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# WASHINGTON JOURNAL OF ENVIRONMENTAL LAW AND POLICY

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## FROM LOON LAKE TO CHUCKANUT CREEK: THE RISE AND FALL OF ENVIRONMENTAL VALUES IN WASHINGTON'S WATER RESOURCES ACT<sup>+</sup>

Rachael Paschal Osborn<sup>\*</sup>

11 WASH. J. ENVT. L. & POL'Y 115 (2021)

*How does one put a dollar value on being in the presence of crystal clear water coursing down a steep slope through a rock-lined, moss-edged stream bed among evergreen trees, for example? While commercial uses of the state's instream flows might be made—tourism and paid-for recreation, for example—such uses do not entail the total benefits derived from streams and lakes.*<sup>\*\*</sup>

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+ This article is dedicated to Professor William H. (Bill) Rodgers, Jr., former Stimson Bullitt Endowed Professor of Environmental Law, now retired from the University of Washington Law School. Professor Rodgers inspired hundreds of environmental lawyers who have worked to protect natural resources everywhere. His environmental legal scholarship is without peer. This article was first presented in 2017, at the University of Washington Law School's 30th Annual Indian Law Symposium, which honored Professor Rodgers for his lifetime of teaching and writing. For a trenchant accounting of Professor Rodgers' career, see John E. Bonine, *William H. Rodgers, Jr., and Environmental Law: Never Give Up, Keep on Going*, 82 WASH. L. REV. 459 (2007). Also, a special thanks to Ken Slattery for insights on Washington's early instream flow program.

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<sup>\*\*</sup> *Swinomish Indian Tribal Community v. State of Washington*, 178 Wn.2d 571, 600, n.15 (2013) (Madsen, J.).

## ABSTRACT

The year 2021 marks the 50<sup>th</sup> anniversary of the Water Resources Act of 1971, Washington's program to protect instream flows in state rivers. Implementation has been controversial and, even a half century later, incomplete. Part 1 introduces the Act. Part 2 examines its legislative history, and administrative development by the Department of Ecology. The Act innovated water allocation, putting instream flows and public uses of rivers on par with out-of-stream water rights. But river protection labors under serious limitations, chief among them the subordination of instream flows to pre-existing water rights. And, although only half of Washington's watersheds are protected under the Act, the program has ground to a halt. Part 3 examines twelve lawsuits that interpreted or relied on the Act, and the role of the courts in both endorsing and eroding the Act's provisions. Part 4 concludes with recommendations for new water resources policy legislation. Absent affirmative steps by the state Legislature, Washington's rivers are unprepared for the adverse impacts of the climate crisis.

## INTRODUCTION

The year 2021 marks the fiftieth anniversary of the Water Resources Act of 1971, Chapter 90.54 of the Revised Code of Washington, a landmark statute which required the state to recognize and protect all public uses of Washington's waterways, including fish and wildlife habitat, recreation, navigation, aesthetics, and water quality.

Hailed as a major reform in the water rights arena, the Water Resources Act put a check on water right permitting statutes that had, since 1917, authorized extraction of prodigious quantities of water from Washington's rivers and aquifers with great efficiency, but without regard for consequent environmental impacts.<sup>1</sup> Under the new statute, the Washington Department of Ecology divided the state into sixty-two watersheds and began a program to adopt instream flow rules that functioned as water rights for rivers.<sup>2</sup>

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<sup>1</sup> Rachael Paschal Osborn & Michael Mayer, *When Water Isn't Wet: The Evolution of Water Right Mitigation in Washington State*, 10 SEATTLE J. OF TECH., ENVTL. & INNOVATION L. 181, 183-88 (2020) [hereinafter Osborn & Mayer]. Over-appropriation of Washington's waters has resulted from various factors, particularly the issuance of too many water rights, leading to a lack of adequate water to support other legally protected uses, including habitat for endangered fish species, tribal treaty water rights, and state instream flows.

<sup>2</sup> WASH. ADMIN. CODE § 173-500-990 (1976) (map); see WASH. ADMIN. CODE §§ 173-501-564 (1976).

Attitudes about instream flow protection have, however, changed. In 2018, responding to a landmark court decision marrying water resource management with land use planning, the Legislature enacted Engrossed Substitute Senate Bill (“ESSB”) 6091, partially reversing the flow protection mandate of the 1971 Water Resources Act, and opening closed basins to new domestic groundwater appropriations.<sup>3</sup> In basins with no instream flow rules, ESSB 6091 removed even the minimal water resource protections afforded under land use laws, enabling a statewide water extraction free-for-all.<sup>4</sup>

The implementing agency has also abandoned the instream flow program. In its 2019 bi-annual report to the Legislature, the Washington Department of Ecology announced it will no longer adopt instream flow rules because, in the agency’s view, the Water Resources Act as interpreted by state courts does not adequately allow for extraction of water demanded by new development, particularly domestic use.<sup>5</sup>

And, in 2020, the Washington Supreme Court ruled that the protections afforded to public uses of rivers under the Water Resources Act are discretionary with the Department of Ecology.<sup>6</sup> It is legally acceptable for the agency to adopt flows that protect one use, such as fisheries, but degrade or destroy another, in this case, recreational use of the Great Gorge reach of the Spokane River.<sup>7</sup>

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<sup>3</sup> Known as the “Hirst Fix” bill, ESSB 6091 authorized the impairment of instream flows and incursion on closed water bodies by out-of-stream domestic groundwater withdrawals. WASH. REV. CODE § 90.94.020(1)-.030(1) (2018).

<sup>4</sup> ESSB 6091 amended two land use statutes that previously required a showing of “adequate water supply” prior to issuance of building and subdivision permits. *Compare* WASH. REV. CODE § 19.27.097 (2017) (amended 2018), *with* WASH. REV. CODE § 19.27.097(1)(g), (5) (2018); and WASH. REV. CODE § 58.17.110 (2017) (amended 2018) *with* WASH. REV. CODE § 58.17.110(4) (2018). Ecology partially justifies its decision to cease adopting instream flow rules in unprotected basins because RCW Chapter 90.94 does “not require setting new instream flow levels.” ANNIE SAWABINI, WASH. STATE DEP’T OF ECOLOGY, PUB. NO. 19-11-86, STATEWIDE PROGRESS ON SETTING INSTREAM FLOWS (2019) [hereinafter *2019 Instream Flow Report*].

<sup>5</sup> *2019 Instream Flow Report*, *supra* note 4, at 1, 3. (fig. 1) (“Ecology is not proposing to commence rulemaking to adopt new instream flows at this time . . . No new instream rules are planned for WRIs not covered by Chapter 90.94 RCW. Recent court decisions, such as *Postema*, *Kittitas*, *Swinomish*, and *Foster*, will continue to make it challenging for Ecology to adopt new instream flow rules. While these cases do not directly restrict Ecology’s authority to adopt instream flow protection in rule, they limit the available tools to balance water needs of diverse users.”) (citations omitted). *See* WASH. STATE DEP’T OF ECOLOGY, INSTREAM FLOW RULE STATUS MAP (2016).

<sup>6</sup> *Ctr. for Envtl. Law & Policy v. Wash. State Dep’t of Ecology*, 196 Wn.2d 17 (2020) [hereinafter *CELP v. Ecology*].

<sup>7</sup> *Id.*

It is time for the Legislature to recommit to protection of water flow in Washington's rivers to protect public values and uses, particularly given the impacts of climate change. But, whether that body has the motivation or ability to do so is a serious question. Proposed elements of a new "Washington State Water Resources/Climate Crisis Response Act" are set forth at the conclusion of this article.

Washington's waters are over-appropriated.<sup>8</sup> Virtually every water rights lawsuit of the last thirty years, at its core, has been concerned with this fact and the administrative response to it. Given this reality, what responsibilities do each of the three branches of government hold toward Washington's water resources? Should the people of Washington expect the Governor, the Department of Ecology, the Legislature, and/or the courts to take preventive action to address the over-extraction of publicly-owned water resources? More fundamentally, how did state policy evolve, from the 1971 adoption of a premier law designed to protect public values in rivers, to a 2018 developer-driven water grab reflecting 19<sup>th</sup> century resource extraction mentality?

Part I of this article introduces the Water Resources Act, starting with the instream flow program's historical development. The Act introduced several important innovations, including placing instream flows on par with out-of-stream water rights. The program was controversial, however, and Ecology and the Legislature hit the pause button between 1985 and 2001. While the Water Resources Act integrates environmental values into the Water Code statutes, it has inherent limitations. Chief among these is that the priority of instream flows is subordinate to 95% of the water rights claimed and issued in Washington. Even with the use of improved flow setting science, instream flows are not adequate to protect river biota because water is over-allocated.

Part II of this article reviews court decisions arising out of the Water Resources Act, or relying on the Act for resolution. In an ever-evolving dance between in-situ protection of rivers and aquifers, and the competing, insatiable quest for water for growth and development, rivers generally won in the courts but lost in the legislature. Between 1973 and 2020, a dozen appellate decisions defined the legal relationships between water rights and instream flows or other environmental values. Court

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<sup>8</sup> See Osborn & Mayer, *supra* note 1 at 183-88. This fact was recognized by the Legislative Committee which studied and reported on water resource issues, leading to the drafting of the Water Resources Act of 1971. See WASH. LEGISLATIVE WATER RES. COMM., FINAL REP. TO THE LEG., 42d Leg., at 2 (1971) ("A significant number, if not all, of Washington streams, rivers, and lakes are actually over-appropriated when all recognized beneficial uses are considered.").

decisions that favored the river usually generated legislative and agency responses challenging the judicial holdings and sometimes reversing their outcomes. Decisions with anti-environmental outcomes were simply ignored by the other branches of government. Each case tells a story and, just as principles of ecology instruct,<sup>9</sup> each story is connected.

## I. THE WATER RESOURCES ACT OF 1971

### A. *Innovation for Instream Flows*

1971 was a major year for environmental law in Washington State. Commensurate with the sweep of new environmental statutes enacted in Congress,<sup>10</sup> Washington's Legislature, led by Governor Dan Evans, enacted three new laws to protect water and the environment: the State Environmental Policy Act (SEPA), the Shoreline Management Act, and the Water Resources Act, following on enactment of the Washington Clean Air Act of 1969 and anticipating the Water Pollution Control Act of 1973.<sup>11</sup> Implementation of the new statutes was vested in the newly minted Department of Ecology,<sup>12</sup> which consolidated existing agencies, including the Division of Water Resources that had overseen Water Code implementation for fifty years,<sup>13</sup> under one umbrella.

The Water Resources Act innovated the law of water rights. It established that instream uses of water were beneficial, including “fish and wildlife maintenance and enhancement, recreational, and . . . preservation of environmental and aesthetic values.”<sup>14</sup> It ranked instream

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<sup>9</sup> BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN & TECHNOLOGY* 29-35 (Courier Dover Publications ed., Reprint ed. 2020) (identifying four principles of ecology, the first being that “everything is connected to everything else”).

<sup>10</sup> National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4321 *et seq.* (2018); Clean Air Act of 1963, 42 U.S.C. § 7401 *et seq.* (2018); Clean Water Act of 1972, 33 U.S.C. § 1251 *et seq.* (2018); *see generally* WILLIAM H. RODGERS, JR. & ELIZABETH BURLESON, *ENVIRONMENTAL LAW* (Thomson West, 2d ed. 2016).

<sup>11</sup> WASH. REV. CODE § 43.21C (2020); WASH. REV. CODE § 90.58 (2020); WASH. REV. CODE § 90.54 (2020); WASH. REV. CODE § 90.48 (2020); WASH. REV. CODE § 70.94 (2020).

<sup>12</sup> *See* WASH. REV. CODE § 43.21A (2020) (enabling act). RCW 43.21A.064 enumerates departmental powers and duties with respect to water resources.

<sup>13</sup> Act of July 1, 1967, ch. 242, 1967 Wash. Sess. Laws 1332-43 (vesting powers of Division of Water Resources of the State Department of Conservation with the Department of Ecology, overseeing WASH. REV. CODE § 90.03 (Surface Water Code), WASH. REV. CODE § 90.44 (Groundwater Code)).

<sup>14</sup> WASH. REV. CODE § 90.54.020(1) (2020). “Beneficial use” is a term of art in water law, *Wash. State Dep’t of Ecology v. Grimes*, 852 P.2d 1044, 1049 (1993), and in designating instream uses as beneficial, the Act expanded the universe of water uses that may be protected as water rights.



uses as co-equal with extractive uses that had dominated water rights allocation for a century, defining the term “utilization” of water to include “retention of water in lakes and streams for the protection of environmental, scenic, aesthetic and related purposes, upon which economic values have not been placed historically and are difficult to quantify.”<sup>15</sup> The law also created an administrative structure for instream flow protection, including a river basin rule-making program.<sup>16</sup>

The Water Resources Act was not Washington’s first instream flow protection statute.<sup>17</sup> The 1949 Fisheries Code authorized state fish and game agencies to comment on water right applications and recommend conditions for individual permits to protect flows.<sup>18</sup> These conditions, known as Surface Water Source Limitations or SWSLs (“swizzles”), could effectively halt new water appropriations in specific streams and rivers, including complete closures.<sup>19</sup> The SWSL list remains in effect, its low flow conditions and closures continuing in force where not

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<sup>15</sup> WASH. REV. CODE § 90.54.120(2) (2020).

<sup>16</sup> WASH. REV. CODE § 90.54.040 (2020); WASH. ADMIN. CODE § 173-500 (2019); KENNETH O. SLATTERY & ROBERT F. BARWIN, *Protecting Instream Resources, in* INSTREAM FLOW PROTECTION IN THE WEST 20-1 (Lawrence J. MacDonnell et al. eds., 1993) [hereinafter SLATTERY & BARWIN]. Enactment of the Water Resources Act was also motivated by fears that the states of the southwestern U.S. could appropriate and transfer water from the Columbia River. “Additional pressure exists on the Columbia River system simply because of the physical reality of possible diversion to the southwest ... The Colorado River Act specifically prohibited federal studies of Columbia River exportation for a ten-year period. Though seven of those ten years remain, it would be naïve to think that southwest states are not doing some planning on their own.” WASH. LEGISLATIVE WATER RES. COMM., *supra* note 8, at 2; Ray Schrick, *Water Bill Draws Mixed Reactions*, WENATCHEE DAILY WORLD, Feb. 20, 1971.

<sup>17</sup> In 1969, by joint resolution, the Washington Legislature created the Legislative Committee on Water Resources. *See* Substitute H. Con. Res. 15, 41st Leg., Extraordinary Sess. (Wash. 1969). The Committee met for a year, took testimony from dozens of witnesses, and issued a final report in January 1971 that provided a foundation for development of the HB 394, enacted as Water Resources Act of 1971 and codified at RCW Ch. 90.54. WASH. LEGISLATIVE WATER RES. COMM., *supra* note 8, at 2. For a chronology and overview of laws pertaining to instream flow protection, see Ken Slattery, retired from Dept. of Ecology, Address at the Washington Chapter of American Water Resource Association Annual Conference: Water Management and Instream Flows After 1971 (Oct. 3, 2017) [hereinafter Slattery] (on file with author).

<sup>18</sup> Law of March 16, 1949, ch. 112, § 46, 1949 Wash. Sess. Laws 253, 272 (1949) (codified at WASH. REV. CODE § 77.57.020) (“It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.”).

<sup>19</sup> Slattery, *supra* note 17, at 2; WASH. STATE DEP’T OF ECOLOGY, FINAL ENVIRONMENTAL IMPACT STATEMENT, WESTERN WASHINGTON INSTREAM RESOURCES PROTECTION PROGRAM: AN OVERVIEW 22-23 (1979) [hereinafter *IRPP Overview*].

superseded by Water Resource Act rules,<sup>20</sup> serving as the primary means to protect flows in basins without instream flow rules.

In 1969, the Legislature adopted the Minimum Water Flows and Levels Act, the first program for comprehensive instream flow protection.<sup>21</sup> While the Minimum Flows Act established a discretionary program for adoption of instream flow rules,<sup>22</sup> only one such rule was adopted.<sup>23</sup> Two years later, the Water Resources Act ostensibly removed agency discretion and mandated the retention of flows to protect multiple instream values, except when “overriding considerations of the public interest” required, and established several other “water resource fundamentals.”<sup>24</sup>

To aid in development of the instream flow program, Ecology adopted a rule for administration of the statute.<sup>25</sup> The rule divided the state into sixty-two river basins, dubbed Water Resource Inventory Areas or WRIAs.<sup>26</sup> The concept of governance by watershed was first proposed in John Wesley Powell’s 1879 Report to Congress on the arid lands of the western U.S., which recommended that the boundaries of future

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<sup>20</sup> WASH. ADMIN. CODE § 173-500-060(4) (1976) (“Low flow limitations to prevail (1) Notwithstanding the establishment of base flows established hereunder, existing low flow limitations shall remain in effect.”); WASH. ADMIN. CODE § 173-500-050(8) (1976) (“‘Low flow’ means those flow level limitations appearing as provisions on permits and certificates issued by the department, or its predecessors, prior to the effective dates of chapters 173-501 through 173-599 WAC.”); WASH. STATE DEP’T OF ECOLOGY, ECY WAC AND SWSL BY REGION (2001) (on file with author).

<sup>21</sup> Law of May 23, 1969, ch. 284, §§ 3-7, 1969 Wash. Sess. Laws 2787, 2790-93 (1969) (codified at WASH. REV. CODE Ch. 90.22).

<sup>22</sup> WASH. REV. CODE § 90.22.010 (2020) (“The department of ecology *may* establish minimum water flows or levels for streams, lakes or other public waters.”) (emphasis added).

<sup>23</sup> Slattery, *supra* note 17, at 11. The first instream flow rule covered the Cedar-Sammamish watershed. *Id.*

<sup>24</sup> Water Resources Act of 1971, WASH. REV. CODE § 90.54.020 (2020). *See generally* WASH. LEGISLATIVE WATER RES. COMM., *supra* note 8. The meaning and scope of the “overriding considerations of the public interest” or OCPI exception has been much litigated. *See* Sections II.H and III.I *infra*.

<sup>25</sup> WASH. ADMIN. CODE § 173-500 (2020). In 1998, the Legislature gave local watershed planning groups the option to modify existing instream flow rules or adopt new rules, setting new parameters for priority dates, requiring government-to-government consultation with Tribes, and other details. WASH. REV. CODE § 90.82.080 (2020).

<sup>26</sup> WASH. ADMIN. CODE § 173-500-990 (2019). Technically there are sixty-three WRIAs, if you include the 1998 designation of the Seattle Mariners’ baseball field as its own watershed in order to circumvent the application backlog and facilitate issuance of a new water right for field irrigation. *See Rachel Zimmerman, Seattle Mariners’ New Ballpark Gets a Special Status for Water*, WALL ST. J. (DEC. 23, 1998), <https://www.wsj.com/articles/SB914302055987148500>.

western states be drawn along watershed boundaries.<sup>27</sup> A century later, Ecology's WRIA construct adopted this science-based method and used it to assess water availability based on river basin water budgets that accounted for historic allocation of water rights and instream needs.<sup>28</sup>

The Water Resources Act directed that “[p]erennial rivers and streams of the state *shall be retained* with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”<sup>29</sup> To implement this mandate, Ecology created the instream flow rules program, with the goal of adopting a discreet rule for each major watershed.<sup>30</sup> One important innovation designated these rule-based instream flows as water appropriations, i.e., water rights for the rivers.<sup>31</sup> The instream flow element of each rule sets forth specific flow rates for specific reaches of the main river and major tributaries in each watershed; adapting to the annual hydrograph, the flow rates change with the season.<sup>32</sup> Once adopted, the flow rule acquires a date of priority that meshes with the prior appropriation system.<sup>33</sup> Instream flows may not impair pre-existing water rights, but post-rule water rights must be conditioned to be

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<sup>27</sup> See generally JOHN W. POWELL, U.S. DEP'T OF THE INTERIOR, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES, WITH A MORE DETAILED ACCOUNT OF THE LAND OF UTAH WITH MAPS (Washington: Government Printing Office 2d ed. 1879). Powell's arguments to Congress are colorfully described, along with his watershed maps, in John F. Ross, *The Visionary John Wesley Powell Had a Plan for Developing the West, But Nobody Listened*, SMITHSONIAN MAG. (July 13, 2018), <https://www.smithsonianmag.com/smithsonian-institution/visionary-john-wesley-powell-had-plan-developing-west-nobody-listened-180969182/>.

