee, we have witnessed the outrageous waste of time and taxpayer dollars to dispute the validity of the Department of Ecology's Rule. From our perspective, the main barrier to effective water management is the Department itself. Our conclusion is based on the following observations:

POLITICAL INFLUENCE: These are a few examples we have observed in recent years.

* Legislators are influenced by "water services industry" lobbyists. These individuals command inordinate attention during legislative sessions and effectively minimize ordinary citizens' opportunity to be heard.

* Ecology's Water Resources Advisory Board (WRAC) comprises a small group of "stakeholders" who represent special interests and not necessarily the public-at-large. (Stakeholder is defined as "one who is involved in or affected by a course of action." Yet, tens of thousands of permit-exempt well owners are only marginally represented at WRAC meetings.)

* According to Ecology staff, no other individuals or groups outside the WRAC organization have been asked to provide recommendations per the requirements of appropriations bill HB 1087.

* Ecology reports that WRAC stakeholders have so far provided 21 comments regarding the relinquishment of water rights (particularly permit-exempt rights) – more comments than on any other topic. This is a clear indication that rural well owners are not fairly represented by this committee.

* Ecology is a division of the Executive Branch. During its 2012 session, the Legislature decided to shelve Senator Haugen's bill (SB 6312) designed to mitigate a depleted reservation account in the Skagit River WRIA. Ecology closed the Carpenter/Fisher basin to development in 2011, apparently in response to the Swinomish Tribe's threat of a lawsuit. Nevertheless, the Governor provided Ecology with a $2.225 million budget appropriation which has allowed the agency to proceed with the mitigation plan previously rejected by the Legislature.

BUREAUCRATIC POLICY: According to Ecology's website: *"The mission of the Water Resources Program is to support sustainable water resources management to meet the present and future water needs of people and the natural environment, in partnership with Washington communities."*

The Water Resources Program is in a constant state of flux. During the last five years, the

Department has had three directors and the Northwest Regional Office has had three section managers. Frequent changes in leadership and continual staff re-assignments have compromised Ecology's mission as well as its decision-making abilities. Among the discrepancies noted in recent years:

* Failing to fulfill obligations outlined in the 2006 contract with Skagit County.
* Dominating discussions during Skagit WRAC meetings.
* Relying on "WRAC's broad network" to inform the public rather than using customary outreach options.
* Bowing to threats of litigation rather than protecting the resource for the public-at-large.
* Refusing to include a broad cross-section of the population on advisory committees.

Ecology ceased processing Skagit River water right applications in 2008 and the agency's section manager announced recently that none of the mitigation funding authorized by Governor Gregoire will be used for that purpose. Meanwhile, the agency is creating new schemes to address decades-old problems rather than working to improve existing rules.

FYI: The Skagit County Board of Commissioners recently decided against reappointing members to the Skagit River WRAC to a third term.

ENGAGING THE PRIVATE SECTOR: The commodification of water rights has been a boon to market speculators, but it seems to have interfered with Ecology's ability to process water rights applications in an efficient manner. Moreover, the agency's recent alliances with private organizations appear to promote objectives that do not necessarily comport with the intent of water law.

Director Ted Sturdevant's recent admission that his agency has already employed at least one private corporation to manage the State's water resources is onerous in our opinion. Washington Water Trust, a nonprofit organization, has been hired to manage financial arrangements for the sale and purchase of water rights among individuals or corporate entities, as well as the transfer of a right from one location to another. We believe the concern shared by many water right holders is justified because this practice shifts the obligations of our elected officials to anonymous individuals who may not have any regard for the people's interest in the natural resources they own.

Ecology also recently announced that it is using the LEAN program introduced by Toyota and Boeing, even though other attempts to adapt the program to government operations have caused scholars to admit that it will only succeed if the "organization's infrastructure reflects a common focus, which is often difficult to achieve in a large bureaucracy." (The Department of Ecology is one of the largest bureaucracies in Washington State, so identifying a "common focus" is likely to present a problem for Mr. Sturdevant.)

While a water right is considered "personal property" and subject to the whims of the marketplace, Ecology seems to have lost sight of the fact that water itself is not for sale in the State of Washington. The term "selling water" is frequently heard during public meetings but Ecology personnel rarely object to its use. Meanwhile, opportunists are methodically changing the public's perception of water ownership in hopes that the Legislature will eventually revise the laws to facilitate their schemes.

MIRACLE WORKER: Last May, Director Sturdevant told Olympia TV personality Austin Jenkins: "So, we've got a directive from the Legislature, we've got authority and we've got funding that says go out there and create solutions. Basically, it says go out there and create a new water supply. So we're going to create new pools of water and share that benefit so fish get some and out-of-stream get some." All this from the same individual who admitted during the interview: "We don't understand how groundwater works."

