

Focus on: How the Foster decision affects our work

More information

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The Foster Decision: Summary

In 2015 the State Supreme Court issued a decision on [Foster v. Ecology, City of Yelm, and Washington Pollution Control Hearings Board](#). The decision, frequently referred to as the “Foster decision,” reaffirmed and reinforced that instream flows adopted in a rule must be protected from impairment. The decision affects Ecology’s work on water right change applications, mitigation packages, and water banking. Instream flows have been adopted in nearly half of the state’s watersheds and the Columbia River (see Figure 1).

Background

The city of Yelm applied to Ecology for a new municipal water right permit to meet its increasing water needs. Ecology conditioned the permit on an extensive mitigation plan that included several strategies using both *in-kind* and *out-of-kind* mitigation to account for the impairment to minimum flows that would result from the new water uses.

The mitigation plan included offsetting the total quantity of water through in-kind or “wet water” mitigation. However, the timing of the mitigation did not match perfectly—the in-kind mitigation occurred during the low-flow period only. It was acknowledged that minimum

instream flows would be slightly affected during the fall and spring seasons, so the city proposed mitigating this with out-of-kind mitigation in the form of habitat improvements. Overall, the mitigation package improved habitat conditions for aquatic species and wildlife, as compared to the status quo.

Ecology generally may not issue a water right permit for any use of water that results in withdrawals that impair minimum flows, unless “it is clear that overriding considerations of public interest [OCPI] will be served.” In Yelm’s water right permit decision, Ecology determined the OCPI exception was

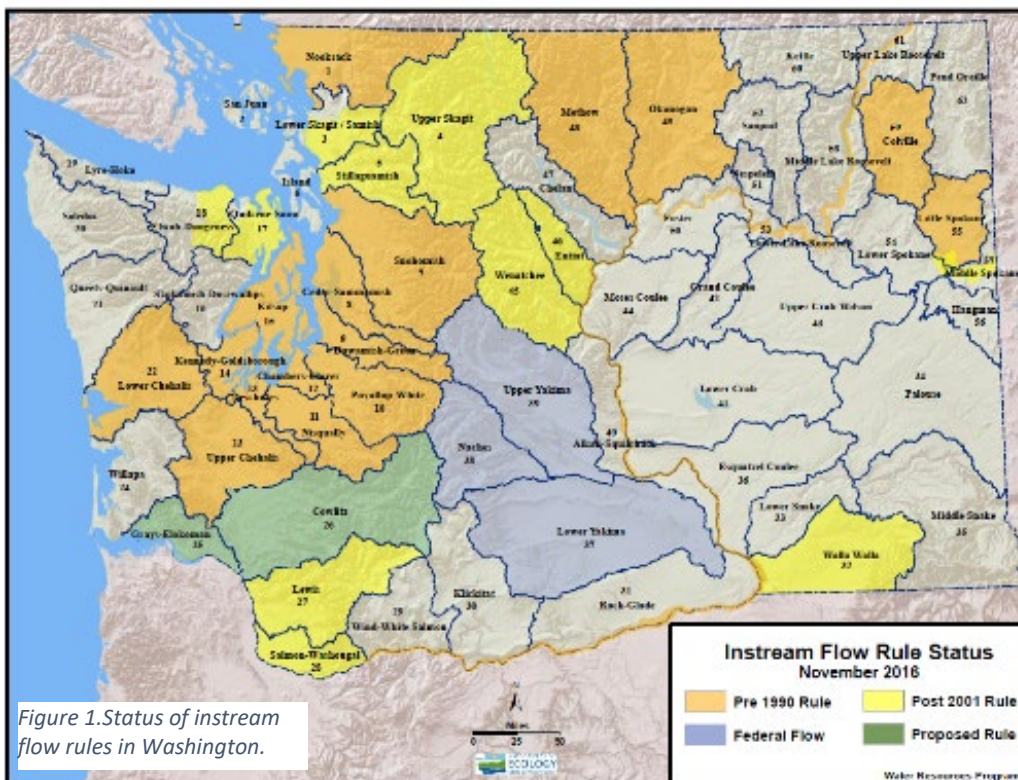


Figure 1. Status of instream flow rules in Washington.

appropriate for use in this water right decision since it resulted in a net ecological benefit, despite the net loss of water. This permitting decision was appealed by Foster.