<sup>28</sup> See, e.g., JOHN COVERT ET AL., WASH. STATE DEP'T OF ECOLOGY, OFR No. 95-04, INITIAL WATERSHED ASSESSMENT TUCANNON RIVER WATERSHED (DRAFT) (1995); TOM CULHANE & JERRY LISZAK, WASH. STATE DEP'T OF ECOLOGY, INITIAL WATERSHED ASSESSMENT WATER RESOURCES INVENTORY AREA 9 GREEN-DUWAMISH WATERSHED (1995).

<sup>29</sup> WASH. REV. CODE § 90.54.020(3)(a) (2020) (emphasis added).

<sup>30</sup> WASH. REV. CODE § 90.54.040(1) (2020); WASH. ADMIN. CODE § 173-500-010-020 (2019); WASH. ADMIN. CODE § 173-500-040 (2019) (list of watersheds); WASH. ADMIN. CODE § 173-500-990 (2019) (map).

<sup>31</sup> WASH. REV. CODE § 90.03.345 (2020) (“The establishment of . . . minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment.”).

<sup>32</sup> WASH. STATE DEP'T OF ECOLOGY, PUB. NO. 98-1813-WR, SETTING INSTREAM FLOWS IN WASHINGTON STATE (2014); see, e.g., WASH. ADMIN. CODE § 173-501-030(2) (2019) (establishing instream flow quantities at thirty discreet points in the Nooksack River and its tributaries, the flows at each point changing bi-weekly).

<sup>33</sup> WASH. REV. CODE § 90.03.345 (2020).

curtailed when the rule-based flows are not met.<sup>34</sup> Instream flow rules also set forth stream closures, either absolute or triggered when flows drop to a certain level. A closure constitutes a finding that no water is available for new water rights.<sup>35</sup>

Washington's instream flow program sputtered to life in the early 1970s. Confusion about conflicting terminology between the Minimum Flows Act and the Water Resources Act, especially the meaning of the terms "minimum flow" and "base flow," led to a slow start.<sup>36</sup> A related but even more fundamental issue concerned the appropriate level of flow protection – true minimums or something more protective of instream resources?<sup>37</sup> Policy staff also grappled with how to implement the Act's "maximum net benefits" proviso.<sup>38</sup>

The first series of flow rules were adopted under Ecology's Basin Planning program, and depended on an agency-developed "base flow methodology," which focused on hydrologic analysis of stream classification systems, frequency of flow discharge rates and other statistical factors.<sup>39</sup> Basin planning also encompassed planning for all water supply needs, in and out of stream.<sup>40</sup> In 1979, Ecology's focus

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<sup>34</sup> WASH. REV. CODE § 90.03.247(1) (2020) ("Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to: (a) Protect the levels or flows."); WASH. ADMIN. CODE § 173-500-060(5)(a) (2019) ("Surface water and/or groundwater appropriation permits, issued subsequent to the effective dates of chapters 173-501 through 173-599 WAC, that will allow either direct diversion from or have a measurable effect on streams where base flow limitations of this chapter, and any such permits or certificates shall be appropriately conditioned to assure maintenance of said base flows.").

<sup>35</sup> WASH. ADMIN. CODE § 173-500-020(3) (2019); *see, e.g.*, WASH. ADMIN. CODE § 173-507-030(1)–(2) (2019) (closing certain streams in the Snohomish River basin). Rule-based closures were often based on the pre-existing SWSL list closures recommended by the Department of Fisheries.

<sup>36</sup> WASH. REV. CODE § 90.22.010 (2020) ("The department of ecology may establish *minimum water flows or levels* for streams, lakes or other public waters...") (emphasis added); WASH. REV. CODE § 90.54.020(3)(a) (2020) ("Perennial rivers and streams of the state shall be retained with *base flows* ...") (emphasis added); *see* WASH. STATE DEP'T OF ECOLOGY, WESTERN WASHINGTON INSTREAM RESOURCES PROTECTION PROGRAM, FINAL ENVIRONMENTAL IMPACT STATEMENT 5 (June 1979) [hereinafter IRPP FEIS].

<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> WASH. REV. CODE § 90.54.020(2) (2020). *See* Section II.K *infra*.

<sup>39</sup> M. EDWARD GARLING, WASH. STATE DEP'T OF ECOLOGY, WRIS TECHNICAL BULL. NO. 11, STREAMFLOW PRESERVATION PROGRAM 3-7 (1976) [hereinafter GARLING].

<sup>40</sup> Basin planning rules were adopted in the Little Spokane (WASH. ADMIN. CODE § 173-555 (2019)), Colville (WASH. ADMIN. CODE § 173-559 (2019)), Okanogan (WASH. ADMIN. CODE § 173-549 (2019)), Methow (WASH. ADMIN. CODE § 173-548 (2019)), Chehalis (WASH. ADMIN. CODE § 173-522 (2019)), and Walla Walla Rivers (WASH.

pivoted to create the Western Washington Instream Resources Protection Program or IRPP.<sup>41</sup> Anticipating Endangered Species Act listings for Pacific salmon,<sup>42</sup> and motivated by the *U.S. v. Washington* tribal treaty fisheries litigation,<sup>43</sup> Ecology focused on rule adoption for western Washington watersheds that supported anadromous fish production, with a focus on adopting flows d rather than more comprehensive basin planning for all water uses.<sup>44</sup> During this period, conflict was evident between Ecology and the Departments of Fisheries and Game, the latter advocating for more protective, biology-based flow setting methods such as the “Toe-Width” and “Instream Flow Incremental Method” or

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ADMIN. CODE § 173-532 (2019)) and the John Day-McNary Pool of the Columbia River (WASH. ADMIN. CODE § 173-531A (2019)). See generally KRIS G. KAUFFMAN & JAMES R. BUCKNELL, WASH. STATE DEP’T OF ECOLOGY, BASIN PROGRAM SERIES NO.4, WATER RESOURCES MANAGEMENT PROGRAM METHOW RIVER BASIN (1976).

<sup>41</sup> *IRPP Overview*, *supra* note 19, at 22-25. The PEIS explained various methods for analyzing and selecting instream flow rates, including the process of negotiation between agencies when selecting flow rates that provided greater or lesser protection for fisheries. See also Jim Pacheco, WASH. STATE DEP’T OF ECOLOGY, Address at the Washington Chapter of American Water Resource Association Annual Conference: Science, Policy & Perspective: Instream Flow Protection in Washington State from the 1970s, 1980s, and 2000s (Oct. 3, 2017), at 2-5 (describing changes in flow-setting science for instream flow rules) (on file with author).

<sup>42</sup> Willa Nehlsen et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and Washington*, 16 FISHERIES No. 2 (1991).

<sup>43</sup> *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975). After ruling that treaty Tribes reserved rights to harvest salmon and co-manage fisheries resources, litigation examined whether and to what extent there was a concomitant tribal right to habitat to support the treaty fisheries. The question was held not ripe. *United States v. State of Washington*, 506 F. Supp. 187, 191 (W.D. Wash. 1980), *aff’d in part, rev’d in part*, 694 F.2d 1374 (9th Cir. 1982), *on reh’g*, 759 F.2d 1353 (9th Cir. 1985), *cert. den.*, 474 U.S. 994 (1985). Tribal rights to habitat to support treaty fisheries, focusing on culvert barriers, was resolved in favor of the tribes. *United States v. State of Washington*, 853 F.3d 946 (9th Cir. 2017). Tribal habitat rights to instream flows to support fisheries have been resolved for some individual tribes by litigation, settlement, and other means. See Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L. J. 195, 211 (2015); Rachel Paschal Osborn, *Native American Winters Doctrine and Stevens Treaty Rights: Recognition, Quantification and Management*, 2 AM. INDIAN L. J. 76, 76 (2013) [hereinafter *Native American Rights*].

<sup>44</sup> IRPP FEIS, *supra* note 36, at 11. IRPP rules were adopted for the following Water Resource Inventory Areas: Nooksack (WASH. ADMIN. CODE § 173-501 (2019)), Snohomish (WASH. ADMIN. CODE § 173-507 (2019)), Cedar-Sammamish (WASH. ADMIN. CODE § 173-508 (2019)), Green-Duwamish (WASH. ADMIN. CODE § 173-509 (2019)), Puyallup-White (WASH. ADMIN. CODE § 173-510 (2019)), Nisqually (WASH. ADMIN. CODE § 173-511 (2019)), Chambers-Clover (WASH. ADMIN. CODE § 173-512 (2019)), Deschutes (WASH. ADMIN. CODE § 173-513 (2019)), Kennedy-Goldsborough (WASH. ADMIN. CODE § 173-514 (2019)), Kitsap (WASH. ADMIN. CODE § 173-515 (2019)), and Wenatchee (WASH. ADMIN. CODE § 173-545 (2019)).

“IFIM.”<sup>45</sup> When the Washington Departments of Fish and Game joined an appeal challenging water rights issued to the City of Tacoma based on impacts to Green River instream flows,<sup>46</sup> the Legislature responded by vesting sole authority for flow setting with Ecology.<sup>47</sup>

In the mid-1980s, following publication of the WRIA 16 IRPP study, encompassing several river basins that flow from the eastern Olympic Mountains into Hood Canal,<sup>48</sup> legislators and public utilities grew concerned that water protected by the instream flow rules would preclude new out-of-stream allocations to serve future population and economic growth.<sup>49</sup> The soon-to-be-defunct State Ecological Commission held opposing concerns, i.e., that the proposed flows were inadequate to protect instream uses and values.<sup>50</sup> In response, Ecology temporarily halted the flow-setting program and prepared a draft environmental impact statement proposing a new focus for water management.<sup>51</sup> In

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<sup>45</sup> IRPP FEIS, *supra* note 36, at 7-8; WASH. STATE DEP'TS OF ECOLOGY, FISHERIES, AND GAME, INSTREAM RESOURCE PROTECTION STUDY REPORT OF 1986 at 9-10 (1986) [hereinafter INSTREAM REPORT 1986] (explicitly describing differing interpretations among the agencies regarding instream flow statutes). The use of IFIM to assess and set instream flows was explained and approved by the Washington Supreme Court in Wash. State Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty. (*Elkhorn I*), 121 Wash. 2d 179, 199-204, 849 P.2d 646 (1993), *aff'd sub nom.* PUD No. 1 of Jefferson Cty. v. Wash. State Dep't of Ecology (*Elkhorn II*), 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994). *See also* Dylan R. Hedden-Nicely, *The Contemporary Method for Quantifying Reserved Instream Flow Water Rights to Support Aquatic Habitat*, 50 ENVTL. L., 257, 257 (2020) (explaining IFIM for lawyers).

<sup>46</sup> Northwest Steelhead and Salmon Council v. Wash. State Dep't of Ecology, No. 81-148 (Wash. PCHB 1983).

<sup>47</sup> WASH. REV. CODE § 90.03.247 (2020). The role of the Department of Fisheries remains consultative.

<sup>48</sup> WASH. STATE DEP'T OF ECOLOGY, W.W.I.R.P.P. SERIES No. 12, SKOKOMISH-DOSEWALLIPS INSTREAM RESOURCES PROTECTION PROGRAM (DRAFT) (1985). *See* Section II.B *infra* for discussion of the landmark litigation flowing from this document.

<sup>49</sup> Slattery, *supra* note 17, at 18; WASH. STATE DEP'T OF ECOLOGY, INSTREAM RESOURCES AND WATER ALLOCATION PROGRAM REVIEW: DRAFT OF ENVIRONMENTAL IMPACT STATEMENT, 1 (1987) [hereinafter 1987 DRAFT EIS]. Ecology followed up with a “preferred alternative” for action, which included setting optimum instream flows, creating a robust water conservation and efficiency program, and focusing on processing water right changes and transfers. WASH. STATE DEP'T OF ECOLOGY, *Appendix G-3, Preferred Alternative Instream Resources and Water Allocation Program Review* (Nov. 1987), in STEVEN J. SHUPE & HEIDI SHERK, WASH. STATE DEP'T OF ECOLOGY, WASHINGTON'S WATER FUTURE, THE REPORT OF THE INDEPENDENT FACT FINDER TO THE JOINT SELECT COMMITTEE ON WATER RESOURCE POLICY (Nov. 1988) [hereinafter SHUPE 1988].

<sup>50</sup> 1987 DRAFT EIS, *supra* note 49, at 1-6. The Ecology Commission held an instream flow workshop in 1985, and with Ecology's input, identified thirty-seven issues associated with the instream flow program. *Id.* at 10-1, App. 1.

<sup>51</sup> 1987 DRAFT EIS, *supra* note 49.

1988, the Legislature enacted a formal one-year moratorium on the flow program, appointed a Joint Select Committee on Water Resources, and hired an “independent fact finder” to recommend course corrections.<sup>52</sup>

The one-year moratorium extended into a thirteen-year hiatus, as the next rule to be promulgated, the Skagit River rule, was not adopted until 2001.<sup>53</sup> Meanwhile, a policy-planning era prevailed, with the Legislature appointing multiple task forces and committees to study aspects of the water management dilemma of over-appropriation versus instream flow protection.<sup>54</sup> In lieu of forward motion by agency or legislature, the short-lived state-tribal “Chelan Agreement” created the multi-caucus “Water Resources Forum,” advocating cooperative, government-to-government planning for water resources and instream flow protection.<sup>55</sup> The Chelan Agreement process collapsed shortly after legislative majorities changed,<sup>56</sup> although it did trigger two water resource pilot

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<sup>52</sup> Act of Mar. 15, 1988, ch. 47, §§ 2-7, 1988 Wash. Sess. Laws 183, 184-90; *see generally* SHUPE 1988.

<sup>53</sup> WASH. ADMIN. CODE § 173-503 (2019). *See* Section II.H, *infra*, for discussion of the litigation flowing from this rule.

<sup>54</sup> *See* JANET CHALUPNIK, *Appendix III, Report of Instream Flow and Water Allocation Advisory Committee* (Dec. 15, 1986), in 1987 DRAFT EIS, *supra* note 49; WASH. STATE DEP’T OF ECOLOGY, PRELIMINARY FINDINGS AND RECOMMENDATIONS OF THE WATER RESOURCE DATA MANAGEMENT TASK FORCE (1990); Act of May 12, 1989, ch. 348, § 11, (1989) Wash. Sess. Laws 1736, 1743-44 (established the Water Conservation Task Force); WASH. REV. CODE § 90.54.180 (2020) (Water Use Efficiency and Conservation Programs and Practices); WATER RIGHTS FEES TASK FORCE, FINAL REPORT TO THE LEGISLATURE (1994); Reclaimed Water Use Advisory Committee (established 1995, reconvened 2014, 2017), *see* WASH. REV. CODE § 90.46 (2020) (notably, reclaimed water projects may provide a suitable alternative to new water appropriations, however, they may not impair existing water rights, including instream flows, RCW 90.46.130); Wash. State Dep’t of Health Water Use Efficiency Advisory Committee (established 2004), *see* WASH. ADMIN. CODE § 246-290 (2019); WASH. DEP’T OF ECOLOGY, PUB. NO. WR-98-154, REPORT OF THE TECHNICAL ADVISORY COMMITTEE ON THE CAPTURE OF SURFACE WATER BY WELLS (DRAFT) (1998); Municipal Water and Instream Flow Subcommittee (established 1997).

<sup>55</sup> Slattery, *supra* note 17, at 23-24; JAMESTOWN S’KLALLAM TRIBE, THE DQ PLAN: THE DUNGENESS-QUILCENE WATER RESOURCES MANAGEMENT PLAN 1.5-1.6, 1.8-1.11 (1994) [hereinafter *DQ Plan*]. In 1989, Gov. Booth Gardner entered into the Centennial Accord with then-26 federally recognized tribes located in Washington, committing to government-to-government cooperation on matters of mutual interest, including natural resources management. WASH. STATE GOVERNOR’S OFFICE OF INDIAN AFFAIRS, CENTENNIAL ACCORD, <https://goia.wa.gov/relations/centennial-accord>. *See* Jovana J. Brown, Treaty Rights: Twenty Years After the Boldt Decision, 10 WICAZO SA REV. 1, 8-11 (1994).

<sup>56</sup> Slattery, *supra* note 17, at 24.

planning projects, one in the Dungeness-Quilcene basins and one in the Methow.<sup>57</sup>

Another policy trend was the devolution of water resource planning to local governments and stakeholders.<sup>58</sup> The 1998 Watershed Planning Act placed optional authority with local “watershed planning units” to create or amend instream flows as part of a larger water supply planning process.<sup>59</sup> Only a handful of planning groups took on the instream flow rulemaking task; some defaulted to the statutory option for Ecology to set flows.<sup>60</sup> Most recently, the 2018 Streamflow Restoration Act jump started watershed planning units to identify mitigation for partial impacts of permit-exempt wells on instream flows.<sup>61</sup>

Since 2001, Ecology has adopted or amended ten instream flow rules.<sup>62</sup> As discussed below, the rulemaking program is again in hiatus.

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<sup>57</sup> *DQ Plan*, *supra* note 55. The DQ pilot planning process, initiated in 1990, did not produce an instream flow rule until 2013, litigation over which concluded in 2019. *See* Section II.K *infra*.

<sup>58</sup> This trend was first evident in the 1985 Groundwater Management planning process (WASH. REV. CODE § 90.44.400-.440 (2020); WASH. ADMIN. CODE § 173-100) and the 1997 Water Conservancy Board statute (WASH. REV. CODE § 90.80). These two processes did not, however, directly affect instream flow rulemaking.

<sup>59</sup> WASH. REV. CODE § 90.82.080 (2020); WASH. REV. CODE § 90.82.085 (2020). *See* Lindsey Schromen-Wawrin, *Adopting Instream Flow Rules in Washington State: Can Citizens Jumpstart the Process Through the Administrative Procedures Act?*, 48 GONZ. L. REV. 561, 567-72 (2013); Clare M. Ryan & Jacqueline S. Klug, *Collaborative Watershed Planning in Washington State: Implementing the Watershed Planning Act*, 48 J. OF ENVTL. PLAN. & MGMT. 491, 491-506 (2005).

<sup>60</sup> WASH. REV. CODE § 90.82.080(5) (2020). The Lewis River and Dungeness River instream flow rules are based on the unanimous agreement of watershed planning members regarding flows. WASH. ADMIN. CODE § 173-527-060(1) (2019); *see* Bassett, 438 P.3d 563 (Wash. Ct. App. 2019). Instream flow setting for the Spokane River was contentious; ultimately Ecology took over the rulemaking process. WASH. ADMIN. CODE § 173-557 (2019). *See* Ctr. for Envtl. Law & Policy v. Wash. State Dep’t of Ecology, 444 P.3d 622, *rev’d*, 468 P.3d 1064 (2020). The Cowlitz-Elochoman basin flow setting process was halted because of the watershed planning unit’s preference to adopt reservations that would deplete biologically necessary flows, a practice held invalid in *SITC II*; *see infra* Section II.H. *See* Draft WASH. ADMIN. CODE § 173-526–527. The Lyre-Hoko draft watershed plan proposed significant protection for rivers and streams on the north end of the Olympia Peninsula, but did not even make it through county commission approval required by the statute. PLANNING UNIT, DRAFT OF LYRE-HOKO WATERSHED PLAN 25-54 (2009), [http://www.clallam.net/environment/assets/applets/\\_2009WRIA\\_19\\_Draft\\_PLAN\\_no\\_Appendices\\_3-26-2010FP.pdf](http://www.clallam.net/environment/assets/applets/_2009WRIA_19_Draft_PLAN_no_Appendices_3-26-2010FP.pdf).