Apparently Mr. Sturdevant hasn't bothered to study the extensive work done by US Geological Survey teams in Washington State. We urge anyone with an interest in Ecology's water resource policy to watch the Sturdevant interview at:

http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012050073

POSSIBLE SOLUTION: After seriously considering the Legislature's directive to determine the "statutory barriers to efficient water rights processing and effective water management," we believe radical changes are necessary.

Before the Department of Ecology becomes "too big to fail," we would recommend that the Legislature study the feasibility of separating the Water Resources Division from Ecology and creating an independent agency similar to the Department of Natural Resources. The director of the new agency would be a publicly elected official, supported by a publicly elected "stewards commission" to represent the people's interest in managing their water resources.

We appreciate the opportunity to comment on this very important project.

Respectfully,

/s/ Diane Freethy

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LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE ENACTS RELINQUISHMENT EXCEPTION FOR WATER RIGHT CHANGE APPLICATIONS

Continuing a recent pattern of incremental reforms to the water right relinquishment statute, the State of Washington has enacted an amendment intended to protect water rights for which change applications are pending before the State Department of Ecology (Ecology). House Bill 1381 passed the Washington Legislature with nearly unanimous support and was signed by Governor Chris Gregoire on March 7, 2012. The bill amends RCW 90.14.140(1) to provide that "[w]aiting for a final determination from the department of ecology on a change application" will constitute "sufficient cause" for nonuse of a water right. However, water right holders should view this amendment with some caution. If this new exception is narrowly construed, it may well turn out to be a trap for the unwary—instead of a safe harbor from relinquishment.

Washington's Relinquishment Statute

Washington enacted its first statutory forfeiture law in 1967. Nonuse of a water right prior to 1967 could result in loss of the right only under application of the common law abandonment doctrine—which requires a showing of intent to give up the right coupled with lack of use. The relinquishment statute eliminates the requirement to prove intent to abandon a water right.

Under RCW chapter 90.14, a water right may be subject to relinquishment if, without sufficient cause, the holder of the right voluntarily fails to beneficially use the right for a period of five consecutive years after July 1, 1967. Relinquishment applies only to water rights that have been beneficially used; under RCW 90.14.150, water rights that are still in permit status are not subject to relinquishment.

There are three separate relinquishment statutes, each applicable to a particular category of water rights. RCW 90.14.160 provides for relinquishment of water rights that vested prior to the 1917 Water Code, generally evidenced by water right claims, or that were authorized by a general adjudication. RCW 90.14.170 provides for relinquishment of riparian rights. RCW 90.14.180 provides for relinquishment of surface water and groundwater rights authorized under water right certificates.

Significantly, relinquishment can occur in whole or in part. Unlike some other western states, Washington law allows partial relinquishment where a water right is actually used but not exercised to its fullest extent. This is the typical circumstance in which water right holders find themselves, and is more common than situations involving total nonuse. Relinquishment is often referred to as a "use it or lose it" rule—but in Washington it is perhaps better characterized as "use it *all*, or lose it a little bit at a time."

Relinquishment Exceptions

As might be expected, the risk of partial relinquishment operates as a tremendous disincentive to conservation. Recognizing this, the Washington Legislature has occasionally flirted with the idea of comprehensive reform of relinquishment law, but has ended up instead enacting a hodgepodge of exceptions. The heart of Washington's relinquishment law is RCW 90.14.140—which specifies exceptions falling into two categories: "sufficient causes" for nonuse (RCW 90.14.140(1)) and outright exemptions from relinquishment (RCW 90.14.140(2)).

Several types of water rights are completely exempt from relinquishment, including rights claimed for power development, rights used for a standby or reserve water supply, rights claimed for a "determined future development," rights claimed for municipal water supply purposes, and trust water rights held by the state for purposes of instream flow or groundwater preservation. RCW 90.14.140(2). For a water right that is not exempt under RCW 90.14.140(2), nonuse must be excused by a "sufficient cause" in order to avoid relinquishment.

"Sufficient causes" include drought or other unavailability of water, active service in the U.S. armed forces during military crisis, the "operation of legal proceedings," federal or state agency leases or options,

reduced water need due to weather conditions, reliance on return flows, and "temporary" crop rotation. RCW 90.14.140(1).

HB 1381 and Its Impact

HB 1381 amends RCW 90.14.140(1) to add "[w]aiting for a final determination from the department of ecology on a change application" to the list of "sufficient causes" for nonuse of water. In testimony before legislative committees, supporters of the bill generally described it as necessary to avoid "penalizing" a water right holder due to delays and backlogs at Ecology.