Yelm's water right permit was first appealed to the Pollution Control Hearings Board (PCHB), then to Thurston County Superior Court. The Supreme Court then granted direct review of the Superior Court's decision. The Supreme Court ruled that the permit was issued in error, overturning lower court rulings. The State Supreme Court ruled that:

- Impairment of instream flows is not permissible, even for *de minimus* impairment or if there is overall ecological benefit associated with a mitigation proposal.
- Ecology cannot use out-of-kind mitigation, such as habitat improvements, to address impairment of instream flows.
- OCPI cannot be used to approve permanent water rights.

Implications

Water Right Change Applications

The Supreme Court's ruling significantly limits Ecology's ability to approve change applications that do not perfectly match the season, timing, and place-of-use between the existing water right and a proposed change. Due to the ruling, Ecology is also unable to approve many minor changes to water rights that the agency could previously approve, such as changing the point of diversion/withdrawal or place of use. Another significant effect of the ruling is that in watersheds where instream flows have been adopted, Ecology cannot approve water right changes that benefit the environment and endangered salmonids if there is any impairment on flow levels at any time of the year.

Let's take the example of changing a water right from a stream diversion to a well withdrawal and the implication of the Court's ruling. When a water right user diverts water directly from a stream (surface water), there is an effect on that stream. It directly reduces the quantity of water in the stream and the

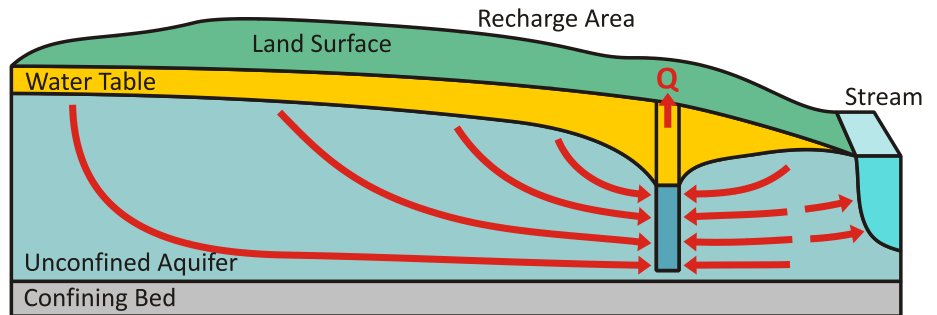


Figure 2. Effects of withdrawing groundwater from a well. 'Q' = withdrawal.