<sup>61</sup> WASH. REV. CODE § 90.94 (2020), WASH. ADMIN. CODE § 173-566 (2019); *see* Section II.J *infra*. *See* Osborn & Mayer, *supra* note 1, at 206-22 for a critique of this statute.

<sup>62</sup> WASH. ADMIN. CODE § 173-503 (2019) (Skagit, 2001), WASH. ADMIN. CODE § 173-505 (2019) (Stillaguamish, 2005), WASH. ADMIN. CODE § 173-517 (2019) (Quilcene-Snow, 2009), WASH. ADMIN. CODE § 173-518 (2019) (Dungeness, 2013), WASH. ADMIN. CODE §



Despite fifty years of mandate by the Legislature to protect instream uses for all rivers, roughly half of Washington's watersheds remain unprotected by rule.<sup>63</sup>

While instream flow policy and planning processes sputtered forward, instream flow litigation substituted to create law and policy for river protection. The Water Resources Act enumerates a list of fundamental principles to guide water resources management, some couched as mandate, others not.<sup>64</sup> As discussed in Part II below, several of these fundamentals have been litigated, some extensively. The connection between water quantity and quality was forged in the Water Resources Act, and challenged up to the U.S. Supreme Court.<sup>65</sup> The recognition of hydrologic connections between ground and surface waters arose in a large cohort of statewide water right permit appeals, culminating in the *Postema v. PCHB* decision of 2000.<sup>66</sup> The Act's quasi-economic test for "maximum net benefits" has engendered controversy for years.<sup>67</sup> Parties have challenged procedural innovations for managing water and flows.<sup>68</sup> The Act controversially connected Growth Management Act land use planning with instream flow protection, particularly in the realm of permit-exempt well development.<sup>69</sup> Most recently, courts have grappled with whether the Water Resources Act requires protection of all instream uses, not just fisheries, when Ecology adopts flows into rule.<sup>70</sup>

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173-527 (2019) (Lewis, 2009), WASH. ADMIN. CODE § 173-528 (2019) (Salmon-Washougal, 2009), WASH. ADMIN. CODE § 173-532 (2019) (Walla Walla amendment, 2007), WASH. ADMIN. CODE § 173-545 (2019) (Wenatchee amendment, 2008), WASH. ADMIN. CODE § 173-546 (2019) (Entiat, 2005), WASH. ADMIN. CODE § 173-557 (2019) (Spokane, 2015). See Slattery, *supra* note 17, at 14, 18.

<sup>63</sup> WASH. STATE DEP'T OF ECOLOGY, WATER RESOURCES PROGRAM, INSTREAM FLOW RULE STATUS (Nov. 2016), <https://apps.wa.ecology.gov/docs/WaterRights/wrwebpdf/wsif.pdf>.

<sup>64</sup> WASH. REV. CODE § 90.54.020 (2020). Water resources management involves the allocation of quantities of water to satisfy both instream and out-of-stream uses, including issuance of water right permits (new and amended) for domestic, municipal, industrial, agricultural and other uses, and adoption of instream flow rules.

<sup>65</sup> WASH. REV. CODE § 90.54.020(10) (2020). See Sections II.A and II.B, *infra*.

<sup>66</sup> WASH. REV. CODE § 90.54.020(9) (2020), at issue in *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726 (2000). See Section II.E *infra*.

<sup>67</sup> WASH. REV. CODE § 90.54.020(2) (2020). The statute alludes to the need to consider non-economic use of resources in determining costs and benefits: "Maximum net benefits shall constitute total benefits less costs including opportunities lost." *Id.* See *infra* Section II.K.

<sup>68</sup> See *e.g.*, *infra* Section II.C.

<sup>69</sup> See *infra* Sections II.F, II.H, II.J and II.K.

<sup>70</sup> *CELP v. Ecology*, 196 Wn.2d 17 (2020). See Section II.L, *infra*.

In sum, the Water Resources Act of 1971 admirably married a host of intersecting statutes, policies and scientific principles. It connected surface and ground waters, water quantity and quality, land use and water rights law. It availed non-traditional litigants, including environmental groups and Native American Tribes, with a mechanism to challenge water resource decisions. It proved, for a time, to be a flexible and useful means to preserve public values that are difficult to measure and protect.

## B. *Instream Controversy*

While the virtues of the Water Resources Act were several, it was also attended by significant political and scientific controversy. Even as instream flow setting grew more robust, rapid population and economic growth exacerbated demand for out-of-stream water appropriations.<sup>71</sup> The insistence that flow protection cannot come at the expense of water supply for growth and development bedevils instream flow policy. The first temporary halt to the instream flow rulemaking program extended more than thirteen years.<sup>72</sup> A great deal of litigation ensued.<sup>73</sup> Another moratorium on the program is now in effect, with no end in sight.<sup>74</sup>

A chief problem with Washington's flow program is that virtually all out-of-stream water rights pre-date the flows protected under the instream flow rules. The rules integrate into Washington's "first in time, first in right" prior appropriation system through priority date, i.e., the date of formal promulgation by the Washington Office of the Code Reviser.<sup>75</sup> Of the thirty existing rules, priority dates range from 1976 through 2015. However, Water Code-based claims, permits and certificates that authorize extraction of water from Washington's rivers and aquifers number about 220,000, almost all with priority dates that precede the first instream flow rule of 1976.<sup>76</sup> The tens of thousands of

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<sup>71</sup> Washington's population nearly doubled during the instream flow policy-planning period, growing from 3.5 million in 1970 to 6 million in 2000. WASH. STATE OFFICE OF FIN. MGMT., GRAPH, TOTAL POPULATION AND PERCENT CHANGE 1970-2019, <https://www.ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/total-population-and-percent-change> ("A rebounding aircraft sector, and solid economic growth overall, resulted in record growth in 1980 when population expanded by 3.85 percent, a pace unmatched since.").

<sup>72</sup> Act of Mar. 15, 1988, ch. 47, §§ 2(5)(a), 2(5)(b), 5-6, 1988 Wash. Sess. Laws 183, 185, 187-89; SLATTERY & BARWIN, *supra* note 16, at 18.

<sup>73</sup> See Section II, *infra*.

<sup>74</sup> 2019 *Instream Flow Report*, *supra* note 4, at 1.

<sup>75</sup> WASH. REV. CODE § 90.03.345 (2020). RCW 90.82.080(2) authorized minor adjustments to the priority date for instream flow rules.

<sup>76</sup> BEN BONKOWSKI, WASH. STATE DEP'T OF ECOLOGY, PUB. NO. 03-11-015, WATER

water rights that pre-date the flow rule in any given watershed are entitled to satisfaction *before* rule-based flows are protected. As a result, for many waterways, the water remaining *after* out-of-stream rights are satisfied is insufficient to support fisheries, water quality, recreation and other instream uses designated for protection under the Water Resources Act.<sup>77</sup>

Important legal rights to instream flows do exist that pre-date or legally supersede Water Code-based rights, but these are generally not reflected in state management of water resources. Public rights to navigation, fisheries and environmental quality in navigable rivers date to statehood, but have been deemed unenforceable by Ecology, and the courts have declined, to date, to use the public trust doctrine to protect instream flows.<sup>78</sup> Tribal treaty rights to instream flows date to “time immemorial,”<sup>79</sup> but, except where quantified in court or enforced by tribes, are not recognized by the state and have not served to ensure adequate instream flow protections for fisheries.<sup>80</sup> Endangered Species

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RIGHT APPLICATIONS PROCESSING, 2003 REPORT TO THE LEGISLATURE (Dec. 2003). Notably, this figure does not include the total number of permit-exempt wells in use around the state, estimated to number as many as half a million. Robert N. Caldwell, *Six-Packs for Subdivisions: The Cumulative Effects of Washington’s Domestic Well Exemption*, 28 ENVTL. L. 1099, 1105 (1998) (citing total estimates of between 263,000 and 404,000 permit-exempt wells); TOM CULHANE & DAVE NAZY, WASH. STATE DEP’T OF ECOLOGY, PUB. NO. 15-11-006, PERMIT-EXEMPT DOMESTIC WELL USE IN WASHINGTON STATE, iii (2015) (“[W]e conclude approximately 17,200 permit-exempt domestic wells were drilled statewide from 2008 through September 4, 2014”); Ken Slattery, WATER RESOURCE PROGRAM, WASH. STATE DEP’T OF ECOLOGY, Address at Citizens Workshop on Exempt Wells: Concepts for Clarifying Group Domestic Use (May 31, 2008) (75,000 wells drilled between 1995-2005) (on file with author).

<sup>77</sup> WASH. REV. CODE § 90.54.020(3)(a) (2020); JOHN J. HOLLOWED & LARRY WASSERMAN, A CRITIQUE OF THE WASHINGTON STATE’S INSTREAM RESOURCE PROTECTION LAWS & REGULATIONS (WORKING DRAFT) 178 *et seq.* (2001) [hereinafter HOLLOWED & WASSERMAN] (on file with author).

<sup>78</sup> *Postema v. Pollution Control Hrgs. Bd.*, 11 P.3d 726, 744 (2000) (“Ecology’s enabling statute does not permit it to assume the public trust duties of the state; the doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest.”); *R.D. Merrill Co. v. Pollution Control Hrgs. Bd.*, 969 P.2d 458, 467 (Wash. 1999); *see Rettkowski v. Dep’t of Ecology*, 858 P.2d 232, 239 (Wash. 1993).

<sup>79</sup> *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Dep’t of Ecology v. Acquavella*, 296 P.3d 835, 840 (2013) (“[T]he [Yakama] Nation also has a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek.”).

<sup>80</sup> *Anderson*, *supra* note 43; *Osborn & Mayer*, *supra* note 1, at 187-88 (examples of tribal treaty rights and instream flow protections in Washington); *Native American Rights*, *supra* note 43.

Act habitat protection requirements,<sup>81</sup> Clean Water Act designation of fisheries uses for surface waters via state water quality standards and hydropower relicensing offer federal statutory protections that remain partially implemented at best.<sup>82</sup>

The problem of water resource over-appropriation through state water rights is exacerbated by three factors.<sup>83</sup> First, the bulk of these rights, about 165,000 pre-Water Code claims, are mostly unadjudicated, leaving them in uncertain legal status.<sup>84</sup> A claim is not a water right, but simply indicia that a water right may exist.<sup>85</sup> Claims may lay unused for decades, then be “revived” by water users even though invalid due to relinquishment or abandonment. Next, prior to 2003 it was Ecology’s policy to issue water rights to public water suppliers in quantities greater than what could be used at the time of issuance. These “inchoate” water rights were validated by the 2003 “Municipal Water Law” and upheld against constitutional challenge.<sup>86</sup> As population and water demand increases, public suppliers expand their systems and grow into these inchoate rights. Even though instream flows ostensibly are protected in their priority dates, future municipal use is permitted to expand at the expense of instream flows.<sup>87</sup> Finally, instream flows are not protected

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<sup>81</sup> See DAVID N. CASSUTO & STEVEN REED, WATER LAW AND THE ENDANGERED SPECIES ACT, WHOSE DROP IS IT ANYWAY?: EFFECTIVE MANAGEMENT OF OUR NATION’S WATER RESOURCES (Megan Baroni ed., 2010). For a map of endangered salmon waterways in Washington, NOAA FISHERIES, STATUS OF ESA LISTINGS & CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON & STEELHEAD (July 2016), at [https://archive.fisheries.noaa.gov/wcr/publications/gis\\_maps/maps/salmon\\_steelhead/critical\\_habitat/wcr\\_salmonid\\_ch\\_esa\\_july2016.pdf](https://archive.fisheries.noaa.gov/wcr/publications/gis_maps/maps/salmon_steelhead/critical_habitat/wcr_salmonid_ch_esa_july2016.pdf). See Osborn & Mayer, *supra* note 1, at 186-87 for examples of ESA limitations on Washington water rights to protect instream flows.

<sup>82</sup> See Megan Hooker, *Recreation and Aesthetics in the Public Interest: History and Overview of Hydropower License Denials by the Federal Energy Regulatory Commission*, 29 J. ENVTL. L. & LITIG. 87 (2014); See Section II.B for discussion of instream flows and Clean Water Act water quality standards.

<sup>83</sup> See WASH. STATE DEP’T OF ECOLOGY & WASH. STATE DEP’T OF FISH & WILDLIFE, ACTION PLAN FOR SETTING, ACHIEVING AND PROTECTING STREAM FLOWS, 14-15 (Feb. 17, 2004) (on file with author), identifying sixteen critical watersheds where water is “‘over-appropriated,’ meaning more water has been legally allocated than is naturally available” and instream flows are insufficient to support all life stages for salmon populations.

<sup>84</sup> General stream adjudications have been completed for only a small number of Washington’s watersheds, creating great uncertainty about the validity of pre-Code claims. WASH. STATE DEP’T OF ECOLOGY, PUB. NO. 19-11-073, COMPLETED ADJUDICATIONS IN WASHINGTON (2019).

<sup>85</sup> WASH. REV. CODE § 90.14.081 (2020).

<sup>86</sup> WASH. REV. CODE § 90.03.330(3) (2020); *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010).

<sup>87</sup> Jeff Kray, *Washington Stater Municipal Water Law: Washington Supreme Court Upholds Controversial Law*, WATER REP. NO. 82, 2010, at 22; Rachel Paschal Osborn,

against permit-exempt well use. The 2018 Streamflow Restoration Act proposes methods to offset future, twenty-year growth in exempt wells for domestic uses. However, the statute does not require mitigation for permit-exempt wells that post-date flow rules up to 2018, nor for non-domestic uses, and explicitly authorizes impairment of instream flows.<sup>88</sup>

A second fundamental problem with Washington's instream flow program relates to the science of flow quantification. The first generation of flow rules (Basin Planning, 1976-1979) relied on obsolete science and questionable negotiation practices, leading to inadequate protection for instream uses, particularly for salmon fisheries.<sup>89</sup>

Washington's program was built on the concept of "minimum flows," i.e., selecting a single flow to protect all of the aquatic life in the river. Biologists, however, reject the use of a single minimum number to replicate the annual and inter-annual variability of river flows, or substitute for the physical and biological functions found in and adjacent to rivers.<sup>90</sup> The second generation of flow rules (IRPP, 1979-1985) were built on improved flow science, but remain tethered to a baseline of degraded stream conditions caused by out-of-stream water rights.<sup>91</sup> Even

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*Municipal Water Law—An Environmental Perspective*, AM. WATER RESOURCES ASS'N SEC. NEWSL. (Wash. Chapter), May–June 2008, at 4-5. Inchoate municipal water rights have not been inventoried statewide, to the author's knowledge, but are known to be quite large in some basins and can significantly deplete stream flows. For example, in the Spokane River, inchoate municipal water rights are calculated to equate to 210 cubic feet per second (CFS).

<sup>88</sup> WASH. REV. CODE § 90.94.020(1), (8) (2020); WASH. REV. CODE § 90.94.030(1), (6) (2020); WASH. REV. CODE § 19.27.097(1)(g) (2019). Non-domestic water use quantities can be large. *See, e.g.*, *Five Corners Family Farmers v. State*, 268 P.3d 892, 902-03 (Wash. 2011) (Wiggins, J., dissenting) (approving use of permit-exempt wells for industrial stockwater purposes of up to 600,000 gallons per day).

<sup>89</sup> GARLING, *supra* note 39, at 5-6, 25-26 (describing the "stream classification committee," staffed by several state agencies, tasked with rating each river basin for various instream uses (e.g., fisheries, navigation, aesthetics, water quality)).

<sup>90</sup> ALLAN LOCKE ET AL., INTEGRATED APPROACHES TO RIVERINE RESOURCE STEWARDSHIP 2 (Instream Flow Council, ed., 2008); Leroy Poff et al., *The Natural Flow Regime*, 47 BIOSCIENCE No. 11 769, 770 (1997). The "natural flow" regime of rivers is defined by five factors: the magnitude, frequency, duration, timing and rate of change of instream flows. The dynamic variability of these factors plays a central organizing role in the biodiversity, production, and sustainability of river ecosystems. *Id.* at 770-71.

<sup>91</sup> *Instream Report 1986*, *supra* note 45, at 10. HOLLOWED & WASSERMAN, *supra* note 77, at 209 ("While the methodology utilized to set flows might have been 'state of the art' in the early 1980's, these 1980's methods are not adequate to meet the needs of imperiled fish of the early 21<sup>st</sup> century. In every case, the instream flows established by rules have been found to be inadequate to provide full habitat productivity for the protection and enhancement of anadromous fish."); Pacheco, *supra* note 41, at 2-5 ("All this work buil[t] a defensible case that the hydrologic method [of flow setting] was insufficient at protecting and preserving instream resources.").

as Ecology began to utilize defensible flow-setting measures in the mid-1980s, politics intervened to halt the program.<sup>92</sup>

Post-2000 rules have, for the most part, improved protection for instream biological resources, although the chief problem noted above remains, i.e., superseding priority for massive numbers of extractive water rights. The “optimum flows” set forth in this cohort of rules have engendered controversy, however. Annual variability in rainfall, snowpack, and other factors means that protective flow rates are not met every year; this basic hydrologic fact meets with frequent criticism by opponents of the instream flow program.<sup>93</sup>

A third issue with Washington’s instream flow program is that flow rules have been adopted for fewer than half of Washington’s sixty-two watersheds.<sup>94</sup> In its 2019 report to the Legislature, the Department of Ecology stated it would not adopt any new flow rules due to its inability to “balance water needs of diverse water users,” i.e., provide water for future out-of-stream domestic and business uses.<sup>95</sup> This self-imposed and unauthorized moratorium is a throwback to the basin planning program of the 1970s, and a questionable response to several legal challenges that were resolved against the agency.<sup>96</sup> Unable to implement its Catch-22 policy preference, that instream uses may be protected only if more water is extracted for future out-of-stream uses, half of Washington’s rivers remain unprotected from new water appropriations.<sup>97</sup> Compounding the problem, Ecology has declined to revisit obsolete or ineffective instream

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<sup>92</sup> See discussion Section I.A, *supra*.

<sup>93</sup> WASH. STATE DEP’T OF ECOLOGY, PUB. NO. 17-11-002, AN INTRODUCTION TO INSTREAM FLOWS AND INSTREAM FLOW RULES, 2 (2017) (explaining why instream flow rules set forth flow rates that are “sometimes higher than the flow in the stream”); Bassett v. Dep’t of Ecology, No. 51221-1-II, at 32 (Wash. App. Apr. 2, 2019) (rejecting argument that the instream flow rule “appropriated more water for fish than naturally exists in the basin”); SHUPE 1988, *supra* note 52, at 18-37.

<sup>94</sup> Specifically, instream flow rules have not been adopted in WRIs 2 (San Juan), part of 3 (Samish), 4 (Upper Skagit), 16 (Skokomish-Dosewallips), part of 18 (Elwha), 19 (Lyre-Hoko), 20 (Sole Duc), 21 (Queets-Quinault), 24 (Willapa), 29 (Wind-White Salmon), 30 (Klickitat), 31 (Rock-Glade), 33 (Lower Snake), 35 (Middle Snake), 34 (Palouse), 36 (Esquatzel Coulee), 40 (Alkali-Squillchuck), 41 (Lower Crab), 42 (Grand Coulee), 43 (Upper Crab-Wilson), 44 (Moses Coulee), 47 (Chelan), 50 (Foster), 51 (Nespelem), 52 (Sanpoil), 53 (Lower Lake Roosevelt), 54 (Lower Spokane), 56 (Hangman), 58 (Middle Lake Roosevelt), 60 (Kettle), 61 (Upper Lake Roosevelt), and 62 (Pend Oreille). In the Yakima watershed, comprising WRIs 37, 38, and 39, federal law and practices associated with the Bureau of Reclamation’s Yakima Project operate to protect flows, but state instream flow rules have not been adopted. A basin planning rule exists for the upper watershed. See Sections II.D and II.G, *infra*.