Ecology's Fiscal Note on the bill even went so far as to suggest that HB 1381 would amount to a tolling provision:

> We anticipate that the addition of this exception would create an incentive for water users in jeopardy of relinquishing their water rights due to nonuse to submit a change application to the department so they would now have sufficient cause for nonuse as they wait for the department to act on their application.

The agency estimated that approximately 20 water right change applications would be filed each year by applicants seeking "relinquishment protection" by filing a change application.

HB 1381 passed the House on a vote of 89-2 and passed the Senate on a vote of 48-0. Governor Chris Gregoire signed the law on March 7, 2012. Now the question is: what will be the impact of this broadly supported new relinquishment exception?

Ecology's water right permitting program suffers from serious lack of funding and processing backlogs, and water right change applications can sometimes take years to reach a final decision.

Horror stories abound, but *Welke v. Washington State Department of Ecology*, PCHB No. 07-013 (2007), provides the best recent example of the problems the legislature hoped to address in enacting HB 1381. In *Welke*, the water right holders were under the mistaken belief that they were not authorized to use their water while their application for a change in the point of diversion was pending before Ecology. When Ecology finally got around to acting on their change application—ten years after it was filed—the agency determined that the water right had been relinquished for nonuse.

It remains to be seen, however, whether HB 1381 will protect water right holders in similar circumstances. Some skepticism is in order, based upon the express statutory language elsewhere in RCW 90.14.140(1) and rules of statutory interpretation.

The Introductory Clause

To begin with, the introductory clause of RCW 90.14.140(1) is hardly a model of clarity. It states: "For the purposes of RCW 90.14.130 through 90.14.180, 'sufficient cause' shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of: . . ."—followed by the list of 12 "sufficient cause" exceptions including the newly-enacted amendment.

The first issue posed by this introductory language is that it includes five or more consecutive years of nonuse in the definition of "sufficient cause"—which, applied literally, means that a "sufficient cause" that does not continue for at least five years provides no protection from relinquishment. *See, Pacific Land Partners, LLC v. State Department of Ecology*, 150 Wn. App. 740, 756-58, 208 P.3d 586 (2009) (stating that "[r]elinquishment is precluded if one of the enumerated exceptions in RCW 90.14.140 prevented beneficial use up to the end of the five-year period" and "the question is whether water was unavailable due to hydrologic, engineering, or other external reasons throughout the five-year period"). Applied literally, this language could result in relinquishment in situations where water right change applicants wait for fewer than five consecutive years to get decisions from Ecology.

The second issue with this introductory language is that nonuse must occur "as a result of" the sufficient cause. This language has been interpreted by the courts to avoid relinquishment only where the "sufficient cause" actually prevented the use of water. The Washington Supreme Court has explained:

> In addressing the exceptions to relinquishment, it is important to bear in mind that generally exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions. *R.D.*

Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

Construing the "operation of legal proceedings" exception, the Supreme Court held that:

> ...the exception requires that the nonuse of water be attributable to the legal proceedings, *i.e.*, that the legal proceedings prevent the use of water." *Id.* at 141-42.

The Court elaborated:

> This approach is in keeping with the general provisions favoring beneficial use of water unless there is **some legitimate reason why the water cannot be used.** Here, while development plans may have been delayed as a result of the litigation, it is not clear **whether beneficial use of the water for other purposes was prevented** while the litigation was pending. *Id.* at 142 (emphasis added). *See also, Ege v. Ecology*, PCHB No. 05-033 (narrowly construing the "unavailability of water" exception).

Based upon *Merrill*, a water right holder should expect similar questions to be asked about nonuse during the time a water right change application is pending before Ecology. Under the Washington water code, an applicant can continue to exercise a water right as originally authorized while applying for approval of a change to the right. It may be very difficult to establish that waiting for Ecology to make a decision actually prevented a water right holder from using water. Unless there is some other "legitimate reason why the water cannot be used," nonuse might result in relinquishment if the new exception is narrowly construed.

It should be noted that HB 1381 was originally introduced as part of a package of bills by the same sponsor addressing various aspects of relinquishment reform. One of those bills, HB 1378—which failed to pass the legislature—would have amended RCW 90.14.140 to require that it be "liberally construed to effectuate" its purposes. It should also be noted that Ecology's former manager of the Water Resources Program testified in opposition to that entire package of bills during the 2011 legislative session. Ecology supported HB 1381 in the 2012 session—but at that point HB 1381 was unaccompanied by any other legislation providing for "liberal construction" of relinquishment exceptions. Unless the legislature enacts a contrary statement of legislative intent similar to HB 1378, the courts and the PCHB will probably continue to apply the rule of narrow construction, with predictable results.

