

## Focus on: Potential Adjudication in Nooksack Basin



As the state agency responsible for managing water resources for Washington, we strive to ensure that there is enough water for people, farms, and fish. It's easy to say this, but the problem is more complicated. Washington has a history of water laws that date back more than 100 years.

One tool in our water management toolbox is a process called adjudication. In a September 2020 report to the state Legislature, we identified two locations that our evaluation shows would benefit from the adjudication process: the Nooksack watershed in Northwest Washington, and an area around Lake Roosevelt in the northeastern part of the state.

### What is an adjudication?

Adjudication is one tool in our water management toolbox. It is a process that brings all water users in a watershed into one court process that permanently **determines everyone's legal water rights in that area**. The court process leads to full and fair water management by confirming legal rights to use water.

*That's just the first question. Read on for other frequently asked questions.*

Contact and accommodation information on page 4.

### Why is a court process necessary?

Washington follows the doctrine of prior appropriation, meaning the first users have rights senior to those issued later. When there are water shortages, senior users are served first and the most junior users may get less or none. There are some places where changes in the law and water use have led to confusion about who can legally use water. An adjudication is the legal process to address the need for all water users to have certainty about their water rights.

Ecology, on our own, cannot apply prior appropriation throughout a watershed. Only state or federal courts have the authority to issue final determinations.



### Who is affected by an adjudication?

The adjudication covers all water uses within a watershed or basin. This includes uses identified in permits issued by Ecology, as well as claims to water that were made before the state adopted its water code.

However, most homes and businesses in these areas are served by water systems, such as public utilities, and will not participate individually in the adjudication. Public utilities will be involved to protect water rights intended for regional uses.

### What about dairies with permit-exempt stockwater?

Dairies and other farms using permit-exempt stockwater, along with other small permit-exempt commercial uses, will be able to obtain an adjudication certificate. Their water right will then be protected from impairment and attached to their real estate asset and can be changed or transferred just as other certificated water rights.



### Will an adjudication take away water from farms and dairies?

Ecology cannot take away legal water. In adjudication, courts look at historic water use to find how much water everyone should be using. Likely, older water uses will be protected. If a farm is not sure whether its current water use is legal, adjudication offers the best path to future security.

### While the adjudication is going on, will farmers be left not knowing where they stand with their water rights?

Even now, before starting the adjudication process, many water users don't know where they stand. Until a court determines water rights to be legally valid, all water users, including farmers, are relying on tentative determinations by Ecology. Users can be subject to enforcement or lawsuits by other users.

### How is an adjudication different?

Instead of addressing individual challenges to each Ecology permit and rule decision over the years, the court takes all of the past decisions and all the water uses not yet decided, and issues a comprehensive decree and final determination. Until water uses are adjudicated, uncertainty about the future will continue to grow.

### Will the lawsuit shut off farmers who were unaware that they needed a water right?

Ecology staff have worked diligently over the years to make sure farmers know who needs a water right or can use water under a permit exemption. We have encouraged all water users who are not permit-exempt to submit water right permit applications, even if they did not know of the requirement before they drilled their wells.

It appears that, in the early 1990s, some farmers were encouraged to apply for a permit and understood that they could continue to irrigate while their applications were pending. Yet Ecology still must apply the law. To decide on these pending applications, Ecology cannot allow impairment of senior rights of others who obtained valid permits and existing instream flows. Ecology has engaged extensively with these farmers over the years to find solutions to their water needs.



### Will an adjudication increase pressure on farmers to convert their land for development?

In agricultural hubs around the state, we are supporting innovative ways to address concerns about maintaining rural character and local agricultural economies. Where water rights have been adjudicated, farms hold water as an asset. Irrigation rights are being banked and marketed to help solve regional water supply challenges. A court's final decree has durable value that can help farmers with their business strategies and their plans to pass land and water to the next generation.

### How would an adjudication in the Nooksack basin help?

The Nooksack watershed has faced conflict over water for many years, with many attempts to settle these disputes. Adjudication lets everyone know who has the right to water. Farms with legal water hold an asset with their land. Many Nooksack water users asked Ecology to adjudicate. Adjudication will make it easier for farms and

others to buy, sell, or trade water through water banks. Once there is a court decree determining all the legal rights to use water, it will be clear who has water to negotiate for changes or mitigation.