<sup>95</sup> 2019 *Instream Flow Report*, *supra* note 4, at 1.

<sup>96</sup> See *infra* Section II.

<sup>97</sup> 2019 *Instream Flow Report*, *supra* note 4, at 5.

flow rules that do not adequately protect fisheries and other instream uses.<sup>98</sup>

In sum, the history of the Water Resources Act is replete with both innovation and poor policy choices, compounded by administrative erosion. The protections it was designed to afford to Washington's rivers is critically important, yet the program is beset by failure to accomplish its statutory purpose of preserving all instream values for public use.

## II. THE CASES AND THEIR STORIES

### A. *Enter the Water Resources Act of 1971*

Washington State was swept up in the national environmental revolution of the late 1960s and early 70s. During this time, the State Legislature adopted important environmental protection statutes, including the Water Resources Act of 1971, and the State Environmental Policy Act (SEPA).<sup>99</sup> Prior to enactment of these two laws, existing statutes authorizing extraction of the state's rivers and aquifers gave minimal protection to environmental values.

The first case to apply these new statutes involved a NIMBY challenge<sup>100</sup> to a proposed community domestic water right, intended to serve a 143-lot residential subdivision on the shores of Loon Lake, north of Spokane, Washington. *Stempel v. Dept. of Water Resources* rejected Ecology's contention that it need not consider the water pollution impacts that could result from issuance of a new water right permit.<sup>101</sup> Instead, the Court elaborated on SEPA's policies and procedures, finding them to "recogniz[e] the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environments and biosphere, as well as to promote the welfare of humans and the understanding of our ecological systems."<sup>102</sup> Even though the

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<sup>98</sup> See, e.g., *Squaxin Island Tribe v. Dep't of Ecology*, 312 P.3d 766 (Wash. Ct. App. 2013) (affirming Ecology's denial of petition to amend instream flow rule for John's Creek, WAC 173-514-030, despite permit-exempt well development depleting senior instream flows set by rule and harming anadromous treaty fisheries).

<sup>99</sup> WASH. REV. CODE § 90.54 (2020) and WASH. REV. CODE § 43.21C (2020). See also WASH. REV. CODE § 43.21A.064 (2020) (establishing procedures and policies for Department of Ecology implementation of the water code statutes). William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33 (1984).

<sup>100</sup> The term NIMBY stands for "not in my backyard," and refers to property owners challenging nearby development projects. *NIMBY*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=NIMBY>.

<sup>101</sup> *Stempel v. Dep't of Water Res.*, 508 P.2d 166 (Wash. 1973).

<sup>102</sup> *Id.* at 117.

traditional four-part test for a water right was satisfied,<sup>103</sup> SEPA obligated Ecology “to consider the total environmental and ecological factors to the fullest in deciding major matters,” including the proposed Loon Lake water right.<sup>104</sup>

The Court also cited the newly enacted Water Resources Act, which provided protections just as vigorous as those found in SEPA. The Act linked water quantity and quality protections,<sup>105</sup> and required the department to “evaluate the possible pollution reentry problems resulting from the domestic water use in the vicinity of the lake.”<sup>106</sup>

The legislative response to *Stempel* was swift. The Legislature immediately amended SEPA to exempt water right applications for fifty cubic feet per second or less for irrigation.<sup>107</sup> Ecology later created a categorical exemption for surface water appropriations of less than one cubic feet per second, and groundwater appropriations of 2,250 gallons per minute or less.<sup>108</sup> As a result of these exemptions, SEPA is almost useless for considering the impacts of water rights on the environment.

The Legislature may have believed that the Water Resources Act fundamentals, combined with the Water Code’s public interest test, would be sufficient to address environmental impacts.<sup>109</sup> However, not only are the environmental impacts of most singular water rights not considered under SEPA, but the cumulative environmental impacts of multiple water rights are also not considered.<sup>110</sup> Hence, impacts to

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<sup>103</sup> Water rights are granted pursuant to a four-part test, which requires affirmative findings that water is physically available, the purpose is beneficial and reasonably efficient, the new right will not impair existing rights, and the public interest is not harmed. WASH. REV. CODE § 90.03.290 (2018); WASH. REV. CODE § 90.44.060 (1987).

<sup>104</sup> *Stempel*, 82 Wash. 2d at 117.

<sup>105</sup> WASH. REV. CODE § 90.54.020(3)(a), (b) (2020).

<sup>106</sup> *Stempel*, 82 Wash. 2d at 119. The Court also discussed how the statutes applied to pre-existing water permits that were not yet finalized. *Id.* at 119-20.

<sup>107</sup> WASH. REV. CODE § 43.21C.035 (1974). One cubic foot per second (cfs) of water equates to approximately 7.5 gallons. Fifty cfs equals 32.3 million gallons per day, an enormous quantity. It is the rare water right that exceeds this amount and is therefore subject to SEPA review.

<sup>108</sup> WASH. ADMIN. CODE § 197-11-800(4) (2019).

<sup>109</sup> WASH. REV. CODE § 90.54.020 (2020); WASH. REV. CODE § 90.03.290 (2020). As discussed below, the Washington Supreme Court has limited use of these statutes to protect the environment. *See* Sections II.B, II.K and II.L, *infra*.

<sup>110</sup> *Yakama Indian Nation v. Dep’t of Ecology*, Nos. 93-157 *et seq.*, at 3-6 (Wash. Pollution Control Hearings Board, Order on Motions for Summary Judgment Oct. 9, 1998) (SEPA cumulative effects analysis is not applicable to batch water right permitting). Ecology has also consistently refused to consider cumulative impacts of water rights on future water supply scenarios. *See Okanogan Highlands All. v. Dep’t of Ecology*, Nos. 97-146, *et seq.*, at FF 24 (Wash. Pollution Control Hearings Board, Final Findings of Fact, Conclusions of Law and Order 2000) (“Ecology never considered the



waterways and aquifers caused by adding on to the pre-existing 220,000 documented water right claims, certificates and permits, and the half-million permit-exempt wells,<sup>111</sup> are never assessed.

Despite the post-decision erosion of SEPA review for most water rights,<sup>112</sup> the Loon Lake case did establish that water quality is a factor to consider in the water right permitting process. As the next case demonstrates, this provided states with an effective tool to limit the impacts of federal dam licensing on river flows.

### B. *The Quantity-Quality Link*

Instream flows were at the heart of the Dosewallips River controversy, which was instrumental in causing the thirteen-year hiatus in the instream flow rulemaking program in the mid-1980s. Ultimately, the case provided landmark environmental protection for Washington's rivers and linked the Water Resources Act with the water quality standards program governed by the state and federal Clean Water Acts.<sup>113</sup> This case established important precedent not only for Washington, but throughout the nation.

The City of Tacoma owns several dams in western Washington that, while providing public benefits of electrical power and water supply for Tacoma customers, have also done substantial damage to instream flow resources.<sup>114</sup> When Tacoma proposed an offshore hydroelectric power

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cumulative impacts of BMG's new rights and existing and future demand from exempt wells and reasonably foreseeable development projects, either independent of or prompted by the mine's development."); *Postema*, 11 P.3d at 744-45 (declining to reach argument that Ecology failed to consider "...the cumulative effect of similar future applications to determine the extent of harm to the environmental value at stake' under the public interest test of RCW 90.03.290" because Ecology's denials were not based on cumulative impacts analysis.).

<sup>111</sup> See *supra* note 76 for discussion of the number of water rights in Washington.

<sup>112</sup> Ironically, Ecology cites the SEPA water right categorical exemption as proof that water right permits do not cause detriment to the public welfare, precluding review not only under SEPA, but also under the public welfare test of the water code. WASH. REV. CODE § 90.03.290(3) (2020). See, e.g., Getaway Holdings, LLC, Final Report of Examination No. S1-28906 at 8 (May 2020) (on file with author).

<sup>113</sup> WASH. REV. CODE § 90.54.020 (2020) (Water Resources Act "Fundamentals"), Washington Water Pollution Control Act, WASH. REV. CODE § 90.48 (2020); Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (2018); WASH. ADMIN. CODE § 173-201A (2019) (state water quality standards).

<sup>114</sup> *City of Tacoma, Washington v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 59-62 (D.C. Cir. 2006) (describing impacts of Tacoma's Cushman dam on instream flows in the Skokomish River); WATER RES. MGMT. PROGRAM, WASH. DEP'T OF ECOLOGY, GREEN-DUWAMISH RIVER BASIN INSTREAM RESOURCES PROTECTION PROGRAM ii (1980)

facility for the pristine Dosewallips River, concerns arose about the impacts of the facility on the river and its healthy salmon populations.<sup>115</sup>

To address these concerns, the Department of Ecology conditioned the project with instream flow requirements. Specifically, Ecology limited the amount of water the Elkhorn facility could divert from the river, requiring that fish-protective flows of between 100 and 200 cubic feet per second be maintained in the bypass reach (i.e., the 1.2 mile length of river between the water diversion and water discharge points).<sup>116</sup>

The flow conditions were imposed via the Elkhorn Project's Clean Water Act Section 401 Certification for the federal power license.<sup>117</sup> Under Section 401, states may impose mandatory conditions on federal licenses in order to protect water quality in state waterways. Washington's water quality standards require protection of specific, designated uses of state rivers, including salmon migration, spawning and rearing.<sup>118</sup> To preserve these uses, specific quantities of flowing water are needed to cover river substrate with water, move spawning gravels, enable fish migration up and down the river, and other functions.<sup>119</sup> To protect the designated uses of the Dosewallips River under state water *quality* standards, Ecology imposed water *quantity* flow limits on the federal hydropower license.<sup>120</sup>

The Washington Supreme Court rejected Tacoma's argument that the State could not impose water quantity conditions via a water quality permit.<sup>121</sup> The Washington Supreme Court further held that the Water Resources Act's instream flow mandate, authorizing the 401

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(describing impact of Tacoma's Howard Hanson dam on instream flows in the Green River).

<sup>115</sup> The project would "divert water from the river, use that water to run turbines [located adjacent to the river] to generate electricity, then return the water to the river 1.2 miles downstream." *Elkhorn I*, 121 Wn.2d at 184.

<sup>116</sup> *Id.* at 183-84. The instream flows derived in part from the Skokomish-Dosewallips River IRPP plan, which was partially responsible for the flow rule moratorium of 1985, and was never adopted into rule. See *supra* Section I.A.

<sup>117</sup> Clean Water Act, 33 U.S.C. § 1341(d). Under Section 401 Certifications, states and tribes may impose mandatory conditions on federal permits to protect water quality. See Katherine Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 25 ENV'T'L LAW 255 (1995).

<sup>118</sup> WASH. ADMIN. CODE § 173-201-045(1)(b)(iii) (1994). The federal Clean Water Act requires states to designate uses of rivers. Clean Water Act, 33 U.S.C. § 1313(c)(2)(A).

<sup>119</sup> WATER RES. MGMT. PROGRAM, WASH. DEP'T OF ECOLOGY, INSTREAM RESOURCES STUDY REPORT OF 1986 11-15 (1986) (discussing instream flow analysis for Dosewallips River); Poff, *supra* note 90.

<sup>120</sup> *Elkhorn I*, 121 Wn.2d at 184-85.

<sup>121</sup> *Id.* at 185-89.

Certification water flow conditions, was an “appropriate requirement of state law” under Clean Water Act section 401(d),<sup>122</sup> serving as “congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.”<sup>123</sup> Thus, under both state and federal law, it was appropriate and necessary to impose flow requirements to protect water quality. Tacoma sought review by the U.S. Supreme Court, where Justice Sandra Day O’Connor wrote that:

Petitioners also assert ... that the Clean Water Act is only concerned with water “quality,” and does not allow the regulation of water “quantity.” This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution.<sup>124</sup>

The broad language of *Elkhorn I* and *II* informed a second state court decision involving a dam on Sullivan Creek in northeast Washington. There, *Elkhorn*’s quantity-quality ruling supported imposition of flow conditions on the federal hydropower license, even though doing so limited the dam owner’s pre-existing water rights.<sup>125</sup> For the state agricultural lobby, these were fighting words. In the 2003 state legislative session, the lobby’s number one priority was a rollback of this newly interpreted power under the state Water Pollution Control Act.<sup>126</sup> The resulting statute purports to amend the court decision:

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<sup>122</sup> Clean Water Act, 33 U.S.C. § 1341(d).

<sup>123</sup> *Elkhorn I*, 121 Wn.2d at 192.

<sup>124</sup> *Elkhorn II*, 114 S.Ct. at 1912-13.

<sup>125</sup> PUD No. 1 of Pend Oreille County v. Wash. State Dep’t of Ecology, 146 Wn.2d 778, 805-21 (2002). The court also ruled that the Water Resource Act’s mandate that “[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions,” WASH. REV. CODE § 90.54.020(10), did not require consideration of the public interest in a surface water right change decision. *Id.* at 794-98.

<sup>126</sup> An agricultural-municipal deal was struck to enable this legislation. For public water suppliers, rollback of *Wash. State Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582 (1998), which cast doubt of the validity of inchoate municipal water rights, was the 2003 legislative priority. Each lobby obtained the relief they sought, *i.e.*, WASH. REV. CODE § 90.48.422 and WASH. REV. CODE § 90.03.330(3), respectively.

The department may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim granted or recognized under chapter 90.03, 90.14, or 90.44 RCW through the authority granted to the department in this chapter.<sup>127</sup>

This legislative reversal was not, however, permitted to overturn the *Elkhorn* victories, likely due to intervention by then-Washington Attorney General Christine Gregoire, who had personally argued *Elkhorn* to the U.S. Supreme Court.<sup>128</sup>

Ironically, Ecology no longer uses the tremendous regulatory power available via Clean Water Act Section 401 certification to protect instream flows. Instead environmental advocacy groups have been the primary proponents of Section 401 conditions on federal permits to protect flows.<sup>129</sup> Most recently, new United States Environmental Protection Agency rules limit state use of 401 certifications to impose conditions on federal projects.<sup>130</sup>

### C. *The Watershed Approach*

By the late 1980s it was apparent that water for new water rights was not available in many of Washington's river basins, given historic over-

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<sup>127</sup> WASH. REV. CODE § 90.48.422(3). It is a live question whether this provision would withstand a pre-emption challenge under the federal Clean Water Act. To date, such a challenge has not been prosecuted to completion.

<sup>128</sup> “The legislature finds that the courts have rendered decisions in *Elkhorn (Public Utility District No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L.Ed. 2d 716 (1994)) and *Sullivan Creek (Public Utility District No. 1 of Pend Oreille County v. Washington Department of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002)) related to water quality certifications issued under section 401 of the clean water act, 33 U.S.C. 1251 *et seq.* Enactment of this legislation does not expand or contract the legal holdings of these decisions . . .” WASH. REV. CODE § 90.48.422(1).

<sup>129</sup> *E.g.*, *Ctr. for Environmental Law & Policy v. Wash. State Dep't of Ecology and Avista Corp.*, No. 08-067 (Pollution Control Hrgs. Bd. 2008) (Notice of Appeal) (settlement imposing instream flows on Spokane Falls hydropower license); *Ctr. for Environmental Law & Policy v. Wash. State Dep't of Ecology and PUD No. 1 of Okanogan County*, No. 12-082 (Pollution Control Hrgs. Bd. Aug. 30, 2013) (Final Findings of Fact and Conclusions of Law as amended on reconsideration requiring additional studies to determine appropriate flows for hydropower license proceedings); *Ctr. for Environmental Law & Policy v. Wash. State Dep't of Ecology and PUD No. 1 of Okanogan County*, 196 Wn. App. 360 (Ct. App. Div. 1, 2016) (public interest test for issuance of new water right for hydropower facility does not require completion of 401 Certification flow conditions).

<sup>130</sup> 40 C.F.R. § 121.3, 121.6 (2020).

allocation and the need for instream flows in quantities adequate to protect fisheries.<sup>131</sup> While the fact of water scarcity was evident in scientific investigations, the notion of limited water availability was political dynamite, especially among rural legislators who opposed protecting instream flows at the expense of out-of-stream water uses.<sup>132</sup> In 1994, an end-of-session legislative standoff led to a 63% cut in Ecology's Water Resources program budget, exacerbating the large existing backlog of water right applications.<sup>133</sup>

The dramatic reduction in staff required a more efficient approach to processing water right applications, with the goal to reduce the politically polarizing backlog. Some of the required findings, e.g., whether water is physically and legally available, typically involve intensive investigation.<sup>134</sup> Instead of piecemeal, permit-by-permit processing, Ecology prioritized several of the sixty-two Water Resource Inventory Areas for water availability assessments, looking primarily at the presence of endangered salmon species and status of instream flows adopted into rule.<sup>135</sup> Ecology then began to "batch process" water right applications by watershed.<sup>136</sup>

Larry Hillis, a Kittitas Valley real estate developer, applied for nine new water rights, but was waiting in a very long line.<sup>137</sup> Per law, his place in line was determined by the date he filed his applications with Ecology. But, was the line a statewide queue consisting of all pending applications, or was it a local queue, based on local water availability? Because Mr. Hillis was really competing for water with other applicants in the Yakima River Basin, it made sense that his wait line consisted of

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<sup>131</sup> See Section I.A, *supra*.

<sup>132</sup> *Id.*; see SHUPE 1988, *supra* note 52 (interviews with legislators and interested parties).

<sup>133</sup> *Hillis v. Wash. Dep't of Ecology*, 131 Wn.2d 373, 385-87 (1997); WATER RIGHTS FEES TASK FORCE, FINAL REPORT TO THE LEGISLATURE App. A (Jan. 6, 1994) (1993-1995 Operating Budget). *Hillis* reported 1,000 new applications per year, with a backlog of 5,000 applications in 1996, 131 Wn.2d at 377, 394-95, having grown from 2600 applications in 1988.

<sup>134</sup> WASH. REV. CODE § 90.03.290. Four basic findings are required to determine a water right application: (1) unappropriated water is physically available, (2) the new right will not impair existing rights, (3) the proposed use is beneficial in purpose and quantity, and (4) there is no detriment to the public welfare or interest.

<sup>135</sup> Ecology conducted sixteen "initial watershed assessments." See, e.g., Covert, *supra* note 28; Culhane, *supra* note 28 [Tucannon and Green River IWAs]. One sign of lack of water availability was the number of days that rule-based instream flows were not met.

<sup>136</sup> *Hillis*, 131 Wn.2d at 379. Ecology's WRIA map illustrates the watersheds used in this approach. See WASH. ADMIN. CODE § 173-500-990 (map). See also Steve Hirschey, et al., *The Practical Evolution of Hydraulic Continuity and Mitigation Principles*, 199 THE WATER REPORT 22, 24 (2020) ["Hirschey"] (describing the batch processing process).

<sup>137</sup> *Hillis*, 131 Wn.2d at 377-78.

applications limited to the physiographic area where he sought water – the upper Kittitas Valley, or perhaps the Yakima Basin as a whole.

Ecology's new batch processing strategy meant that each watershed had its own application line, and the agency used its discretion to decide which watersheds to process first.<sup>138</sup> Given the over-appropriated condition of the Yakima basin, meaning that water was likely not available for new water rights, Ecology prioritized its processing elsewhere. Mr. Hillis challenged, and obtained a trial court order directing Ecology to process his Kittitas County water right applications ahead of any and all later-filed applications regardless of location in the state.<sup>139</sup>

On appeal, the Washington Supreme Court chided the Legislature for failing to adequately fund the water resources program, leading to the massive backlog in water right applications. Because separation of powers principles prevented the Court from ordering the Legislature to fund the program, and because Ecology was prohibited from using funds not appropriated for the water rights program, the fault lay squarely with the Legislature.<sup>140</sup>

On the merits, the Court ruled that Ecology could rely on watershed assessments and prioritize applications by criteria such as public health emergencies and non-consumptive uses. The Court agreed that batching applications by water source was reasonable, but held that Ecology must adopt rules before imposing these activities as a requirement for processing water rights.<sup>141</sup>

In response, Ecology adopted the *Hillis* rule, WAC Chapter 173-152, adopting protocols to organize workload, conduct basin assessments, and prioritize applications to address exigencies and non-consumptive water uses.<sup>142</sup> Several bills attempted, unsuccessfully, to force expedited review of water right applications.<sup>143</sup> The water right application backlog has never been (and likely never will be) completely resolved. Ecology now

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<sup>138</sup> *Id.* at n. 11.