Conclusion and Implications

Water right holders should be cautious about relying on the new relinquishment exception for nonuse while waiting for Ecology to act on a change application. Notwithstanding Ecology's description of HB 1381 during the legislative process, applicants should not assume that nonuse is automatically exempt from relinquishment during the time a change application is pending. Until the courts definitively construe this new exception, protection from relinquishment can be assured only if the water right holder continues to exercise the water right while waiting for Ecology to act on a change application—either by using the water or placing it temporarily in the Trust Water Right program.

HB 1381 illustrates some of the difficulties inherent in incremental reform of Washington's relinquishment laws. HB 1381 is almost universally popular and undeniably stems from concepts of fundamental fairness. Nevertheless, this new relinquishment exception will be applied in the context of a broader existing statute, and subject to existing rules that can make relinquishment difficult to avoid.

HB 1381 is a modest reform—a tweak to a statute in need of an overhaul. The State of Washington has yet to conquer the challenge of comprehensive relinquishment reform that protects water right holders, prevents water hoarding, and removes disincentives to water conservation. HB 1381, Washington Laws of 2012, chapter 7 can be found at: http://apps.leg.wa.gov/documents/billdocs/201112/Pdf/Bills/Session%20Law%202012/1381.SL.pdf
(Sarah Mack)

CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for Environmental Law & Policy

August 30, 2012

By electronic mail

Evan Sheffels and Maia Bellon
Department of Ecology Water Resources Program
Olympia, Washington

Re: 2012-13 Recommendations for Effective Water Management and Efficient Water Rights Processing

Dear Evan and Maia:

In response to the Department of Ecology's for stakeholder recommendations regarding "statutory barriers to efficient water rights processing and effective water management, including identification of obsolete, confusing, or conflicting statutory provisions", the Center for Environmental Law and Policy (CELP) respectfully submits the following comments. Many of our comments are similar to last year's—we are repeating the points because we think the issues are only becoming more important with the passage of time.

Re-Prioritizing Instream Flows.

- Washington's water statutes codify the prior appropriation doctrine, a priority system for allocation of water resources. Under state law, water flows for rivers are accorded a junior priority related to the date of Water Resources Inventory Area (WRIA) rulemaking. The priority dates for instream flows depend upon when the rule was adopted and range from 1977 to the present. As such, protection of instream flows is subordinate to all pre-existing water rights, which include approximately 250,000 claims, certificates and permits as well as rights for hundreds of thousands of permit-exempt wells. Instream flow rules, as you know, are regulatory flows. They do not set optimal levels for fish and environmental values.
- In the 20 WRIAs where instream flow rules exist, those flows are increasingly unmet, causing fish habitat and productivity to fall, among other deleterious impacts to wildlife, water quality, recreation and other public uses. There are many reasons why this is happening, including increasing reliance on permit exempt wells in many counties. New permit-exempt wells, which are drilled without an assessment of whether water is legally available, often have a high degree of hydraulic conductivity and indirectly or directly impair existing instream rights, and at times, out of stream rights. Because neither the counties nor Ecology are able, as a practical matter, to protect existing rights, the Tribes and impacted water users are beginning to resort to litigation. A case in point is the Squaxin Island Tribe's lawsuit against Ecology and Mason County over John's Creek for failure to close that imperiled waterway. That lawsuit may be a harbinger of increasing basin by basin litigation which is a costly and inefficient way to address an emerging state-wide problem unless the Legislature acts soon.
- Senator Karen Fraser wisely warned the state not to disregard the Treaty rights of tribal people to fish in their usual and accustomed places. She advised: "When the US created Washington State, they didn't give us all the water. They held some

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back to meet pre-existing commitments. Everything we do as a state is floating on top of this unquantified sea of federal obligations."

- That unquantified sea includes Treaty rights which by and large are unquantified. The State has the opportunity to avert a legal Armageddon over these inchoate Treaty Rights by as a minimum, reprioritizing existing instream flow rules to before statehood.
- *CELP recommends* that the statutory scheme for instream flow protection be amended to rank instream flows as the first priority under state law. Under this system, state agencies should be mandated to identify the quantity of flows necessary to meet (or at least not impair) Native American treaty obligations, and identify that quantity as the first priority on the stream. State-based out-of-stream water rights would then be recognized as subordinate to the instream flow right, but maintain priority as between those rights as established under current state law. Instream flows should be quickly adopted for all surface waters in the state (see the following recommendation).

Establish Instream Flows Statewide.