### Why can't everyone work together to find a solution, instead of using a court proceeding?

Ecology respects and has been a part of several attempts at collaborative solutions led by local leaders in the Nooksack basin over the years. These genuine intentions to voluntarily reach agreement have not led to full and fair solutions, nor a binding settlement. Many water users want solutions, but this cannot happen without knowing where water can be legally used and what needs to stay in streams.

Negotiations can continue while preparatory steps are being taken, and after the court action is filed. Negotiated agreements can be submitted to the court to make them part of the adjudication. However, without a court to approve a settlement, no agreement will be final or binding.

### Is Ecology doing this for the tribes?

For many years, the Lummi Nation and Nooksack Tribe have worked together within the Nooksack community on water solutions. They have the earliest claims to water in the basin, dating back at least to their 1855 treaties with the federal government. However, the rights haven't been quantified. In the absence of a court decree, no one knows how much water this might be, what streams and rivers are affected, or during what seasons. Ecology cannot regulate tribal water on its own. An adjudication is the only way we can answer these questions.

Tribes and Ecology have been in court many times in the past over water rights issues. Although the "Lummi Groundwater" case ultimately led to a settlement with non-tribal water users on the Lummi Peninsula, the case was limited to groundwater and was not a comprehensive

watershed-wide adjudication. Now, both the Lummi Nation and Nooksack Tribe have agreed to bring all their groundwater and surface water rights into a comprehensive adjudication in state court, which will shave years off the process by avoiding disputes over the court's jurisdiction.



### How much will this cost and who pays?

The Governor's 2021 budget proposal to the Legislature includes a request for approximately \$1 million over two years to prepare for the two recommended adjudications. This would allow the superior courts and Attorney General's Office to prepare for the filings, with databases and technology to enhance efficiency. Court cases would not be filed until the end of the biennium.

The Governor's 2021 budget proposal also requests \$250,000 for a collaborative process in the Nooksack Basin to be led by the Whatcom County Executive.

Ecology plans to keep its current small team of adjudication experts to work with water users on collaborative settlement concepts for the court to consider. They will also prepare information needed for the case.

While each water user may choose to hire lawyers and consultants, parties are not required to incur large legal bills in order to take part in the process. Ecology understands the budget impacts of this work and we are committed to a streamlined and efficient process to keep every party's expenses as low as possible.



### How long will this take?

Ecology's recommendation proposes a deliberate and moderate pace that would include pre-adjudication work in 2021-22, leading to the filing of a court action in 2023. This would provide about two years for ongoing negotiation and collaboration on water solutions. Ecology estimates 10-20 years for final resolution of all rights. Many rights would be resolved along the way.

### Didn't the last adjudication take 40 years to complete?

Yes, however, we do not anticipate it will take that long in this instance. While the *Acquavella* case took a long time, it provided valuable lessons on how to streamline the process which ultimately led to legislative changes in 2009. Technology has also improved—digital court filings will replace pre-internet paper filings and copying, and electronic

notifications have replaced mailing, allowing more efficient processing of water rights. All of these steps will simplify the next adjudication we undertake.

### Why is Ecology proposing to start this process now?

In 2019, the Legislature directed Ecology to assess where an adjudication process is needed to help resolve water rights disputes. We completed that assessment and identified two locations that our evaluation shows would benefit from the adjudication process: the Nooksack watershed in Northwest Washington, and an area around Lake Roosevelt in the northeastern part of the state.

By starting this process sooner rather than later, we can incorporate tribal water rights in the state court process, resolve questions about old pre-code claims, and provide legal certainty to support public and private investments in regional water supply solutions.

#### [Water right adjudications](#)

Find the report and other information online at [www.ecology.wa.gov/WaterRightAdjudications](http://www.ecology.wa.gov/WaterRightAdjudications)

#### ADA accommodations

To request ADA accommodation including materials in a format for the visually impaired, call Ecology at 360-407-6872, email [WRpubs@ecy.wa.gov](mailto:WRpubs@ecy.wa.gov) or visit <https://ecology.wa.gov/accessibility>. For Relay Service or TTY call 711 or 877-833-6341.

#### Contact information

Robin McPherson  
[WRAdjudications@ecy.wa.gov](mailto:WRAdjudications@ecy.wa.gov)  
 360-407-7244