<sup>139</sup> *Id.* at 379-80.

<sup>140</sup> *Id.* at 385-87, 389-90.

<sup>141</sup> *Id.* at 395-96, 398-401.

<sup>142</sup> WASH. ADMIN. CODE § 173-152-010, 050.

<sup>143</sup> *E.g.*, SB 6757 would have required that “the director must make a final determination on water rights applications within twelve months in areas without a regional water resource plan and within three months for applications in areas with a regional water resource plan.” Laws of 1997, Ch. 442, Section 114, would have required Ecology to process water right applications within 180 days or one year, depending on whether a watershed plan was in place. That section was vetoed. *See* Governor’s explanation of partial veto at the end of the engrossed bill. *Id.* at 2754.

requires pre-application and “completeness” reviews to limit futile and incompetent applications.<sup>144</sup>

The problem of the never-ending backlog criticized in *Hillis* arose in part from a 1994 budget fiasco. A Water Right Fee Task Force report evaluated whether applicants should pay full freight for processing applications and recommended certain efficiencies.<sup>145</sup> It was another ten years before the Legislature approved modest increases to application fees,<sup>146</sup> and the Water Resources Program remains chronically underfunded. During the 2010s, state budgets conditionally appropriated \$1 million per year to Ecology, contingent on issuing 500 water right decisions per year.<sup>147</sup> The agency became a permit processing factory, de-prioritizing instream flow rulemaking, enforcement, and other essential water management activities.

Another *Hillis* offshoot was the privatization of water right processing. In 2000, Ecology established the “cost reimbursement” program, through which applicants may expedite by paying a pre-approved consultant.<sup>148</sup> The catch: all pre-existing, senior applications seeking water from the same source must also be processed.<sup>149</sup> In 2010, privatization continued with “certified water right examiners,” who may be hired to complete the statutory evaluation of post-permit water use necessary to obtain a final certificate of water right.<sup>150</sup>

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<sup>144</sup> GOVERNOR’S OFFICE FOR REGULATORY INNOVATION AND ASSISTANCE, NEW WATER RIGHT PERMIT PROCESS (June 28, 2016), [https://www.oria.wa.gov/Portals/\\_oria/VersionedDocuments/Schematics\\_N-Z/New-Water-Right-Permit-Process-Schematics.pdf](https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/Schematics_N-Z/New-Water-Right-Permit-Process-Schematics.pdf).

<sup>145</sup> WATER RIGHTS FEES TASK FORCE, FINAL REPORT TO THE LEGISLATURE (Jan. 6, 1994). See Water Rights Fees Act, ch. 495, sec. 1, 1993 Wash. Laws 2231, 2231. (Finding that “a water right confers significant economic benefits,” and that water rights applicants pay less than two percent of the costs of the administration of the water rights program.”)

<sup>146</sup> WASH. REV. CODE § 90.03.470; Water Rights–Fees Act, ch. 412, sec. 1, 2005 Wash. Laws 1746, 1746. (finding water right fees to be archaic, outdated, and insufficient to cover even the cost of handling the fee). The water right application fee at the time was \$10, and had not changed since 1917, when the Water Code was first enacted. See CTR. FOR ENVIRONMENTAL LAW & POLICY, WATER IS WORTH IT: MAKING THE CASE FOR A WATER MANAGEMENT FEE (2004).

<sup>147</sup> See, e.g., E.S.S.B. 6052, § 302(9)(b), 64th Leg., 3d Spec. Sess. (Wash. 2015). To be fair, many decisions were, necessarily, denials.

<sup>148</sup> WASH. REV. CODE § 90.03.265; WASH. REV. CODE § 43.21A.690; WASH. DEP’T OF ECOLOGY, FREQUENTLY ASKED QUESTIONS: COST REIMBURSEMENT OPTION FOR PROCESSING WATER RIGHT APPLICATIONS, Pub. No. 05-11-016 (April 2019).

<sup>149</sup> WASH. REV. CODE § 90.03.265 (with the exception that, if cost reimbursement senior application would not diminish the water available to other applicants, then it need not be processed).

<sup>150</sup> WASH. REV. CODE § 90.03.330; WASH. REV. CODE § 90.03.665 (Certified water right examiners – fees and rules); WASH. ADMIN. CODE § 173-165; WASH. DEP’T OF ECOLOGY,

Procedural and budget issues greatly influenced implementation of the Water Resources Act. The processing of water rights applications competes with the instream flow program, sometimes directly through budget, and always indirectly in that water allocated to instream flows is unavailable for future out-of-stream appropriations. The 1994 budget showdown, fueled in part by partisan opposition to the instream flow program, did not make sense. It affected water right processing much more than instream flow rulemaking. As discussed in Section II.E, *infra*, the budget handicap led Ecology to find new ways to process water rights, and not in a way that the Legislature was hoping for.

#### D. The “Discovery” of Hydraulic Continuity

A major innovation in environmental policy for water rights was implementing scientific understanding of the connections between ground and surface waters. As recognized in the Water Resources Act and the state Groundwater Code, the investigation for a proposed groundwater right must consider not only impacts on the target aquifer, but on hydraulically connected surface water sources.<sup>151</sup> Groundwater applications must consider whether the target aquifer contributes to local (or even non-local) surface waters. If so, then the groundwater, even if abundant, may already be legally allocated.

This hydrogeological setting was precisely at issue in the Yakima River Basin’s “Black Rock-Moxee” litigation.<sup>152</sup> In 1993, after conducting a groundwater study in the Black Rock-Moxee area, east of the city of Yakima, Ecology determined it would issue several hundred new agricultural water rights, mostly from deeper basalt aquifers lying beneath the shallower sedimentary aquifers of the basin. This decision was made despite substantial scientific evidence that the deeper aquifers contribute water to the Yakima River system, which has been over-appropriated for more than 100 years.<sup>153</sup>

The Yakama Nation appealed the first batch of water right approvals to the state Pollution Control Hearings Board, challenging Ecology’s conclusion that the target groundwater was disconnected from the

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HIRING A CERTIFIED WATER RIGHT EXAMINER, Pub. No. 13-11-003 (Oct. 2013); *see* NEW WATER RIGHT PERMIT PROCESS, *supra*, note 144.

<sup>151</sup> WASH. REV. CODE § 90.54.020(9); WASH. REV. CODE § 90.44.030.

<sup>152</sup> Rachael P. Osborn, *Hydraulic Continuity in Washington Water Law*, 47 IDAHO L. REV. 23 (2010). *See also* Vander Houwen v. Wash. Dep’t of Ecology, 170 Wn.App. 1009 (Ct. App. Div. 3 Aug. 14, 2012).

<sup>153</sup> *See* Tom Ring, *Review of Literature Pertinent to Impacts of Further Groundwater Development, Black Rock-Moxee Study Area, Washington* (rev. June 2, 1993) (on file with author).



Yakima River, which supports several salmon populations to which the Nation holds treaty rights.<sup>154</sup> A multi-year pre-trial procedural challenge, triggered by Ecology's imprecise method for notifying tribes about water right decisions, was unsuccessful.<sup>155</sup> But, by the time the Black Rock-Moxee appeals returned to the PCHB, Ecology had reversed its hydraulic continuity policies and was defending the denial of groundwater permits based on impacts to surface waters in other courts.<sup>156</sup>

Following summary judgment motions, the parties settled.<sup>157</sup> Settlement was driven, in part, by the *Postema v. PCHB* cases, discussed *infra*, which revealed Ecology's 180-degree change of policy regarding hydraulic continuity during the pendency of the Black Rock-Moxee procedural case. It also made sense, given the Water Resources Act requirement that "[f]ull recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters."<sup>158</sup>

The three sovereign governments of the Yakima basin – the Yakama Nation, U.S. Bureau of Reclamation and Department of Ecology – entered into a Memorandum of Agreement to fund a comprehensive groundwater model developed by the U.S. Geological Survey, to hold in abeyance all water right applications until the model was complete, and to co-manage the water resources of the Yakima Basin.<sup>159</sup> Ten years and ten million dollars later, the USGS model concluded that virtually all groundwater in the basin eventually discharges to the Yakima River, and

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<sup>154</sup> *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Washington v. Acquavella*, No. 77-2-01484-5 (Yakima Cty. Super. Ct. Mar. 1, 1995) (final order awarding to the Yakama Nation minimum instream flows necessary to maintain treaty fisheries at off-reservation fishing sites); *see also* *Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257 (1993) (affirming Yakama Nation water right for treaty-based fisheries).

<sup>155</sup> *Den Beste v. Pollution Control Hearings Bd.*, 81 Wn. App. 330 (1996).

<sup>156</sup> *See* Section II.E *infra*.

<sup>157</sup> *Yakama Indian Nation v. Wash. Dept. of Ecology, et al.*, Nos. 93-157, *et seq.*, (Pollution Control Hrgs. Bd. Oct. 9, 1998) (Order on Motions for Summary Judgment).

<sup>158</sup> WASH. REV. CODE. § 90.54.020(9); *see also* WASH. REV. CODE. § 90.44.030 ("... the withdrawal of groundwater may affect the flow of any spring, water course, lake, or other body of surface water, the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to groundwater.").

<sup>159</sup> Memorandum of Agreement Among the Yakama Nation, the U.S. Bureau of Reclamation, and the Washington Department of Ecology (Aug. 12, 1999) (on file with author) [hereinafter *Yakima MOA*]; *see also* *Wash. State Dep't of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 7 (2000) ("Ecology entered a "Memorandum of Agreement" with the Yakama Nation and the United States Bureau of Reclamation, under which Ecology agreed to impose a five-year moratorium on the issuance of any groundwater permits in the Yakima River Basin. Ecology has not, in fact, issued any new groundwater permits in the Yakima River Basin since 1993.") (citations omitted).

therefore contributes to fulfillment of senior water rights for irrigation as well as the Yakama Nation's treaty rights to instream flows for fisheries.<sup>160</sup>

As a result of litigation and the USGS study, all new Yakima water rights must be "water budget neutral."<sup>161</sup> The Yakima MOA prohibition on new water rights was followed by prohibitions on unmitigated new permit-exempt wells, and most recently, proposals to mitigate impacts associated with *past* groundwater appropriations, both permitted and permit-exempt.<sup>162</sup> To obtain a new water right or drill a new permit-exempt well, the water user must present evidence of in-kind mitigation that fully compensates for the consumptive use associated with the new water right.<sup>163</sup>

The Black Rock-Moxee appeals did not result in direct backlash in the state Legislature. However, the underlying concept, that ground and surface waters must be managed together, has been challenged many times over the years through legislative bills.<sup>164</sup>

Positive outcomes from the case have included the development of programs and protocols through which the MOA signatories co-manage water resources in the basin. The parties were already participating in the Bureau of Reclamation's Systems Operations Advisory Committee, a committee of biologists who advise the Bureau on water releases from Project reservoirs to maintain adequate flows for fisheries.<sup>165</sup> The

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<sup>160</sup> D.M. Ely, M.P. Bachmann, and J.J. Vaccaro, U.S. GEOLOGICAL SURVEY, NUMERICAL SIMULATION OF GROUNDWATER FLOW FOR THE YAKIMA RIVER BASIN AQUIFER SYSTEM, WASHINGTON, SIR 2011-5155, 82-83 (2011), <https://pubs.usgs.gov/sir/2011/5155/pdf/sir20115155.pdf>; see Hirschey, *supra*, note 136 at 24-25.

<sup>161</sup> See, e.g., WASH. ADMIN. CODE § 173-539A-050; see generally Osborn & Mayer, *supra*, note 1.

<sup>162</sup> See *infra* Section II.G.

<sup>163</sup> See Yakima County Water Resource System, Domestic Well Permit Frequently Asked Questions (v.2, May 12, 2020) [Editors see:

<https://www.yakimacounty.us/2095/YCWRS---Water-Availability---Well-Permit/>;

KITTITAS COUNTY PUBLIC HEALTH, WATER RESOURCES,

<https://www.co.kittitas.wa.us/health/services/water-resources.aspx>; BENTON COUNTY

PLANNING DEP'T, BENTON COUNTY RURAL WATER SUPPLY PROGRAM,

<https://www.co.benton.wa.us/pview.aspx?id=21075&catid=0>.

<sup>164</sup> See *infra* Section II.E for listing of anti-hydraulic continuity bills.

<sup>165</sup> U.S. BUREAU OF RECLAMATION, INTERIM COMPREHENSIVE BASIN OPERATING PLAN FOR THE YAKIMA PROJECT, Ch. 4, 7-8 (Nov. 2002). SOAC was created in response to *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, *supra* note 154 which directed USBR to operate the federal water project in accordance with Yakama Nation treaty fishing rights.

Yakima MOA led to creation of the Water Transfer Working Group.<sup>166</sup> Per the MOA, Ecology convenes a committee of the sovereigns during drought years to evaluate applications for emergency drought water permits. In 2015, this led to innovation for at-risk streams, under which the Kittitas Reclamation District's irrigation canal was engineered to release augmentation water to maintain fisheries flows during drought conditions.<sup>167</sup>

The outcome of the Black Rock-Moxee appeals revealed the power of Water Resource Act policies mandating integrated management of ground and surface waters and protection of fisheries.<sup>168</sup> Leveraging the terms and goodwill of the settlement that resulted, the three sovereigns of the Yakima Basin have created new programs and tools to accommodate instream and out-of-stream uses.

#### E. *The One-Molecule Rule*

During the three-year pendency of the Black Rock-Moxee appeals, described *supra*, Ecology policies on hydraulic continuity underwent major alteration.<sup>169</sup> Initially, Ecology issued groundwater permits with conditions to protect senior surface water rights, including rule-based instream flows. In *Hubbard v. Ecology*, a new groundwater permit required curtailment when pumping would deplete flows in the Okanogan River.<sup>170</sup> Experts calculated a .004% reduction to Okanogan River flows, but even *de minimis* reductions to rule-based instream flows are not legal.<sup>171</sup> The court upheld the permit, but the process revealed how tenuous actual management would be.<sup>172</sup> Groundwater movement

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<sup>166</sup> Tom Ring, pers. comm. 7-4-20. See WASH. DEPT. OF ECOLOGY, Water Transfer Working Group, <https://ecology.wa.gov/About-us/Our-role-in-the-community/Partnerships-committees/Water-Transfer-Working-Group> and <https://www.ezview.wa.gov/?alias=1962&pageid=37065> (meeting information).

<sup>167</sup> *Id.*

<sup>168</sup> WASH. REV. CODE § 90.54.020(9); WASH. REV. CODE § 90.54.020(1); WASH. REV. CODE § 90.54.020(3)(a).

<sup>169</sup> Osborn, *supra*, note 152 at 33-38.

<sup>170</sup> *Hubbard v. Wash. State Dep't of Ecology*, 86 Wn.App. 119, 122 (1997).

<sup>171</sup> *Id.* at 126.

<sup>172</sup> *Id.* at 127; see SLATTERY & BARWIN, *supra* note 16, at 6 to 17 (describing difficulties associated with regulating water rights to protect rule-based instream flows).

can be slow. When must the agency order a halt in pumping to prevent impairment?

In 1996, after conducting the basin assessments at issue in *Hillis v. Ecology*,<sup>173</sup> Ecology changed course.<sup>174</sup> Instead of granting interruptible permits, the agency denied 300 groundwater applications statewide, because the target aquifers were hydraulically connected to rivers that did not meet instream flows some number of days of the year.<sup>175</sup>

About 130 appeals ensued, most involving disappointed applicants challenging the denials.<sup>176</sup> The Tulalip Tribes and the Muckleshoot Indian Tribe intervened to defend the denials within their ceded territories. The appeals were consolidated to resolve legal issues, then de-consolidated for individual hearings. Ultimately, five cases went as far as the Washington Supreme Court.<sup>177</sup>

*Postema v. Pollution Control Hearings Board* held that, when Ecology issues a water right decision, it must consider the relationship between ground and surface waters, relying in part on the Water Resources Act mandate that “[f]ull recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.”<sup>178</sup> Hydraulic connectivity does not require denial of groundwater rights as a matter of law, but is a factual determination that informs the legal question of

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<sup>173</sup> See *supra* Section II.C.

<sup>174</sup> The policy change was driven by science: “Ecology concedes that when adopting minimum flow rules it did not believe that withdrawals from deep confined aquifers would have any impact on stream flows because of the presence of an aquitard. New studies by the United States Geologic Services have established that significant leakage occurs across aquifers, and thus withdrawals from deep aquifers will impact surface waters more than was thought . . .” *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 738-39 (Wash. 2000). “There seems to be no dispute that Ecology has revised its view of the interconnection of groundwater and surface water in hydraulic continuity as new information has become available. There is also no dispute that Ecology has altered the methods by which it determines the impact of groundwater withdrawal on surface waters.” *Id.* at 740.

<sup>175</sup> *Id.* at 732.

<sup>176</sup> *Id.* A single appeal challenged the grant of a new water right in the Walla Walla basin. *Center for Environmental Law & Policy v. Dept. of Nat. Res.*, PCHB No. P96-165, Order on DNR’s Motion to Dismiss (1997).

<sup>177</sup> *Postema*, 11 P.3d at 731-32.

<sup>178</sup> *Id.* at 734-35 (quoting WASH. REV. CODE § 90.54.020(9)); see also WASH. REV. CODE § 90.44.030. Many of the WRIA rules contain provisos on how to address groundwater vis-à-vis instream flows, however, the language is inconsistent from one rule to the next. The Court declined to interpret the law differently for each basin, and instead relied on scientific principles of hydrogeology and the rule of priority, which protects instream flows as a form of water right. *Postema*, 11 P.3d at 735-41.

impairment.<sup>179</sup> In assessing hydraulic connectivity, Ecology may, and even must, use up-to-date scientific methods to determine impairment.<sup>180</sup>

*Postema* was the Court's first major review of Washington's instream flow program. The Court examined the significance of the Water Resources Act mandate to establish base flows to maintain instream uses including "wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."<sup>181</sup> Instream flows are appropriations with priority based on the date of rule adoption, and entitled to protection from impairment just like out-of-stream water rights.<sup>182</sup> If a proposed groundwater withdrawal would deplete flows when a river is not meeting its minimum flows, the application must be denied.<sup>183</sup> Likewise, withdrawals that would deplete closed waterways must also be denied.<sup>184</sup>

During and after the *Postema* proceedings, several legislative bills proposed altering the scientific standards for determining hydraulic continuity.<sup>185</sup> For example, one bill would have legislated that wells more than one-quarter mile from a surface water body are not hydraulically continuous with that surface body, and directed Ecology to *not* model the effects of groundwater pumping (instead requiring use of field techniques and direct data).<sup>186</sup> To satisfy concerns about the science, Ecology convened a technical advisory committee of hydrogeologists from public and private sectors. The committee concluded that groundwater withdrawals almost always have an influence on surface water bodies.<sup>187</sup>

*Postema*'s ruling, that impairment of instream flows is a factual inquiry, triggered development of groundwater models and studies throughout the state, as Ecology and water right applicants endeavored to determine where and when hydraulic continuity would operate to prevent

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<sup>179</sup> *Id.* at 741.

<sup>180</sup> *Id.* at 740-41 ("Ecology should not be able to rely on use of outdated methodology which would allow impairment of surface water rights. Using a method fraught with error potential where more scientifically acceptable methods exist would be inconsistent with the statutes prohibiting the grant of applications where impairment would occur.")