- The Department of Ecology has only established instream flows for 20 out of 62 designated WRIAs around the state. We are hopeful that after a hiatus of eleven years since the Skagit rule was adopted, the Director may sign the proposed Dungeness Rule. However, we cannot wait another eleven years for the next instream flow rule. Many rivers and streams are being depleted by permitted and permit-exempt water rights, leaving senior rights, treaty rights, and base flows at risk.
- *CELP recommends* that the Legislature authorize Ecology to adopt a blanket or general permit type of instream flow, based on conservative assumptions about water flow and climate impacts on water supply, in order to provide immediate, baseline protection for Washington's waters until such time as site-specific flows are adopted.

Science-Based Water Management.

- Ecology must make a determination that water is available when it issues a water right, but the statutes contain no policy directives regarding what that means or how it is to be determined. As a result, sound scientific basis for water right decisions is unfunded and often unavailable. The recent decision of *Kittitas County v. Eastern Washington Growth Management Hearings Board,* 253 P.3d 1193 (Wash. 2011) affirmed that the counties are obligated to protect water resources and may only authorize new development where water is both physically and legally available—meaning that no impairment of instream or out of stream rights will occur as a consequence.
- The lack of science-based water management makes it very difficult for Ecology to approve new water rights and for counties to approve new development. This bottleneck could have serious consequences for economic development, particularly, in counties in Eastern Washington and in watersheds where instream flows are not consistently met.
- *CELP recommends* that the Legislature specifically require that Ecology map and assess ground water resources statewide using best available science, and to provide funding for those efforts. That information will greatly assist counties in making development determinations. The Legislature should specifically direct that Ecology engage in rulemaking to establish protocols workable "at the counters" of county building and development departments state-wide.

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Groundwater Monitoring Program.

- Groundwater is an important source of water for municipal and agricultural usage, but Washington lacks a consistent program to assess and monitor the availability of groundwater for existing and future uses. In some areas of the state, groundwater appears to be in serious overdraft condition.
- *CELP recommends* that the Legislature enact a groundwater monitoring bill, similar to SB 6593 and HB 2477, introduced in 2008, which establishes a statewide groundwater assessment and monitoring program. If general funding is not available, CELP suggests that the Legislature enact a reasonable fee on holders of existing water rights the proceeds of which would be dedicated to fund this program

Water Right Claims Fee

- Washington adopted a water code in 1917, and a groundwater code in 1945, both of which grandfathered in pre-existing water rights. The existence and scope of those pre-existing rights were unknown until 1974, when the state created a Water Claims Registry and required that claims for pre-code rights be filed. It is believed that many of the 165,000 claims filed with the state are duplicates, overstate water use or are otherwise not valid. Under current statute, the only mechanism to establish validity of claims is to conduct a general stream adjudication.
- This matters because, as the *Acquavella* adjudication demonstrates, general stream adjudications are an unfathomably slow and inefficient means to cull valid water rights and assess what water remains available.
- *CELP recommends* that the Legislature do one of the following. 1) Assess a reasonable quantity-based fee on water users who wish to maintain their claims in the state registry, and use that fee to fund Ecology's efforts to cull invalid claims from the registry. 2) Require claimants to renew their claims within a set period of time, and to provide basic data tentatively supporting their validity.

Well Construction Fee.

- If general funding is not available, *CELP recommends* passage of SB 5757, which would increase the fee for construction of a new well (which typically costs between $10,000 and $100,000) by $200, and to fund Ecology's essential work to map and assess our ground water supplies for environmental concerns, public health, and to provide sustainable future development.

Exempt Well Reform.

- Permit-exempt wells continue to be constructed around the State without review of impacts to local water resources. At one time it was believed that these wells caused only de minimis impacts due to their small size. We now know this is no longer true because (1) thousands of exempt wells are drilled every year, concentrating impacts and (2) the attorney general has interpreted the exempt well statute to allow unlimited use of groundwater – without a permit – for (a) domestic lawn and garden irrigation and (b) stockwatering, including industrial feedlots and dairies. Controls are needed to prevent over-appropriation of water resources and other negative impacts.
- *CELP recommends* adoption of a bill similar to SB 5888, introduced during the 2009 session. That bill clarifies that the permit-exemption cannot exceed 5,000 gallons per day and restricts use of permit-exempt wells in areas where groundwater impacts surface waters that are fully appropriated, provide habitat for endangered salmon, otherwise adversely affect public uses. The bill also clarifies the priority date and enforceability of permit-exempt wells.

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Re-establishing Ecology's Enforcement Authority.

