

WATER RESOURCE MANAGEMENT: Where We Are Today



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(See Key Concepts on back page)

Over the last 20 years, the Washington State Supreme Court has issued several rulings that have profoundly reshaped how the Department of Ecology (Ecology) manages water. Taken together, these rulings have removed several of our tools and as a result, we currently lack flexibility for balancing the competing needs of water users across the state. The most recent decisions, *Foster* (2015) and *Hirst* (2016), directly impact water users across the state.

Current challenges

The water code, written 100 years ago, was not designed to accommodate the changing and dynamic needs of water users today. After a long history of seeing the public's water as an infinite resource, the realities of population growth, economic development, and importance of instream protection for fish demand that we manage water as the finite resource that it is. Through the years, Ecology has navigated evolving case law to find creative ways to effectively manage water to meet the needs of people, farms, and fish. With these court cases, however, our toolbox for effectively balancing the needs of water users has gotten smaller; while we find ourselves spending buckets of money on drops of water, the return on our efforts is growing smaller.

We have had successes in the state, notably the Yakima Basin Integrated Plan and water banking in the Kittitas, Dungeness, and Walla Walla basins. However, most of these areas are unique—they are either regulated under a different statutory scheme, have adjudicated water rights, and/or contain extensive water infrastructure. Our collaborative relationships in these areas allowed for flexible solutions that, in other parts of the state, would likely be met with opposition. Given our existing laws and resources, replicating these successes in other parts of the state would be time consuming, costly, and in the end, may be elusive.

A path forward

We are proud of the strong 100-year history Washington has in protecting rivers, fish, and instream resources. We will continue to work with partners to find collaborative approaches that would support a more flexible water management structure that still protects stream flows and existing water rights. However, the water code is no longer able to provide the framework for long-term, robust solutions that communities require. At this crossroads, we believe legislative engagement is critical to reconcile and balance competing interests for a limited resource.

“The statutes do not authorize a *de minimis* impairment of an existing right. RCW 90.03.290 plainly permits no impairment of an existing right.”

“The [OCPI] exception is very narrow, however, and requires extraordinary circumstances before the minimum flow water right can be impaired.”



Postema v. Pollution Control Hearings Board (2000)

At issue in this case was Ecology’s obligations when analyzing an application to withdraw groundwater that is interconnected to surface water (called *hydraulic continuity*). The appellants contested Ecology’s denials of applications for new groundwater uses that were in hydraulic continuity with closed water bodies.

The court upheld Ecology’s denial of the groundwater permit applications. The court also ruled:

- Ecology must determine impairment on a case-by-case basis.
- Hydraulic continuity between groundwater and a stream with unmet instream flows is not by itself a sufficient reason to determine impairment to minimum instream flows.
- “A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights.”
- In stating that the law doesn’t allow for “*de minimis*” impairment of existing rights, the court established that “any effect on the flow or level of the surface water” in closed streams would mean impairment.

Implications: The decision defined the “one molecule” standard, which established that *de minimis* impacts constitute impairment, no matter whether they are observable or significant. In practice, this meant that Ecology would have to deny all applications that would have any negative effect on instream flows already at or below minimum flows, regardless of how small those effects are.

Swinomish v. Ecology (2013)

In 2001, Ecology adopted an instream flow rule for the Skagit Basin (WAC 173-503). In 2006, Ecology amended the Skagit Basin rule to establish reservations of water. The reservations provided a legal source of water for rural homes and businesses to use when the Skagit River falls below the instream flow levels. Ecology justified the reservation by using “overriding considerations of the public interest” (OCPI). The Swinomish Indian Tribal Community appealed the rule revision, arguing that the department acted beyond its statutory authority by applying OCPI to create reservations and allowing aggregate uses of water to impair previously established instream flows. In its decision, the court ruled in favor of the Tribe and:

- Invalidated the Skagit rule revision that had a reservation of water for future uses.
- Established that Ecology could not use OCPI to justify water use that impairs existing instream flows.
- Clarified that OCPI could not be used to justify allocating water for domestic use.
- Stated that OCPI is a *very narrow* exception and requires *extraordinary* circumstances before the minimum flow water right can be impaired.

Implications: The decision signaled that Ecology could not use OCPI in the context of rulemaking to justify establishing reservations for future uses of water that would impair senior instream flows. This was the first of two cases that removed a balancing tool for allocating water from our toolbox.

“Municipal water needs do not rise to the level of ‘extraordinary circumstances’ that we held are required to apply to the OCPI exception, nor can a mitigation plan ‘mitigate’ by way of ecological benefit the legal injury to a senior water right.”