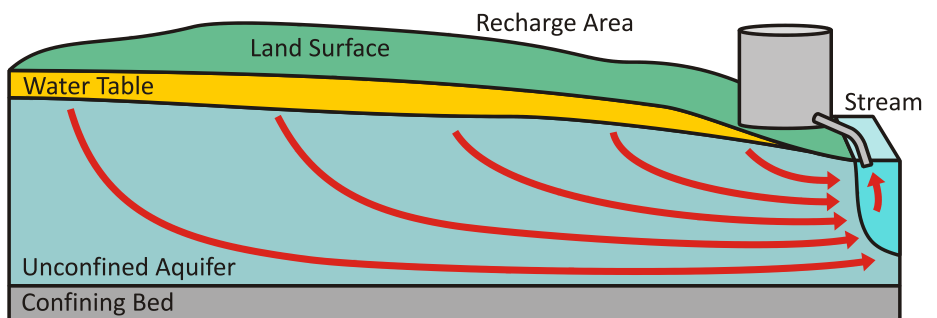


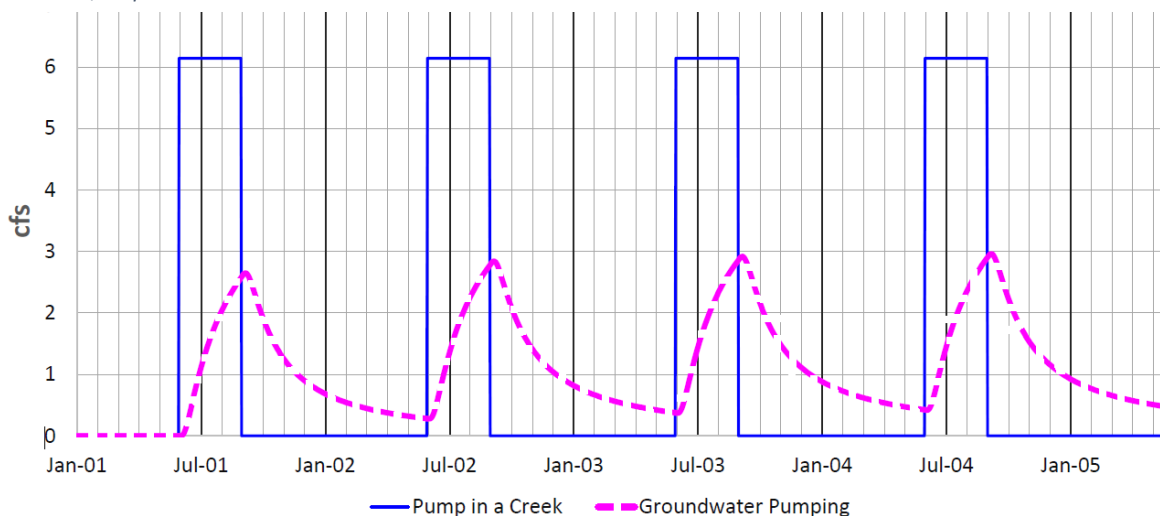
Figure 3. Effects of pumping water from a stream with a surface water diversion.

timing of the impact is immediate. When a water right user withdraws the exact same quantity of water from a well (groundwater), the effect on the nearby surface waters is generally less direct. Less water comes from the stream and the timing is delayed, see Figures 2 and 3. This is due to attenuation (spreading) of the impact through the aquifer.

Figure 4 shows patterns of streamflow depletion, based on modeled data from the USGSⁱⁱ, and helps demonstrate the direct effect of pumping from a stream (see the solid blue line), versus the effect on the stream when a nearby well is pumped (see the dashed pink line). When the well is pumped, the impacts on the stream are reduced at the time the pumping occurs, but continue through the winter months.

Historically, Ecology supported these source changes due to their environmental benefits, including increased streamflow during summer low flow conditions, and benefits to aquatic species like threatened and endangered salmon.

Figure 4. Example of streamflow depletion caused by a surface water diversion vs. pumping an equivalent volume of groundwater from nearby well. From Barlow, P.M., and Leake, S.A., 2012, *Streamflow depletion by wells—Understanding and managing the effects of groundwater pumping on streamflow: U.S. Geological Survey Circular 1376*, 84 p.



Under the Court’s decision, in a watershed with adopted instream flows, Ecology can no longer approve these source changes because of these new impacts to the surface water body into the winter.

Mitigation Packages

The Court’s ruling made it clear that water right mitigation must address flow impairment, even *de minimus* impairment, both in-time, and in-place. For new groundwater uses, mitigating all flow impairment from all affected waterbodies can literally be impossible. A new groundwater withdrawal may have predicted (modeled) impacts that extend out many miles from the proposed new well. Under the Foster decision, the applicant must mitigate flow impacts in multiple--potentially dozens of--smaller tributary streams. Often, applicants find that flow mitigation through acquisition and retiring of a senior water right is not available from these smaller streams.

Water Banks

The Foster decision also affects water banking in areas of the state with instream flow rulesⁱⁱⁱ. Prior to the ruling, Ecology could accept existing seasonal irrigation water rights in water bank proposals for mitigation of new year-round of domestic uses. As described above, we now cannot consider seasonal water rights for mitigating year-round uses in water banking proposals because the timing of the actual use and the water right doesn’t match. This significantly limits the opportunity for developing water banks to mitigate for new year-round uses in watersheds with adopted instream flows.