- In the 1993 decision in *Rettkowski v. Pollution Control Hearings Board*, the Washington Supreme Court held that Ecology lacks authority to regulate water as between a senior water right claimholder and junior water right permit holders. The Court reasoned that the water code statutes authorize courts, and only courts, to determine the validity of water right claims – a precept to enforcing priorities.
- This is a problem because expensive and time-consuming litigation between users or a general adjudication are the only way disputes can be resolved. The current adjudication of the Yakima, *Aquavella,* has been going on for thirty year AND WILL NOT RESOLVE GROUNDWATER CLAIMS. There are 70 petitions pending for adjudication, and another seven incomplete adjudications pending. The adjudication system is woefully inadequate to deal with such an essential resource. Plainly, the system must be reformed. The logical solution is to recognize that Ecology needs the ability to enforce and protect existing water rights, including instream flows.
- *CELP recommends* that the Legislature clarify that Ecology has authority to tentatively determine the validity of all water right claims, certificates, permits and permit-exempt rights in order to regulate as between users and to protect instream flow rights, and grant Ecology the resources to tackle the job. We further recommend that the Legislature establish an appeal process to a specialized water court.

Clarifying Public Interest Review for Surface Water Transfers.

- In the 2002 decision in *PUD No. 1 of Pend Oreille County v. Ecology,* the Washington Supreme Court held that Ecology lacks authority to consider the public interest when it reviews applications to transfer existing surface water rights. The Court reasoned that the language of RCW 90.03.380 does not specifically reference public interest review, as it does for groundwater transfers. The Court did not acknowledge or reference RCW 90.54.020(10), which states that "expressions of the public interest will be sought at all stages of water planning and allocation discussions."
- This problem creates a conflict in state law and undermines precepts of water law deeming water a public resource that originated in Roman Law. Water is a public resource essential not only to our economy but to life—state law should recognize that fundamental fact. Ecology has argued and the PCHB has ruled that the public interest cannot be considered in transfers of surface rights, thus ignoring important impacts associated with surface water transfers.
- *CELP recommends* that the Legislature explicitly reference the public interest test to ensure that Ecology can consider modern-day problems, such as impacts on endangered species, water quality, and other factors when it reviews proposals to change the place or purpose of use.

Abolishing Policy of De-Facto Transfers of Water Rights.

- The Department of Ecology currently operates under a policy that allows water users to engage in self-help in transferring or changing their water rights without obtaining approval as required by RCW 90.03.380 and 90.44.100. Thus, water users may change their place of use, point of diversion or withdrawal, and purpose of use without going through the state change process. As a result, the public and existing water users are unable to review and comment on changes that might affect their interests. This policy, POL 1120 (Section 7) has not been adopted by rule and therefore has never been subject to review.
- *CELP recommends* that the Legislature adopt a resolution or budget proviso disallowing Ecology's de facto transfer policy.

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Open and transparent processes.

- Pursuant to the 2003 Municipal Water Law, changes in place of use for municipal water rights are now accomplished through water system planning and approved by the Department of Health, rather than the Department of Ecology's water right transfer process.
- This process runs afoul of all-important transparency in government decision making and is contrary to the public interest and protection of existing rights, since neither the public nor water right holders have an opportunity to become aware of or contest the change.
- *CELP recommends* that the Legislature amend RCW 90.03.386(2) to require that changes in place of use of municipal water rights be subject to public notice and comment as required for all other changes and transfers of existing rights.

Reinforcing Loss of Water Rights for Non-Use

- Under RCW 90.14.140, water users lose their rights if they fail to use them for more than five years. Over time, the Legislature has adopted a host of exemptions to this statutory relinquishment provision, many of them adopted for special interest purposes.
- This is important because water is a scarce resource and rights that have been lost for non-use should return to the public domain to augment instream flows and to be available, where there is sufficient water, for new users or public uses. Failure to acknowledge and enforce relinquishment leads to hoarding and speculation in water rights, a growing problem as water right markets expand in Washington.
- *CELP recommends* that the Legislature eliminate the following statutory exemptions to relinquishment: RCW 90.14.140(1)(g), (h), (j), (k); 90.14.140(2)(a), (c), (d), (f) and (g). CELP further urges the Legislature not to extend the grace period for failure to use rights beyond five years.

Defining Reasonable Efficiency.

- In the 1993 decision in *Grimes v. Ecology,* the Washington Supreme Court ruled that water right holders are required to exercise reasonable efficiency in the use of their rights. "Reasonable efficiency" has never been defined.
- This matters because Washington has no standards to define efficiency and no program to enforcement against water waste. When water users say that relinquishment causes them to use water they do not actually need, they are essentially wasting water – an unacceptable practice. "Reasonable efficiency" standards for all classes of water use are necessary to ensure that water is used wisely, and that unused water may be returned to the public.
- *CELP recommends* that the Legislature adopt a general definition of reasonable efficiency and direct the Department of Ecology to adopt rules defining efficiency for differing classes of water uses.