<sup>181</sup> *Id.* at 735 (quoting WASH. REV. CODE § 90.54.020(3)(a)).

<sup>182</sup> WASH. REV. CODE § 90.03.345 (1979); *Postema*, 11 P.3d at 735.

<sup>183</sup> *Postema*, 11 P.3d at 741.

<sup>184</sup> *Id.* at 741-43.

<sup>185</sup> H.B. 2203 (Wash. 1996); H.B. 1116 (Wash. 1997); H.B. 2050 (Wash. 1997).

<sup>186</sup> H.B. 2050 (Wash. 1997) (vetoed by Governor, FINAL LEGISLATIVE REPORT, 55th Leg., Reg. Sess. at 167-68).

<sup>187</sup> WASH. DEPT. OF ECOLOGY, PUBL. NO. WR-98-154, REPORT OF THE TECHNICAL ADVISORY COMMITTEE ON THE CAPTURE OF SURFACE WATER BY WELLS ES-3 (1998).

new appropriations.<sup>188</sup> In almost all cases, hydraulic connections between ground and surface waters does exist.<sup>189</sup> After *Postema*, much of Washington, at least in those basins where instream flow rules have been adopted, is closed to new water rights unless mitigated.<sup>190</sup> This set the stage for the legal expansion and abuse of permit-exempt wells.

#### F. *Six Packs for Subdivisions*

Permitting of new water rights was near a standstill by the mid-1990s, and *Postema* was the *coup de grace*. Permit-exempt wells became the go-to loophole for obtaining water supply for new development. Dramatic increases in new exempt wells were observed in the 1990s and 2000s.<sup>191</sup> Land developers, unable to obtain water rights, resorted to multiple permit-exempt wells to serve subdivisions.<sup>192</sup> Because permit-exempt wells are unregulated, no entity evaluates their impacts on the environment and pre-existing water rights.<sup>193</sup>

In the Yakima River basin, where water was fully appropriated, real estate developer Campbell & Gwinn LLC proposed to build Rambling Brooks Estates, a twenty-home subdivision near Ahtanum, each house to

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<sup>188</sup> See, e.g., U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, 9722-B2V, SPOKANE VALLEY – RATHDRUM PRAIRIE HYDROLOGIC STUDY (2007); U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, 9722-A4W, GROUND WATER IN THE YAKIMA RIVER BASIN, WASHINGTON, AND ITS RELATION TO THE SURFACE-WATER RESOURCE (2011); see also *supra* Section II.D; Squaxin Island Tribe v. Ecology and Miller Land Co., PCHB No. 05-137, Modified Findings of Fact and Conclusions of Law (2007); U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, 9722-E8A, SIMULATED CLIMATE CHANGE EFFECTS ON THE METHOW RIVER, WASHINGTON (2015). See generally PAUL BARLOW & STANLEY LEAKE, CIRCULAR 1376, STREAMFLOW DEPLETION BY WELLS—UNDERSTANDING AND MANAGING THE EFFECTS OF GROUNDWATER PUMPING ON STREAMFLOW (2012).

<sup>189</sup> CAPTURE REPORT, *supra* note 187, at ES-3.

<sup>190</sup> Osborn & Mayer, *supra* note 1, at 193-96.

<sup>191</sup> Caldwell, CULHANE & NAZY, and Slattery *Supra* note 76; Nathan Bracken, *Exempt Well Issues in the West*, 40 ENVTL. L. 141, 225-32 (2010).

<sup>192</sup> Dep't of Ecology v. Campbell & Gwinn LLC, 146 Wash. 2d 1, 14, 43 P.3d 4 (2002). See *id.* at 14 n.3 (“the issue [in this case] has arisen recently because developers have sought ways to obtain water in the face of a backlog on permit applications.”); *id.* at 16 n.3. See also *infra* Section II.G.

<sup>193</sup> Caldwell, *supra* note 76, at 1106. Rachel P. Osborn, *Hirst: The Bigger Picture*, NAIADS (Jan. 16, 2018), <https://naiads.blog/2018/01/16/hirst-the-bigger-picture/> (maps illustrating astounding growth of permit-exempt wells in Washington between 1940 and 2010); NORTHWEST INDIAN FISHERIES COMMISSION, STATE OF OUR WATERSHEDS: 2016 (2016).

be served by an individual, permit-exempt well.<sup>194</sup> Although permits are not required for small domestic wells, well drillers must notify the state prior to drilling.<sup>195</sup> When twenty such notices for the Rambling Brooks subdivision arrived at Ecology’s well inspector desk, investigations ensued.<sup>196</sup> Eventually, the parties filed a “friendly” declaratory judgment action to determine whether Campbell & Gwinn could utilize permit-exempt wells in this way.<sup>197</sup>

The resulting decision, *Department of Ecology v. Campbell & Gwinn, LLC*, clarified the permit-exempt well proviso in the Groundwater Code.<sup>198</sup> A property owner is entitled to use only one 5,000 gallon per day (gpd) permit-exemption.<sup>199</sup> A permit-exempt well is a water right just like any other, and subject to prior appropriation’s priority rule.<sup>200</sup>

Property proponents argued that “development will be paralyzed in rural areas,” and the dissent predicted that the decision “tolls the bell for growth and growth management in rural Washington.”<sup>201</sup> Despite these dramatic claims, *Campbell & Gwinn* did not stop rural growth, nor even slow it down. More than 50,000 permit-exempt wells have been drilled throughout Washington in the twenty years since the *Campbell & Gwinn* decision.<sup>202</sup>

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<sup>194</sup> *Campbell & Gwinn*, 43 P.2d at 4-5. The subdivision name was perhaps a misnomer. Brooks do not ramble in the over-appropriated Ahtanum Valley, at least not during irrigation season.

<sup>195</sup> WASH. ADMIN. CODE § 173-160-151 (2008).

<sup>196</sup> *Campbell & Gwinn*, 43 P.2d at 5-6. A 1997 Attorney General Opinion concluded that this use of permit-exempt wells did not conform to the statute. WASH. ATTORNEY GEN., AGO 1997 No. 6, WATER – WATER RIGHTS – WELLS – STATUS IN WATER RIGHTS SYSTEM OF EXEMPT GROUND WATER WITHDRAWALS (1997).

<sup>197</sup> *Campbell & Gwinn*, 43 P.2d at 6.

<sup>198</sup> *Id.* at 21 (citing WASH. REV. CODE 90.44.050).

<sup>199</sup> *Id.* at 10; *see* WASH. ADMIN. CODE CH. § 246-291 (Residences may use more than one well to pump 5,000 gpd, and they may serve water to more than one residence if total use does not exceed 5,000 gpd. Limitations on the number of homes that may be served by a single well fall within the regulatory province of the Washington Department of Health’s Drinking Water Program.).

<sup>200</sup> *Campbell & Gwinn*, 43 P.2d at 9 (Permit-exempt wells are “subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right.”). Although protection of instream flows was not at issue in this case, this rule was critical in the Hirst litigation, relating to permit-exempt well impairment of instream flow regulations. *See infra* Section II.J.

<sup>201</sup> *Campbell & Gwinn*, 43 P.2d at n.9.

<sup>202</sup> *See* CULHANE & NAZY, *supra* note 76 (from 2000 to 2007, wells were drilled at a rate of around 10,000 per year, while 17,200 wells were drilled from 2008-2014).

Ecology convened a working group to determine how to implement the *Campbell & Gwinn* ruling, but the group did not complete its work.<sup>203</sup> Meanwhile, two legislative bills which would have amended RCW 90.44.050 to allow one permit-exempt well “per residence” did not advance.<sup>204</sup> While the general rules set forth in *Campbell & Gwinn* remain intact, the 2018 Legislature did adopt a major exception to the impairment standard for permit-exempt wells that deplete instream flows.<sup>205</sup> While the Water Resources Act was not directly at issue in *Campbell & Gwinn*, the case represents the first in a series of lawsuits exploring how unregulated permit-exempt wells mesh with growth management laws, as well as their relationship to priority protection for instream flow rules.

### G. *The Kittitas Story*

The Yakima River basin general stream adjudication, *State v. Acquavella*, effectively closed the Yakima Basin to new surface water rights, and the Black Rock-Moxee settlement closed the basin to new groundwater permits.<sup>206</sup> Water supply is chronically short in the basin, and junior water rights are curtailed every few years.<sup>207</sup> Even as new water rights became unavailable, developers were building homes at record rate in the Upper Kittitas Valley, relying on permit-exempt wells for water supply.<sup>208</sup>

The USGS groundwater study, funded through the Black Rock-Moxee settlement, concluded that most groundwater in the Yakima basin

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<sup>203</sup> Dep’t of Ecology, Draft Proposal for Clarifying Group Domestic Use Environmental Health Directors Meeting (Oct. 19, 2019) (on file with author). The group grappled with such esoteric concepts as determining when, in the history of a piece of property, e.g., from the time of federal homestead claim to present day subdivided parcel, the single well limitation would attach.

<sup>204</sup> E.g., S.B. 5145 (Wash. 1997); H.B. 2181 (2003).

<sup>205</sup> See *infra* Section II.J.

<sup>206</sup> See *supra* Section II.D.

<sup>207</sup> *Campbell & Gwinn*, 43 P.3d at 9 (2002). For example, in 2004, the City of Roslyn was ordered to curtail diversions, impacting water supply for its customers while junior-priority domestic wells outside the city continued to operate without interference. *In re Determination of Rights to Use of Surface Waters*, 674 P.2d 160 (1983) (order Limiting Post-1905 Diversions During Periods of Water Shortage); Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage, *In re Determination of Rights to Use of Surface Waters Etc.*, 100 Wash. 2d 651, 674 P.2d 160 (1983) (No. 77-2-01484-5) (arguing a “junior” water right in the Yakima Basin can date back to as early as 1905, and still be subject to interruption during a water-short year).

<sup>208</sup> Jonathan Martin, *Big Growth, Big Fight Over Water*, SEATTLE TIMES, Nov 21, 2007.



was discharging to the Yakima River.<sup>209</sup> Groundwater closures were needed to protect both senior water rights for irrigation and other out-of-stream uses and treaty-based instream flow rights. In light of this information, Aqua Permanenté, a rural water advocacy group in Cle Elum, petitioned Ecology to close upper Kittitas County to all new groundwater withdrawals including permit-exempt wells.<sup>210</sup> The resulting moratorium on new wells would slow the rampant development of second homes and subdivisions in the area.<sup>211</sup> Public backlash was substantial.<sup>212</sup>

The Department of Ecology denied the petition to close the basin,<sup>213</sup> but the agency was aware that new wells were violating the rule of priority, and likely impairing senior rights. After denying the Aqua Permanenté petition, Ecology attempted negotiations with Kittitas County to find water and/or land use management measures that would protect senior water rights, but not limit residential development. After Ecology adopted an emergency rule to reduce permit-exempt well pumping from 5,000 to 1,250 gallons per day, Kittitas County requested an Attorney General Opinion on the legality of Ecology's approach.<sup>214</sup>

The ensuing Attorney General Opinion made no one happy.<sup>215</sup> According to the Washington State Attorney General's Office, Ecology could not by rule reduce the 5,000 gpd permit-exempt well quantity

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<sup>209</sup> GROUND WATER IN THE YAKIMA RIVER BASIN, *supra* note 188.

<sup>210</sup> See *Ground Water Withdrawal Moratorium by WA Department of Ecology for Upper Kittitas County* (July 2009), <https://www.co.kittitas.wa.us/response/200907-doeqwwm/default.aspx>, joined by Center for Environmental Law & Policy co-petition (Oct. 8, 2007) (on file with author). The petitions were based on the Water Resource Act proviso that authorizes Ecology to “withdraw various waters of the state from additional appropriations until [sufficient] data and information are available” “to allow for the making of sound decisions” about water resources. WASH. REV. CODE § 90.54.050(2).

<sup>211</sup> Martin, *supra* note 208.

<sup>212</sup> Mary Swift, *Department of Ecology Gets Earful at Listening Session*, DAILY RECORD (Oct. 26, 2007), [https://www.dailyrecordnews.com/news/departement-of-ecology-gets-earful-at-listening-session/article\\_53659907-98b1-559b-893d-eb75a43727fa.html](https://www.dailyrecordnews.com/news/departement-of-ecology-gets-earful-at-listening-session/article_53659907-98b1-559b-893d-eb75a43727fa.html); *Upper County Well Closure: Criticized, Praised*, DAILY RECORD (July 17, 2009), [https://www.dailyrecordnews.com/news/upper-county-well-closure-criticized-praised/article\\_ece83e3b-4b62-51c1-83af-0fc2fb7da902.html](https://www.dailyrecordnews.com/news/upper-county-well-closure-criticized-praised/article_ece83e3b-4b62-51c1-83af-0fc2fb7da902.html).

<sup>213</sup> Letter from Wash. Dept of Ecology (Nov. 9, 2007) (on file with author).

<sup>214</sup> WASH. STATE DEP'T OF ECOLOGY, ECOLOGY SEEKS PROTECTION OF KITTITAS WATER SUPPLIES FOR SENIOR WATER RIGHT HOLDERS, STREAM FLOWS, AND REGIONAL ECONOMY, PUB. NO. 09-11-025 (Sept. 2009).

<sup>215</sup> WASH. ATTORNEY GEN., AGO 2009 No. 6, INTERPRETATION OF STATUTES EXEMPTING CERTAIN WITHDRAWALS OF GROUNDWATER FROM PERMITTING REQUIREMENTS, AND AUTHORIZING THE DEPARTMENT OF ECOLOGY TO WITHDRAW WATERS FROM APPROPRIATION (2009).

authorized by statute.<sup>216</sup> Ecology was, however, authorized to completely close the basin, as Aqua Permanenté had requested.<sup>217</sup>

Meanwhile, land use advocates challenged the County's comprehensive plan for failure to protect water resources under the Growth Management Act. *Kittitas County v. Eastern Washington Growth Management Hearings Board* held that the GMA does require local land use jurisdictions to protect water resources.<sup>218</sup> The Kittitas County plan and regulations did not comply with these requirements. Even though permit-exempt wells are exempt from Water Code permitting, local governments must ensure that water supply for new development complies with Water Code requirements.<sup>219</sup> The Kittitas code did not, partly because developers were not required to disclose common ownership of adjacent properties and were using multiple permit-exempt wells in violation of the *Campbell-Gwinn* rule.<sup>220</sup>

Administrative aftermath of the water rights and land use challenges was twofold. Ecology amended the local WRIA rule, WAC Ch. 173-539A, to close Upper Kittitas County to all new groundwater withdrawals, including permit-exempt wells, unless they are mitigated and qualify as "water budget neutral."<sup>221</sup> In response, a robust (and expensive) water market has developed, in which *existing* water right holders retire and transfer their rights into trust to seed a water "bank" or "exchange," from which water credits are sold to mitigate impacts of *new* permit-exempt wells.<sup>222</sup>

Locally, Kittitas County adopted ordinances to manage water resources and require mitigation for new development reliant on permit-

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 256 P.3d 1193 (2011) [hereinafter *Kittitas*]. *E.g.*, WASH. REV. CODE § 36.70A.020(10) (GMA goal to protect the environment, including "water quality [ ] and the availability of water"); WASH. REV. CODE § 36.70A.070(1) (requiring that land use elements "shall provide for protection of the quality and quantity of groundwater used for public water supplies"); WASH. REV. CODE § 36.70A.070(5)(c)(iv) (requiring that rural elements include measures "[p]rotecting . . . surface water and groundwater resources"); WASH. REV. CODE § 19.27.097; WASH. REV. CODE § 58.17.110 (requiring counties to assure adequate potable water is available when issuing building permits and approving subdivision applications).

<sup>219</sup> *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 256 P.3d 1193, 1210-11 (2011).

<sup>220</sup> *Id.* at 11208-09 (developers would create separate LLCs for adjacent properties to avoid disclosure of common ownership).

<sup>221</sup> WASH. ADMIN CODE § 173-539A-030; WASH. ADMIN CODE § 173-539A-050.

<sup>222</sup> *See Osborn & Mayer, supra* note 1 at 200 (discussion of water banks and mitigation credits, citing a 2014 report which compares average cost of public water bank (\$1,290 per acre-foot) with private water bank (\$54,345 per acre-foot)).

exempt wells.<sup>223</sup> The County established its own water bank, and in remote areas where mitigation is not available, authorizes cisterns for household water usage.<sup>224</sup> While some legislative proposals were filed in response to *Kittitas*,<sup>225</sup> it was the subsequent *Hirst* decision in Whatcom County that pushed developer tolerance past the breaking point, leading to significant statutory erosion of protections for instream water resources.<sup>226</sup>

#### H. *The Optimal Flow Solution*

In 1996, local governments and Native American tribes in Skagit County entered into a Memorandum of Agreement to break the logjam and push Ecology to adopt a flow rule for the Skagit River basin, and to reduce the use of permit-exempt wells in the basin.<sup>227</sup> The Skagit instream flow rule was adopted in 2001, and in a first for Ecology's flow program, protected both high and low flows in the river, as well as estuarine flows.<sup>228</sup> While the rule closed much of the basin to new exempt wells, the County continued to issue building permits relying on permit-exempt wells as water supply for rural homes and subdivisions.<sup>229</sup>

In *Swinomish Indian Tribal Community v. Skagit County (SITC I)*, the Tribe sued to enforce the MOA and halt new wells that were

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<sup>223</sup> See *Kittitas County Water Resources*, <https://www.co.kittitas.wa.us/health/services/water-resources.aspx>.

<sup>224</sup> See *Water Banking and Water for Building Permits*, KITTITAS COUNTY, <https://www.co.kittitas.wa.us/health/services/water-banking-building-permits.aspx>; KITTITAS CTY., WASH. CODE § 13.25 (2011).

<sup>225</sup> E.g., S.B. 5836 (Wash. 2013).

<sup>226</sup> See *infra* Section II.J.

<sup>227</sup> *Swinomish Indian Tribal Cmty. v. Skagit Cnty.*, 138 Wash. App. 771 (Wash. Ct. App. 2007) [hereinafter "*SITC P*"]; Memorandum of Agreement (1996) (on file with author), signed by Skagit County, City of Anacortes, Skagit Public Utility District, Swinomish Indian Tribal Community (SITC) and other Skagit basin tribes, and the Washington Departments of Ecology and Fish & Wildlife. The Skagit River rule was the first rule to be adopted in 13 years, after the 1988 Legislative one-year moratorium on instream flow rulemaking. See *supra* Section I.B.

<sup>228</sup> WASH. ADMIN. CODE § 173-503 (2001). Evolving scientific understanding of the nature and value of instream flows required an expansion of the "minimum flow" approach used for instream flow rules. See Poff, *supra* note 90; Locke, *supra* note 90. See WASH. STATE DEP'T OF ECOLOGY, A CONDENSED SUMMARY OF THE SCIENCE BEHIND THE SKAGIT RIVER BASIN WATER MANAGEMENT RULE AND THE 2006 AMENDMENT (n.d.).