Overriding Consideration of Public Interest (OCPI)

The Supreme Court decision also eliminates the use of OCPI as a balancing tool for any permanent appropriation of water. This means that OCPI can only be used when issuing *temporary* water rights. Since Ecology issues temporary water rights infrequently, this tool now has extremely limited applicability.

Streamflow Restoration Planning Projects

The 2018 Streamflow Restoration law (RCW 90.94) requires 15 watershed planning groups to prepare local watershed plans that include projects and actions (projects) to offset new consumptive water use from future domestic permit-exempt well use and achieve Net Ecological Benefit (NEB) in the watershed.

In Streamflow Restoration planning, since plans are prepared with implementation in mind, if a plan includes a project that violates the Foster decision, Ecology is unable to participate in the implementation of that project. For example, Ecology could not approve a permit or provide grant funding for a project that violates the Foster decision.

Ecology recognizes that local planning groups might support projects that benefit their watershed, but that don’t meet the requirements of the Foster decision. This creates an inherent tension: on the one hand, a local planning group may want to include

projects the group supports. On the other hand, implementing or supporting the project would require Ecology to violate its own legal authorities—and Ecology cannot do that. To help avoid this tension, Ecology staff members working with these 15 planning groups are taking all reasonable steps to adhere to applicable laws, policy, and guidance, while advising the planning groups with which they work.

It is Ecology’s intent to help planning groups prepare plans that include projects intended by the planning group to not only offset all new consumptive water use from future domestic permit-exempt well use, and achieve a NEB, but also be implementable. This includes not violating the Foster decision.

Next Steps

The Legislature established the [Joint Legislative Task Force on Water Resource Mitigation](#) (Task Force) in RCW 90.94.090 to understand impacts of the 2015 Foster decision. In that law, Ecology is authorized to issue permit decisions for up to five water mitigation pilot projects using a stepwise mitigation approach that can include out of kind mitigation. The Task Force issued an initial report on progress from the pilot projects, but work continues.

More information about the Task Force, including their 2019 report to the legislature, can be accessed on their webpage: <http://leg.wa.gov/JointCommittees/WRM/Pages/default.aspx>

Definitions

Instream flow: Many rivers in Washington are regulated under instream flow rules. The rules function as a water right for the river. Ecology establishes the rule minimum flows that help maintain healthy ecosystems to support fish, communities, and economies.

OCPI: An acronym for Overriding Considerations of Public Interest. RCW 90.54.020(3)(a) provides that withdrawals of water that conflict with minimum instream flows may be authorized “only in those situations where it is clear that overriding considerations of the public interest will be served.”

Rule: State agencies adopt rules (WACs) to implement state or federal laws. Also known as a Washington Administrative Code (WAC), is an agency order, directive, or regulation issued by authority of statutes. Like legislation and the Constitution, regulations are a source of primary law in Washington.

Streamflow Restoration Planning: Per RCW 90.94.020 and 90.94.030, Ecology, planning groups, and technical consultants have been working on watershed plan development in 15 water resource inventory areas (WRIAs) since January 2018. The law provides for 1-3 years of planning, depending on the WRIA.

ⁱ RCW 90.54.020(a)

ⁱⁱ Data at a given location may be different based numerous factors, including hydrogeology, geology, distance from the well to the surface water, etc. Your specific situation may vary; data provided are relative. For additional information, see Barlow, P.M., and Leake, S.A., 2012, Streamflow depletion by wells—Understanding and managing the effects of groundwater pumping on streamflow: U.S. Geological Survey Circular 1376, 84 p., <http://pubs.usgs.gov/circ/1376/>.

ⁱⁱⁱ Water banks in the Yakima Basin are not affected by the Foster decision because there are no state-adopted instream flow rules. The Yakima Basin is regulated by Federal Flow regulations not affected by Foster.