Recognizing Tribal Treaty Water Rights

- Stevens Treaty Tribes located within Washington's boundaries hold rights to instream flows in rivers throughout the state in order to provide habitat for treaty fisheries. These rights were recognized by the Washington Supreme Court in the Yakima general adjudication (*Acquavella)* proceedings, but have not been quantified for most of the Tribes.
- This matters because tribal water rights are senior to all other state-based water rights, but many streams and aquifers in Washington are already fully or over-appropriated, thus posing risk of substantial litigation.

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- *CELP recommends* that the Legislature recognize that tribal instream rights exist and establish a Water Compact Commission, similar to the commission established in Montana, to work with the Tribes to give effect to those rights.

Restrictions on Eligibility for Grants.

- Many water users receive grant funds relating to water resources that may not be in compliance with water efficiency, anti-waste, and quantity or other limitations. Individuals or entities should not be eligible for state or federal grants (e.g., pass-through Natural Resource Conservation Services monies to conservation districts, Bonneville Power Authority, Washington Conservation Commission, Salmon Recovery Funding Board, Recreation and Conservation Office, Department of Fish & Wildlife, Ecology, Department of Health) if water rights held by such persons or entities are of dubious validity due to non-use, inefficiency, non-compliance with water right parameters, failure to meter, or other factors indicating non-compliance with Water Code requirements.
- *CELP recommends* that the Legislature require that all grant applicants establish full compliance with state law, namely the Water Code, as a precondition to receiving state or federal grant money.

Real Estate Disclosure to Protect Consumers and Instream Flows.

- The state's existing real estate disclosure statute gives potential property purchasers the false impression that if they intend to rely on a permit exempt well, they can drill a well irrespective of stream closures, existing rights or other restrictions on availability. Fifteen families in the Skagit River basin are suing the state because they did not realize that the basin where they wish to reside is closed to permit exempt wells.
- CELP recommends that the Legislature adopt HB 2410 from last session to protect consumers and scarce water resources.

We thank you for considering these comments on our suggestions for water code reform as part of the process for Ecology's 2012 report to the Legislature. Please do not hesitate to contact me if CELP can provide additional information.

Sincerely,

Suzanne Skinner
Executive Director

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DATE: **August 30, 2012**
TO: **Rebecca Inman, Ecology**
FROM: **Anne Watanabe**
RE: **WRAC – Stakeholder Comments**

Thank you for the opportunity to provide the following comments.

EFFICIENT WATER RIGHTS PROCESSING

ROE/Cost Reimbursement: Allow applicants to prepare or contract independently outside of the Cost Reimbursement program to prepare ROEs for Ecology's review and approval. This can be a faster, more efficient and cost effective process for applicants. ECY should be able to review and process these more expeditiously without starting the investigation of extent and validity from scratch.

Permit Extensions: Allow automatic permit extension of 5-10 years for any permit with a development schedule set to expire before 2014.

Relinquishment: Clarify "determined future development" under RCW 90.14.140(2) (c).
Get rid of the 5 year "use it or lose it" relinquishment provision.

Water Conservancy Board Decisions: ECY should not be allowed to re-invent the entire extent and validity analysis nor should it discount one legitimate methodology over another if the evidence supports the water duty and consumptive use quantities; and the analysis is done by a licensed hydrologist and hydro-geologist. Non-licensed ECY staff should not be allowed to make technical modifications to an ROE.

PERMIT EXEMPT WELLS

Case law, AG Opinions, and the state of water as we know it today since 1945, lead to the necessity of amending or clarifying RCW 90.44.050. While relevant case law and AG Opinions interpret use of the exemption, they still leave a lot to subjective interpretation on a case-by-case basis. ECY's inconsistent

interpretation of the Ground Water Code, associated case law and AG Opinions has only confused the arena of permit exempt wells and made due process even less predictable for the public.

More clarity is needed on whether or not a property owner is entitled to one permit exemption per project under the Groundwater Code. The Washington State Supreme Court ruling in *Campbell & Gwinn* explicitly affirmed the use of one exemption per project. ECY does not have a consistent public message about what is a "project" and when the "project" must be defined for water availability purposes. **The Ground Water Code limits use of water not to exceed 5,000 gpd and does not limit the use of the exemption to a number of lots, amount of acreage or number of wells. The stated limitation is 5,000 gpd.** In 2002, the party to *Campbell & Gwinn* ended up in Supreme Court because ECY staff gave him conflicting guidance and interpretations of the Ground Water Code. Today, the same lack of consistent understanding of *Campbell & Gwinn* seems to permeate ECY to the detriment of the public and those making investments in their community.