<sup>229</sup> The state building code requires permitting authorities to determine, *inter alia*, that water supply is available before issuing a permit for both building and subdivisions. WASH. REV. CODE § 19.27.097 (pre-2018 version); WASH. REV. CODE § 58.17.110 (pre-2018 versions). Indiscriminate reliance on permit-exempt wells to make this land use determination has been the source of friction and litigation relating to instream flow protection. See *supra* Sections II.G, and *infra* II.J.

depleting the instream flows protected by the Skagit rule.<sup>230</sup> The Court held the MOA to be a valid agreement promoting the public policy goals of both the Growth Management Act and Water Resources Act of 1971.<sup>231</sup> The court dismissed the case, however, surmising that alternative enforcement measures were available to the Tribe.<sup>232</sup>

Skagit County then sued the Department of Ecology to invalidate the 2001 instream flow rule because it did not provide for non-interruptible water use that would allow new wells to support rural development.<sup>233</sup> Ecology settled the case with the County by amending the Skagit rule to create “27 reservations of water for out-of-stream year-round noninterruptible beneficial uses in the Skagit River basin.”<sup>234</sup> The reservations were designed to allow for twenty years of new water rights and permit-exempt wells for rural growth.<sup>235</sup>

In 2008, the Swinomish Tribe challenged the 2006 amendments, asserting that the reserves would “impair established minimum instream flows necessary for fish, wildlife, recreation, navigation, scenic and aesthetic values.”<sup>236</sup> In an elaborate discussion of state instream flow law, the Court held that Ecology was not authorized to subordinate existing, rule-based instream flows to new out-of-stream uses. Specifically, the “overriding considerations of the public interest” or OCPI exception set forth in the Water Resources Act could not be used to re-allocate water in a way that impaired instream flows.<sup>237</sup>

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<sup>230</sup> *SITC I*, 138 Wash. App. 771.

<sup>231</sup> *Id.* at 778-79 (“encourages coordination between multiple parties to ensure the proper stewardship of the state’s water resources” (citing WASH. REV. CODE § 90.54.010)).

<sup>232</sup> *Id.* at 780. The Court suggested the Tribe could appeal individual building permits or challenge County GMA codes as examples of alternative enforcement measures. As discussed *infra*, the Tribe instead challenged the amended instream flow rule.

<sup>233</sup> *Skagit County v. Dept. of Ecology*, No. 03-2-00668-5 (Thurston Cty. Super. Ct. 2003).

<sup>234</sup> *Swinomish Indian Tribal Cmty. v. Wash. State Dep’t of Ecology*, 178 Wash. 2d 571, 602 (Wash. 2013) (“*SITC II*”); *see* WASH. ADMIN. CODE § 173-503A-073 (2013) (subsequently withdrawn).

<sup>235</sup> *SITC II*, 178 Wash. 2d at 602; WASH. STATE DEP’T OF ECOLOGY, CHAPTER 173-503 COST BENEFIT ANALYSIS, MAXIMUM NET BENEFITS ANALYSIS & LEAST BURDENSOME ANALYSIS, Pub. No. 06-11-010, at 30-32 (May 2006) (rescinded Dec. 11, 2019) (“Skagit Cost Benefit Analysis”). Ironically, some of the reserves, intended to provide twenty years of water, were exhausted during pendency of the litigation. WASH. STATE DEPT. OF ECOLOGY, 2011 REPORT TO THE LEGISLATURE: STATEWIDE PROGRESS ON SETTING INSTREAM FLOWS, Pub. No. 12-11-002, at 6 (May 2012).

<sup>236</sup> *SITC II*, 178 Wash. 2d at 576.

<sup>237</sup> *Id.* at 581 (referring to WASH. REV. CODE § 90.54.020(3)(a), which states “Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural

*SITC II* rested on two basic rules. First, as established in *Postema*,<sup>238</sup> instream flows set by rule are “an existing water right that may not be impaired by subsequent withdrawal or diversion of water from a river or stream.”<sup>239</sup> As with off-stream water rights, rule-based instream flows are protected from even *de minimis* impairment by junior water users.

Second, Ecology lacked discretion to adopt the reserves based on the OCPI exception, which must be narrowly applied.<sup>240</sup> To support its OCPI finding for the Skagit reserves, Ecology compared the projected monetary value of future development based on the reserves with the value of protecting instream flows.<sup>241</sup> Out-of-stream water uses returned a much larger value than the “small monetary loss to fisheries” that would result from streamflow depletion caused by the reserves.<sup>242</sup> Rejecting this comparison, the Court noted that population growth and associated demand for water is inevitable and does not constitute an “overriding” interest. Further, reserving water for private development is not an “overriding *public* interest.”<sup>243</sup> In contrast, the Water Resources Act specifically identifies a need to protect instream flows and uses for the benefit of future generations, something that can only be accomplished by halting new out-of-stream appropriations.<sup>244</sup>

Next, in *Fox v. Skagit County*, landowners sought reversal of a County building permit denial that was based on a finding that the property’s well was inadequate due to the reinstated Skagit River rule.<sup>245</sup> Post-dating the flow rule, the well was subject to curtailment in favor of instream flows. As an interruptible domestic water supply, the well was

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condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”).

<sup>238</sup> See *supra* Section II.E.

<sup>239</sup> *SITC II*, 178 Wash. 2d at 585 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68 (Wash. 2000)). See WASH. REV. CODE § 90.03.345 (“The establishment of . . . minimum flows or levels under WASH. REV. CODE § 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment.”).

<sup>240</sup> WASH. REV. CODE § 90.54.020(3)(a).

<sup>241</sup> *SITC II*, 178 Wash. 2d at 586-88; see Skagit Cost Benefit Analysis, *supra* at 235, at 13-30.

<sup>242</sup> *SITC II*, 178 Wash. 2d at 579, n.3, 4, 583-84. Indeed, out-of-stream uses were valued (at the high end) to be an order of magnitude larger than the monetary value of instream flows that would be lost as a result of the reserves, approximately \$33-56 million versus \$5 million. *Id.* at n.3, 4.

<sup>243</sup> *SITC II*, 178 Wash. 2d at 587.

<sup>244</sup> *SITC II*, 178 Wash. 2d at 587-88 (quoting WASH. REV. CODE § 90.54.010(1)(a)).

<sup>245</sup> *Fox v. Skagit County*, 193 Wash. App. 254, 259-60 (Wash. Ct. App. 2016).

not an adequate water source.<sup>246</sup> *Fox* also rejected the property owners' claims to riparian and common law water rights.<sup>247</sup>

After *SITC II*, multiple bills proposed to re-define the priority of instream flows, amend the Court's interpretation of OCPI, and provide tax relief to affected properties.<sup>248</sup> One bill successfully grandfathered water reserves adopted into pre-*SITC II* instream flow rules in the Dungeness and Wenatchee basins.<sup>249</sup> In 2018, the *Hirst* response legislation led to a major reordering of water priorities, allowing both past and future permit-exempt wells to supercede instream flows.<sup>250</sup> However, that law specifically exempted Skagit County.

*SITC II* led to an effective moratorium on new rural development in Skagit County.<sup>251</sup> As in the upper Kittitas Valley, water supply options such as trucked water, extension of PUD lines, cisterns and winter flow capture are all feasible methods to supply water to outlying properties, but county land use authorities have not accepted these alternatives.<sup>252</sup> Study bills have defused tension by evaluating water storage and other mitigation options to support new water rights.<sup>253</sup> Ecology recently struck a deal to mitigate water uses erroneously authorized pending final decision in *SITC II*.<sup>254</sup>

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<sup>246</sup> *Id.* at 270 (“A well that is subject to interruption is not ‘capable of supplying at least three hundred fifty (350) gallons of water per day.’ [Skagit County Code] 12.48.030,” and is therefore not an adequate water supply for the purposes of issuing a building permit). The court also found that Ecology was not duty-bound to mitigate for the Fox's domestic water supply. *Id.* at 277-78.

<sup>247</sup> *Id.* at 273-74.

<sup>248</sup> *See, e.g.*, S.B. 6589, 63rd Leg., Reg. Sess. (Wash. 2014); S.B. 5003, 65th Leg., Reg. Sess. (Wa. 2017); H.B. 6589, 65th Leg., Reg. Sess. (Wa. 2017); S.B. 1793, 64th Leg., Reg. Sess. (Wa. 2015).

<sup>249</sup> WASH. REV. CODE § 90.54.210 (enacted as S.B. 6513, 64th Leg., Reg. Sess. (Wa. 2016)). *See infra* Section II.K for discussion of litigation relating to the Dungeness instream flow rule.

<sup>250</sup> *See infra* Section II.J; WASH. REV. CODE § 90.94.020(1), .030(1); *See Osborn & Mayer, supra* note 1, at 206-222.

<sup>251</sup> The Skagit County moratorium was based on assumption that only permit-exempt wells may satisfy statutory determination of water adequacy for building permits. WASH. REV. CODE § 19.27.097 (pre-2018 version).

<sup>252</sup> WASH. STATE DEPT. OF ECOLOGY, FEASIBILITY STUDY TO MITIGATE GROUNDWATER IMPACTS THROUGH STORAGE IN THE SKAGIT BASIN, Publ. No. 16-11-002, at 5-13 (2016).

<sup>253</sup> S.B. 6589, 64th Leg., Reg. Sess. (Wa. 2016). *Skagit River Basin: Developing Solutions*, WASH. STATE DEP'T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Water-supply/Protecting-stream-flows/Instream-flow-implementation/Skagit-River-basin-projects/Developing-solutions> (last visited Dec. 26, 2020) (Ecology's website discusses options for Skagit Basin water supply for future uses).

<sup>254</sup> MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY AND THE CITY OF SEATTLE, SEATTLE CITY LIGHT FOR THE RELEASE OF WATER TO THE SKAGIT RIVER FOR INSTREAM FLOW AUGMENTATION AND MITIGATION

One far-reaching consequence of the Skagit cases has been Ecology's informal (and arguably *ultra vires*) decision to halt rule-making in unprotected basins, leaving half of the state's watersheds without legal protection for instream flows.<sup>255</sup> One hundred fifty years of aggressive out-of-stream water allocation has markedly depleted many of Washington's rivers, harming instream resources and uses.<sup>256</sup> Nonetheless, Ecology stands by its policy that flows cannot be protected unless the rules also provide new water for future growth.<sup>257</sup>

*SITC II* was a paean to the Water Resources Act, putting instream flows on true par with off-stream water rights. It was short-lived, however, given subsequent legislative action in response to the Yelm and Whatcom County cases, discussed *infra*, and the Court's own retreat from protection of public uses of rivers in the Spokane River case.<sup>258</sup>

### I. *Water for Water*

As new ground and surface water permits became difficult to obtain, Ecology turned to water right mitigation, i.e., measures to compensate for the impacts of new water uses that would support permit issuance. The first water right mitigation proposals arose during the original *Postema* appeals of 1996, when the Pollution Control Hearings Board rejected tree removal and septic discharge credit as measures to offset consumptive water use.<sup>259</sup> Water-for-water or "in kind" mitigation was

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PURPOSES (2019), <https://apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/skagit-seattlecitylight-moa.pdf>; STATE OF WASH. DEP'T OF ECOLOGY, MIDDLE SKAGIT MITIGATION

(2019), <https://apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/MiddleSkagitMitigationMap.pdf>.

<sup>255</sup> STATE OF WASH. DEP'T OF ECOLOGY, REPORT TO THE LEGISLATURE: STATEWIDE PROGRESS ON SETTING INSTREAM FLOWS (2019), [https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=ECY%202019%20Report%20on%20Progress%20on%20Setting%20Instream%20Flows\\_58c7ab7e-758e-487a-9629-4abacf13ae85.pdf](https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=ECY%202019%20Report%20on%20Progress%20on%20Setting%20Instream%20Flows_58c7ab7e-758e-487a-9629-4abacf13ae85.pdf) [hereinafter "2019 Legislative Report"]; see WASH. STATE DEP'T OF ECOLOGY, INSTREAM FLOW RULE STATUS (2016), <https://apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/wsisf.pdf>.

<sup>256</sup> See Osborn & Mayer, *supra* note 1, at 183-88 (describing reasons for water over-appropriation in Washington).

<sup>257</sup> 2019 *Instream Flow Report*, *supra* note 4.

<sup>258</sup> See Section II.I, II.J, and II.L.

<sup>259</sup> E.g., Manke Lumber, PCHB Nos. 96-102 to 106 (Wash. Pollution Control Hearings Bd. Nov. 1, 1996) (final order), <https://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1379>; Cedar River Water & Sewer Dist., PCHB Nos. 96-59 & -60 (Wash. Pollution Control Hearings Bd. Nov. 15, 1996) (final order), <https://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1374>.

the standard for many years. But, the difficulty or expense of obtaining mitigation water in some areas gave rise to the concept of “out-of-kind” mitigation, i.e., compensating for new water uses through habitat improvement projects or other non-water measures.<sup>260</sup>

In 2011, Ecology issued a set of groundwater rights to the cities of Olympia, Lacey and Yelm that would impair instream flows in the Nisqually and Deschutes Rivers.<sup>261</sup> To compensate, the water rights were conditioned on a coordinated mitigation plan to purchase and restore a wetland, combined with other in-kind and out-of-kind mitigation activities. Ecology authorized the streamflow impairments using the OCPI exception that was soon to be rejected in *SITC II*.<sup>262</sup> Sara Foster, a local landowner, challenged the water right issued to Yelm.<sup>263</sup>

In *Foster v. Ecology and City of Yelm*, the Supreme Court (1) reaffirmed that Ecology may not use the OCPI proviso to issue new water rights that impair instream flows and (2) rejected out-of-kind mitigation projects to offset water depletions that cause impairment to other water rights, including instream flows.<sup>264</sup> Regarding out-of-kind mitigation, the Court extended *Postema* and *SITC II* to find that the “prior appropriation doctrine does not permit even de minimis impairments of senior water rights. Therefore we reject the argument that ecological improvements can ‘mitigate’ the injury when a junior water right holder impairs a senior water right,” i.e., an instream flow rule.<sup>265</sup> Water resource mitigation must be in-kind, in-place and in-time to satisfy the no impairment rule.<sup>266</sup>

In response to *Foster*, the Legislature again proposed a logging trees-for-water mitigation standard.<sup>267</sup> Ecology announced “we currently lack flexibility for balancing the competing needs of water users across the state,” inviting legislative involvement in the mitigation question.<sup>268</sup> The Legislature obliged. In January 2018, it enacted SB 6091, which includes a tentative step to overturn *Foster*.<sup>269</sup> The new statute authorizes

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<sup>260</sup> For a detailed history and critique of water right mitigation in Washington, see Osborn & Mayer, *supra* note 1.

<sup>261</sup> *Foster v. Wash. State Dept. of Ecology*, 362 P.3d 959 (Wash. 2015).

<sup>262</sup> *Id.* at 469-70.

<sup>263</sup> *Id.* at 470.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 476-77 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 90 (Wash. 2000)).

<sup>266</sup> Osborn & Mayer, *supra* note 1.

<sup>267</sup> S.B. 5789, 65th Leg., Reg. Sess. (Wa. 2017).

<sup>268</sup> WASH. STATE DEPT. OF ECOLOGY, WATER RESOURCE MANAGEMENT: WHERE WE ARE TODAY, Publ. No. 16-11-003 (Nov. 2016).

<sup>269</sup> S.B. 6091, 65th Leg., Reg. Sess. (Wa. 2018). See *infra* Section II.J for discussion of the instream flow impairment aspects of this bill.



watershed planning groups to use out-of-kind projects to “offset” impacts associated with permit-exempt wells.<sup>270</sup> The statute also establishes the Joint Legislative Task Force on Water Resource Mitigation to oversee five water right projects that will use out-of-kind mitigation to address impacts to impaired instream flows.<sup>271</sup>

Out-of-kind mitigation raises a host of problems. Chief among them is the absence of an objective, science-based foundation to compare mitigation benefits of habitat projects with the harms caused by loss of stream flow.<sup>272</sup> Other problems include lack of rational planning processes, impairment of senior off-stream water rights, destruction of public uses of rivers that depend on water, inability to maintain out-of-kind mitigation in perpetuity, and failure to address climate change.<sup>273</sup>

The damage that out-of-kind mitigation could cause to Washington’s rivers and aquifers represents a major fallback from the goals and mandates of the Water Resources Act. Given the constitutional underpinnings of the impairment standard, an out-of-kind mitigation program, even with explicit Legislative approval, will not meet *Foster*’s “not even de minimis impairment” rule for off-stream water rights.<sup>274</sup> As statutory creatures, however, instream flows are subject to Legislatively mandated impairment.

### J. Hirst and Aftermath

The 1985 Nooksack River instream flow rule closed several tributary streams to new water rights, and established low flow water rights for other streams and the river mainstem.<sup>275</sup> These rule-based flows are not met for many days of every year, and thousands of permit-exempt wells have been drilled in the basin since the rule was adopted.<sup>276</sup> With one

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<sup>270</sup> WASH. REV. CODE § 90.94.020(4), .030(4). The statute proposes a standard to offset consumptive use quantities, which could avoid impairment if properly timed and located, but contains no implementation requirement. The problem is demonstrated in the WRIA 1 (Nooksack) streamflow restoration plan. See Osborn & Mayer, *supra* note 1, at 206-222.

<sup>271</sup> WASH. REV. CODE § 90.94.090. See *Joint Legislative Task Force on Water Resource Mitigation*, WASH. STATE

LEG., <https://leg.wa.gov/JointCommittees/WRM/Pages/default.aspx> (Last visited December 26, 2020). The work of the task force is ongoing as of date of publication.

<sup>272</sup> Osborn & Mayer, *supra* note 1, at 223-25 (for detailed discussion of problems associated with out-of-kind water resource mitigation).

<sup>273</sup> *Id.* at 226-35.

<sup>274</sup> *Foster*, 362 P.3d at 963.

<sup>275</sup> WASH. ADMIN. CODE § 173-501-030-040 (1985).

<sup>276</sup> *Whatcom County v. Hirst*, 381 P.3d 1, 5-6 (Wash. 2016) (instream flows in portions of the Nooksack River ‘are not met an average of 100 days a year.’”); ST. OF OUR

exception, the Nooksack rule does not specify that stream closures are applicable to permit-exempt wells.<sup>277</sup>

Relying on the rule's silence on permit-exempt wells, Whatcom County adopted a comprehensive plan allowing new building permits to rely on permit-exempt wells for water supply.<sup>278</sup> Concerned about the impact of new wells on local streams and aquifers, land use advocates sued the County for failure to protect water resources, and failure to assess whether water was legally available before granting new building permits.<sup>279</sup>

*Hirst* held that the Growth Management Act requires local land use jurisdictions to protect water resources when adopting comprehensive plans and associated regulations.<sup>280</sup> Further, counties have an independent duty to determine legal water availability when issuing building permits and may not simply rely on the Department of Ecology's outdated rules.<sup>281</sup> Whatcom County's comprehensive plan failed to protect water availability.<sup>282</sup>

In affirming the Growth Management Hearings Board, *Hirst* reviewed the history of instream flow litigation:

Ecology adopted the Nooksack Rule in 1985, and the rule has not been amended. We have since recognized that 'Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on surface waters' . . . We have been protective of minimum instream flow rules and have rejected appropriations that interfere with senior instream flows.<sup>283</sup>

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WATERSHED REPORT LUMMI WATERSHED, at 76, 81 (2016) (data re exempt well development in the Nooksack watershed).

<sup>277</sup> WASH. ADMIN. CODE § 173-501-030-040 (1985); see also *Hirst*, 381 P.3d at 5-6 ("1,652 permit-exempt well applications have been drilled in otherwise closed basins since 1997," and "this proliferation of rural, permit-exempt wells was creating 'difficulties for effective water resource management'").

<sup>278</sup> *Id.* at 678.

<sup>279</sup> *Hirst*, 381 P.3d at 1.

<sup>280</sup> *Id.* at 11-14 (citing *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985)).

<sup>281</sup> *Id.* at 13-16.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 7-8 (quoting *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726 (Wash. 2000) and citing e.g., *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 311 P.3d 6 (Wash. 2013) and *Foster v. Dep't of Ecology*, 362 P.3d 959 (Wash. 2015)).