“The GMA places an independent responsibility to ensure water availability on counties, not on Ecology.”



Foster v. Ecology (2015)

The Supreme Court overturned Ecology’s approval of a water right permit for the City of Yelm that would have provided water for future growth. Ecology had conditioned the permit on an extensive mitigation package, which included mitigating the total quantity of water through “in-kind mitigation,” and mitigating small impairment during the spring and fall with habitat improvements (“out-of-kind mitigation”). Ecology determined that the project was in the public interest and used OCPI to approve the application. In their ruling, the court ruled that:

- Ecology cannot use OCPI to justify permanent allocations of water.
- No impairment of instream flows are permissible, regardless of magnitude or ecological impact (reaffirming their holding in *Postema*).
- Ecology cannot use out-of-kind mitigation, such as habitat improvements, to address impairment of instream flows.

Implications: This decision eliminates the use of OCPI as a balancing tool for any permanent appropriation of water. Also, by emphasizing that mitigation must be strictly in-kind, in-time, and in-place, the ruling limits our ability to approve change applications that do not perfectly match the season and place of use. As the water community is increasingly looking to water banks as a solution to shortages, this inflexible impairment standard makes finding water banking solutions significantly more difficult.

Hirst, Futurewise, et al v. Whatcom County (2016)

Hirst, et al appealed Whatcom County’s Comprehensive Plan contending that the county failed to comply with the Growth Management Act (GMA) requirements to protect water resources. Under contention was whether the county could allow residents to withdraw water from permit-exempt wells. Ecology’s instream flow rule for the Nooksack River (WAC 173-501) closed most streams to new water right permits, but allowed permit-exempt wells in most of the basin. The county (and Ecology in an amicus brief) argued that Whatcom County sufficiently protected water resources by following the water resource management rule. The court ruled that the county:

- Failed to comply with GMA’s requirements to protect water resources.
- Has an independent obligation to ensure that new permit-exempt uses do not impair instream flows and closures when making water availability determinations.
- Cannot rely on the exclusion of permit-exempt groundwater from regulation in the instream flow rule; counties must make an independent decision about legal water availability.

Implications: We are working with counties to understand the full impacts. The ruling represents the collision of growth management and prior appropriation, and has potential to preclude rural development in many parts of the state. While the case directly relates to Whatcom County, it appears to set legal precedent for other counties where instream flow rules do not apply to new permit-exempt water uses. Whatcom, Spokane, and Okanogan counties have enacted measures to implement the Hirst decision which require applicants relying on permit-exempt groundwater withdrawals to ensure they do not impair instream flows.

Key Concepts

Instream Flow Rules

Instream Flow Rules: Many rivers in Washington are regulated under instream flow rules, which essentially function as a water right for the river. Under RCW 90.54.040 and 90.22.010, Ecology establishes minimum flows to protect fish, wildlife, and other instream resources (such as recreation and aesthetic values). Like all water rights, an instream flow rule has a “priority date,” the date of the rule’s adoption. An instream flow rule only affects water right decisions made after its priority date.

Overriding Consideration of Public Interest (OCPI)

Overriding Consideration of Public Interest (OCPI): The Legislature recognized that there may be times when it is in the public interest to impair an instream flow. RCW 90.54.020 authorizes Ecology to allow withdrawals of water that would conflict with instream flows, “where it is clear that overriding considerations of the public interest will be served.”

Mitigation

Mitigation: Ecology allows water right applicants to offset the impairment that their proposed water use would cause to a stream or river.

- “In-kind” or “water for water” mitigation offsets impairment by putting an equal amount of water back into the river as would be taken out.
- “In-place” mitigation addresses all impacts of the impairment at the location where the impairment would occur.
- “In-time” mitigation addresses all impacts of the impairment at the same time as when the impairment would occur.

Ecology’s policy is to attempt to achieve in-kind, in-place, and in-time mitigation if possible. When not possible, Ecology has approved new appropriations of water in which the applicant made ecological improvements (such as restoring degraded habitat) to offset the habitat loss associated with reduced stream flow. This is called “out-of-kind mitigation.”

Permit-Exempt Uses

Permit-Exempt Uses: While new uses of groundwater require a permit from Ecology, some small groundwater uses are exempted from the permitting process. These include water for:

- A single home or groups of homes (up to 5,000 gallons per day);
- Livestock (no gallon per day limit);
- A non-commercial lawn or garden one-half acre in size or less (limited to reasonable use); or,
- Industrial purposes, including irrigation (up to 5,000 gallons per day).

Although these permit-exempt uses don’t require a water right permit, they are still subject to state water law and cannot impair other existing water rights.