Group B Water systems operating under the exemption should be allowed to operate as a Group B under the exemption until such time that the number of connections and water usage exceeds what the exemption can support, i.e., a permit or mitigation water would be obtained for amounts of water use that exceed 5,000 gpd.

Earlier this year the AG accepted and then withdrew questions submitted by Rep. Brian Blake regarding RCW 90.44.050 and WAC 173-539A. Some constituents who opposed obtaining the Opinion stated they thought the questions posed were already answered, while others admitted they prefer the ability to subjectively interpret vague language. We encourage an AG Opinion that will help clarify some of the issues raised above about the current exempt well statute and ECY's implementation of it. An AG Opinion would very likely help guide the WRAC to needed legislative amendments.

Amend 90.44.050 to explicitly state that the exemption for a group use is not subject to a specified "build out" period after which water from the exemption cannot be lawfully used. ECY's Upper Kittitas Groundwater Rule (WAC 173-539A) placed this unnecessary restriction on group uses under the exemption such that

any group use put to beneficial use before July 16, 2009 (the date of the Upper Kittitas Rule) must acquire mitigation water for any new connections after July 16, 2014. ECY should not be allowed to deny the continued use of an exempt well not to exceed 5,000 gpd, especially after such well is put to beneficial use.

Allow water used from an exempt well to be consolidated with an existing Group A water system without having to de-commission the exempt well as now required under RCW 90.44.105.

WATER USE EFFICIENCY

The legislature and the agencies should institute a process to review water use efficiency and irrigation requirements by senior water right holders and major claimants in the *Acquavella* adjudication. A daunting task, but within irrigation districts, portions of the irrigable acreage is now converted to non-irrigated lands. Perhaps the irrigation districts should be required to re-assess their water needs for water that can be placed in Trust and used as mitigation.

ECY and DOH need better policy coordination to approve, enforce and expand Group water systems. For private group systems operating under a permit and the Muni Law, both agencies should be actively reviewing the amount and status of a water system's inchoate water, water use and conservation practices. DOH has allowed some large private water systems to operate without adequate water system plans and use water at a rate that far exceeds DOH's guidelines for maximum daily demands namely because of leaky systems and lack of conservation practices. Some systems will not be able to physically build out and put all its water rights to beneficial use, yet the inchoate water will remain protected from relinquishment under the Muni Law. The legislature and agencies should not allow these water systems to "hoard" inchoate water that will not be used. The legislature and agencies should provide strong incentives for existing water systems to expand their service area so the inchoate water can be used by others; and also incentivize expansion if a 3rd party brings new water rights to support the new connections on an existing system. Existing private Group A water systems seem to resist expansion and appear to have no incentive to do so. Amendments to the water system plan for service area expansions should be streamlined, efficient and cost effective.

WATER BANKING/MITIGATION

ECY should prioritize establishing these banks especially in an area like Upper Kittitas County where, for many residents, the only option for water is to buy water through a water bank. ECY and instigators of the Upper Kittitas Groundwater Rule did not fully anticipate the delays caused by the ECY-USBOR

Storage Exchange Contract No. 09XX101700 (Exchange Contract), Section 18(b), Endangered Species Act and Restriction on Water Use.

During the three years of dealing with the Upper Kittitas County Groundwater Rule and the unanticipated ESA issues, ECY, Kittitas County, WDFW and other Yakima Basin water managers formed the Domestic Water Reserve Program (DWRP). One initial goal of the DWRP was to develop a mitigation program that would allow for out-of-place and out-of-time mitigation and would be reserved for those situations where the ESA burden under the Exchange Contract could not be met without enormous cost to the owner; and where such *on-site* mitigation would not yield the most environmental benefits for the cost, nor meet habitat priorities previously identified by the numerous fishery resource managers in the Basin. In many cases, the ESA criteria identified in the Exchange Contract cannot even be measured because of lack of flow data on small local streams near new proposed uses of groundwater. This lack of data creates huge delays in processing permits and Water Budget Neutral decisions. This ESA provision should be removed from the Exchange Contract, or the DWRP's efforts should aggressively continue to define acceptable mitigation, including more comprehensive solutions such as establishing a Groundwater Management Area, Aquifer Protection Zone or similar in Kittitas County. There needs to be a better "umbrella" solution so that a local jurisdiction can obtain mitigation on behalf of property owners in the County, or select geographic areas of concern.

ECY has provided its own trust water as mitigation for certain new uses of groundwater. ECY should make more of its trust water available as "umbrella" mitigation for new ground water uses in over-appropriated basins.

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