Per *Hirst*, the statutes and court decisions that constitute the jurisprudence of the Water Resources Act are binding, not only on the Department of Ecology, but on local governments as well.<sup>284</sup>

The *Hirst* decision was tremendously controversial. The building industry and counties claimed the decision effectively halted real estate development in any basin where rule-based instream flows were not being met.<sup>285</sup> Despite the controversy, however, options were available. Two counties, Spokane and Okanogan, responded with local ordinances to assess water availability.<sup>286</sup> Public interest advocates pointed to the Kittitas and Dungeness water banks as examples of successful in-kind mitigation programs that could address the *Hirst* requirements.<sup>287</sup> Tribes called for rational management of water resources, and protection of treaty rights.<sup>288</sup>

The legislative aftermath of *Hirst* was significant. At the end of the 2017 Third Special Session, the Senate blocked adoption of the state capital budget, blaming the House for failure to reverse *Hirst* and restore reliance on Ecology's instream flow rules as a basis for issuing building permits.<sup>289</sup> In January 2018, the Legislature quickly enacted SB 6091, creating a new chapter in the RCWs to reverse *Hirst* and authorize impairment of instream flows by domestic wells.<sup>290</sup>

ESSB 6091 radically altered the hallmark concept underlying the Water Resource Act: priority protection for instream flows. Where flow rules are adopted, watershed planning or "streamflow restoration" committees must recommend some form of "offset" for future domestic

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<sup>284</sup> *Id.* at 17-18.

<sup>285</sup> See, e.g., Don C. Brunell, *Impact of Hirst decision must be addressed*, AUBURN REPORTER, Nov. 8, 2017; S. 65-5239, Reg. Sess., at 3-5 (Wa. 2017) (summary of public testimony relating to legislative proposals to "fix" the consequences of the *Hirst* decision).

<sup>286</sup> Spokane County, Wa., Res. No. 16-0833, In Re Adopting an Interim Ordinance for Processing of Building Permits in Rural Areas of Unincorporated Spokane County (2016); Okanogan County Commissioners, Ordinance 2016-5, An ordinance relating to land use decisions requiring the use of water from other than a certificated source (Nov. 8, 2016).

<sup>287</sup> S. 65-5239, Reg. Sess., at 3-5 (Wa. 2017).

<sup>288</sup> See Lorraine Loomis, *Being Frank: Accountability Matters for Water and Treaty Rights*, NWIFC, June 6, 2017; Arnold Cooper, *To preserve water and fish, ignore false alarms*, THE NEWS TRIBUNE, Apr. 23, 2017.

<sup>289</sup> E.g., S.B. 5239, 65th Leg., Reg. Sess. (Wa. 2017). H.B. 2248 65th Leg., Reg. Sess. (Wa. 2017) would have provided two years to assess potential amendments.

<sup>290</sup> WASH. REV. CODE § 90.94.020(1), .030(1); Osborn & Mayer, *supra* note 1; Jean Melious, *The Controversy Over Permit-Exempt Wells in Washington*, 8 Seattle J. of Evntl. Law 144, 151 (2018). Ironically, control of the Senate changed parties, and the Democrat-controlled Legislature enacted the bill to reverse *Hirst*.

withdrawals.<sup>291</sup> Past depletions are not addressed. The statute does not require actual implementation or enforcement to ensure long-term compliance.<sup>292</sup> Non-domestic uses, such as stockwater, are not mitigated.<sup>293</sup> Where flow rules have not been adopted, the new statute eliminates *Hirst*'s requirement that all counties determine legal water availability before issuing building permits.<sup>294</sup>

Implementation of Ecology's "streamflow restoration" program is proving problematic. The agency has interpreted RCW Ch. 90.94 to not require in-kind or water-for-water mitigation for permit-exempt well impacts.<sup>295</sup> The Nooksack instream flow rule has been amended to allow for continued water development in the basin,<sup>296</sup> and to re-open closed basins in order to "re-time high flows," i.e., divert water during winter months, establishing a precedent that will likely be followed elsewhere.<sup>297</sup>

*Hirst* logically followed *Postema* and *Kittitas*, linking water and land use laws, and recognizing that finite water resources serve as a limit on growth.<sup>298</sup> *Hirst* also applied the prior appropriation doctrine to Washington's instream flow program. Had it withstood legislative repudiation, *Hirst* would have provided important precedent for principled resource management. Instead, the State Legislature displayed an anti-environment bias that will deplete aquifers and rivers

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<sup>291</sup> WASH. REV. CODE § 90.94.020(2), .030(2).

<sup>292</sup> WASH. REV. CODE § 90.94.020(4), .030(4) (describing watershed plan content, but omitting mandate for implementation).

<sup>293</sup> WASH. REV. CODE § 90.94.020(8), .030(8) (statute applicable only to new domestic groundwater uses).

<sup>294</sup> WASH. REV. CODE § 19.27.097.

<sup>295</sup> Osborn & Mayer, *supra* note 1. Two planning groups have adopted watershed plan addenda that propose to offset impacts of future exempt wells using in-kind mitigation.

NISQUALLY WATERSHED PLANNING UNIT, NISQUALLY WATER RESPONSE TO THE 2018 STREAMFLOW RESTORATION ACT (WASH. REV. CODE § 90.94): ADDENDUM TO THE NISQUALLY WATERSHED MANAGEMENT PLAN, (2019),

<https://apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/wria11/WRIA11-AddendumNisquallyWatershedManagementPlan-01162019.pdf>;

JESSICA KUCHAN & EUGENE N.J. ST. GODARD, WRIA 59 WATERSHED PLAN ADDENDUM (2019),

<https://apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/wria59/WRIA59WatershedPlanAddendum.pdf>.

<sup>296</sup> WASH. ADMIN. CODE § 173-501-065 (2020); *see* WASH. STATE DEP'T OF ECOLOGY, Nooksack River basin rule amendment, <https://ecology.wa.gov/Water-Shorelines/Water-supply/Protecting-stream-flows/Instream-flow-implementation/Nooksack-basin-rule>.

<sup>297</sup> *See* WASH. ADMIN. CODE § 173-501-070(4) (2020) ("New interruptible uses may be approved from streams regulated under WASH. ADMIN. CODE § 173-501-040" [i.e., pre-existing closures under Surface Water Source Limitation recommendations of Wash. State Dep't of Fish & Wildlife]).

<sup>298</sup> Melious, *supra* note 290, at 146, 153.

statewide.<sup>299</sup>

### K. *Mitigation that Works*

In contrast to the post-*Hirst* legislative debacle, the Dungeness River Basin instream flow rule overcame a legal challenge based on a *pre-litigation* statutory fix. The Dungeness rule offers a rational approach to the ever-present off-stream versus instream conflict: a public water exchange. As in the Kittitas rule, the Dungeness rule imposes a “water budget neutral” standard for impacts of new uses.<sup>300</sup> Its water exchange program provides an affordable option to obtain in kind mitigation for new water users.<sup>301</sup> And, it creates water reserves for future domestic use that, unlike the amended Skagit rule, require mitigation through the water exchange (or otherwise).<sup>302</sup>

Despite widespread local support,<sup>303</sup> a pro-development group challenged the Dungeness rule, arguing that the reserves violated *SITC II*, and that Ecology should have conducted a “maximum net benefits” test before adopting instream flows.<sup>304</sup> The resulting decision in *Bassett v. Ecology* is significant for two reasons. First, it affirmed the rule’s approach to mitigate impacts of permit-exempt wells on instream flows. The Kittitas Valley basin closure set the stage in prohibiting unmitigated rights in an over-appropriated basin.<sup>305</sup> *SITC II* and *Foster* provided the sideboards by enforcing priority for instream flows, and rejecting non-water mitigation.<sup>306</sup> The Dungeness rule followed suit and withstood challenge.

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<sup>299</sup> For the state’s thirty-two watersheds without instream flow rules, ESSB 6091 eliminated the duty of local jurisdictions to determine the legal availability of water, regardless of actual instream flow conditions. WASH. REV. CODE § 19.27.097(1)(g) (2018).

<sup>300</sup> See WASH. ADMIN. CODE § 173-518-070(3) (requiring that new groundwater uses be mitigated, be nonconsumptive, or demonstrate no impact on instream flows).

<sup>301</sup> See WASH. ADMIN. CODE § 173-518-075.

<sup>302</sup> See WASH. ADMIN. CODE § 173-518-080 (“Consumptive water use that would impact surface water sources listed in Table III must be mitigated in accordance with this chapter.”).

<sup>303</sup> The Dungeness basin is the western half of one of the two original pilot watershed planning basins identified for action in 1990. 1990 Wash. Laws, Ch. 294, Sec. 3. The first water supply plan for the basin was published in 1994, see *DQ Plan*, *supra* note 55, and the Ch. 90.82 watershed plan was completed in 2004. WASH. ADMIN. CODE § 173-518-010(4) (2013).

<sup>304</sup> *Bassett*, 438 P.3d, *rev. den.*

<sup>305</sup> See *supra* Section II.G.

<sup>306</sup> See *supra* Sections II.H and II.I.

Second, *Bassett* held that Ecology need not perform a cost-benefit analysis comparing the value of instream flows with that of off-stream diversions.<sup>307</sup> In so holding, *Bassett* put forth a new and troubling interpretation of the Water Resources Act, i.e., that it is not a mandatory statute.<sup>308</sup>

### Mitigation

The *Bassett* plaintiffs asserted that the OCPI finding creating water reserves in the Dungeness rule was similar to those held improper in *SITC II* and *Foster*.<sup>309</sup> The Court rejected Ecology's argument that an OCPI determination made simultaneously with adoption of the flows cannot lead to impairment. Instead, the Court relied on a 2016 amendment to the Water Resources Act that explicitly validated the Dungeness instream flow reserves.<sup>310</sup> If the Dungeness reserves did not provide adequate mitigation, given historic over-allocation of the watershed, the legislative end-run would be a questionable tactic.<sup>311</sup> But the rule established a "no net loss" standard for future off-stream water rights, and the legislative meddling did not damage the integrity of protection of flows.

The Dungeness Water Exchange is operated by the Washington Water Trust, which acquires and retires existing water rights, repackaging them into mitigation credits in amounts suitable for landowners to purchase before applying for building permits.<sup>312</sup> Water users may purchase credits for household, outdoor, irrigation and stockwater uses, and make a one-time payment of between \$1,000 and \$2,200 for each element of the mitigation package.<sup>313</sup>

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<sup>307</sup> *Bassett*, 438 P.3d at 573-74.

<sup>308</sup> See *infra* Section II.L.

<sup>309</sup> *Bassett*, 438 P.3d at 575-77. See *supra* Sections II.H and II.I.

<sup>310</sup> See WASH. REV. CODE § 90.54.210(1)(2016) ("The legislature declares that the reservations of water established in WASH. ADMIN. CODE § 173-518-080 and 173-545-090, as those provisions existed on March 31, 2016, are consistent with legislative intent and are specifically authorized to be maintained and implemented by the department."). The Court also rejected plaintiffs' argument that the legislative approval violated separation of powers. *Bassett*, 438 P.3d at 577-78.

<sup>311</sup> *Bassett*, 438 P.3d at 568 (describing water over-allocation and resulting impacts on aquifers and surface water resources).

<sup>312</sup> DUNGENESS WATER EXCHANGE, WASHINGTON WATER TRUST, <http://www.washingtonwatertrust.org/water-exchange>.

<sup>313</sup> *Id.*; see Dungeness Water Exchange FAQ, Question 15.

### Maximum Net Benefits

Since enactment, the ‘maximum net benefits’ proviso of the Water Resources Act has engendered controversy.<sup>314</sup> That section states:

Allocation of waters among potential uses and users *shall* be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.<sup>315</sup>

Conflicts have centered on the scope of the test. Some have argued that instream flow rules, along with proposals for out-of-stream water diversions, should be subject to a cost-benefit review. Others have maintained that instream flows would likely come in last in any analysis directly comparing the economic value of water kept instream versus diverted out-of-stream. Therefore, the Legislature could not have intended to apply the maximum net benefits test to adoption of instream flows, else flows would not be adopted.

In 2000, the *Postema* court agreed, when it found that the Maximum Net Benefits proviso did not operate to second-guess water right permitting decisions.<sup>316</sup> Following settlement of a Columbia River water right appeal,<sup>317</sup> Ecology published an interpretive statement, asserting that maximum net benefits analysis would be used only when adopting water reserves pursuant to RCW 90.54.050(1) and other statutes.<sup>318</sup>

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<sup>314</sup> SHUPE 1988, *passim* (stakeholder perspectives); Report of Instream Flow and Water Allocation Advisory Committee at 3-4 and attached stakeholder comments (Dec. 15, 1986), App. G-1 to SHUPE 1988.

<sup>315</sup> WASH. REV. CODE § 90.54.020 (emphasis added). Similar language was added to a policy preamble to the Surface Water Code in 1979: “It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state’s public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.” WASH. REV. CODE § 90.03.005.

<sup>316</sup> *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 82-83 (Wash. 2000) (The MNB test does not “override minimum flow rights once established by rule, ... conflict with the statutes authorizing or mandating rules setting minimum flows, [nor] conflict with the specific statutes respecting priority of minimum rights.”)

<sup>317</sup> Stipulation, Settlement Agreement and Order of Dismissal, *Ctr. for Env’tl. Law & Policy v. Wash. State Dep’t of Ecology, et al.*, PCHB No. 02-216, at 6-7 (Aug. 19, 2003).

<sup>318</sup> WASH. STATE DEP’T OF ECOLOGY, WHEN TO PERFORM A MAXIMUM NET BENEFITS ANALYSIS, PROGRAM POLICY/INTERPRETIVE STATEMENT, No. POL-2025, at 2 (2005).

Ecology did conduct a maximum net benefits analysis as part of the amended rulemaking for the Skagit River basin.<sup>319</sup> Interestingly (and correctly) Ecology noted that the prior appropriation doctrine rule of priority (first in time, first in right) “is incompatible with a general maximum net benefit approach of issuing water rights according to its marginal value.”<sup>320</sup> The question of interpretation as applied to water reserves then arose in a challenge to the Skagit rules reserves, and was resolved in *SITC II*.<sup>321</sup>

“Maximum net benefits” here refers to both diversionary uses, many of which can be quantified in dollars, and also to instream uses, many of which cannot be economically quantified. It follows that the term “maximum net benefits” in RCW 90.03.005 and RCW 90.54.020(2) does not mean economic benefits alone. That more than economic benefits are contemplated is also necessarily the case because RCW 90.54.020 additionally mandates that waters of the state shall be of high quality. RCW 90.54.020(3)(b). High quality is also not a benefit from instream flow that is readily subject to dollar valuation.

Thus, economic gains alone do not justify using RCW 90.54.020(3)(a) to reallocate water that is already subject to a minimum flow water right.<sup>322</sup>

The *Bassett* challengers argued the Dungeness rule was invalid for failure to conduct a maximum net benefits analysis as part of the rulemaking process.<sup>323</sup> The court disagreed, relying on *SITC II* but also finding the term “shall” in the Water Resources Act did not mandate performance of a maximum net benefits review, and that such analysis was discretionary with the agency.<sup>324</sup> The agency and courts have now effectively erased the maximum net benefits mandate, which appears twice in the water allocation statutes.<sup>325</sup>

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<sup>319</sup> WASH. STATE DEP’T OF ECOLOGY, CHAPTER 173-503 COST BENEFIT ANALYSIS, MAXIMUM NET BENEFITS ANALYSIS & LEAST BURDENSOME ANALYSIS, Pub. No. 06-11-010, at 30-32 (2006) (rescinded Dec. 11, 2019).

<sup>320</sup> *Id.* at 30.

<sup>321</sup> See *supra* Section II.H.

<sup>322</sup> Swinomish Indian Tribal Cmty. v. Wash. State Dep’t of Ecology, 178 Wash. 2d 571, 600 (Wash. 2013) (footnotes omitted); see also *id.* at n. 15 (quoted in the preamble above).

<sup>323</sup> *Bassett*, 438 P.3d 563 (Wash. Ct. App. 2019).

<sup>324</sup> *Id.* at 572-74.

<sup>325</sup> *Bassett* resolved three other claims relating to the Water Resources Act, finding the four-part test for individual water right permits does not apply to instream flow rules, that



According to *Bassett*, the maximum net benefits test is not a mandate because the term “shall” appears twenty-two times in the Act’s declaration of fundamentals for water utilization and management.<sup>326</sup> This reasoning does not recognize interspersed use of the terms “shall” and “may” throughout the statute.<sup>327</sup> The Legislature knew the difference between a mandate and a normative standard, and was precise in its language when it intended specific outcomes. This reasoning also fails to recognize the complexities of water management that the Water Resources Act was intended to address.

While *Bassett* contributes to the continuing vitality of the Water Resources Act as an instream flow protection tool, it also previews the Act’s decline. Scientific understanding of water resources has only improved in the past fifty years, as have the tools for water management, such as water banking and natural resource economics. While the statute is flexible enough to keep up, apparently the courts are not.

### L. *Spokane Denouement*

The Spokane River runs directly through the city of Spokane, and is avidly used by the public for recreation and aesthetic enjoyment, especially during summer months. The Spokane has also suffered significant loss of flow over time due to prodigious groundwater appropriations in Washington and Idaho that deplete surface water flows.<sup>328</sup> After fifteen years of local and state agency deliberation, the Department of Ecology adopted an instream flow rule that will allow continued issuance of water rights and further depletion of Spokane River flows.<sup>329</sup> Environmental and recreational groups advocated for

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Ecology does have authority to close subbasins to new appropriations, and that the priority date of instream flow rules supercedes pre-existing water right applications and permit-exempt wells that have been constructed, but not yet put to beneficial use. *Id.* at 574-75, 577-78, 578-80.

<sup>326</sup> *Id.* at 573-74 (citing WASH. REV. CODE § 90.54.020).

<sup>327</sup> *E.g.*, *State v. Huntzinger* held that legislative use of both “may” and “shall” in a statute is a “careful choice of language indicat[ing] the legislature considered the two words to have different force, that is, to be directory when “may” is used, mandatory when “shall” is used.” 594 P.2d 917, 920 (Wash. 1979).

<sup>328</sup> CELP v. Ecology, 196 Wn.2d 17, 21 (2020). The Spokane River is fed by the Spokane-Rathdrum Aquifer, which underlies and provides public water supply to a half-million people in the greater Spokane, WA-Coeur d’Alene, ID region. U.S. Geologic Survey, Spokane Valley-Rathdrum Prairie Hydrologic Study, Overview, at [https://www.usgs.gov/centers/wa-water/science/spokane-valley-rathdrum-prairie?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/centers/wa-water/science/spokane-valley-rathdrum-prairie?qt-science_center_objects=0#qt-science_center_objects).

<sup>329</sup> *Id.* at 23.

environmentally protective flows that would halt new appropriations, and challenged the rule upon adoption.<sup>330</sup>

In a surprise reversal of twenty years of Water Resources Act jurisprudence, *Center for Environmental Law & Policy v. Ecology* held that the Act's seemingly mandatory language to protect flows for all public uses is nonbinding. The decision did not refer to substantive precedent, particularly the *Postema* and *Swinomish* decisions, which relied on the mandatory language of the same subsection at issue in the Spokane River case, RCW 90.54.020(3)(a), to resolve water right and instream flow conflicts.<sup>331</sup> Nor did the decision analyze the legislative history of the statute.<sup>332</sup> Instead, relying on dictum in a 1979 criminal law decision, the Court ruled that the word "shall," appearing in RCW 90.54.020(3)(a) is subordinate to the term "may" as it appears in an older statute (the Minimum Flows Act of 1969), and may be disregarded. Of more concern for future interpretations of the Water Resources Act, the Court found that its statements containing the term "shall" are not binding because they are mere "general declaration of fundamentals."<sup>333</sup>

The Court affirmed Ecology's disregard of the impact of future water depletion on recreational and aesthetic uses of the Spokane River.<sup>334</sup> The flow quantities adopted into instream flow rules become a floor, above which more water rights may be allocated. The Court focused on a perceived conflict between fisheries and recreation, but did not discuss the actual conflict between recreational use and future off-stream water diversions. In addition to allocation of future water rights, several other factors will continue to deplete the Spokane River. Large inchoate water rights held by the City of Spokane are unaffected by the instream flow rule, and as the City grows into or transfers these rights to third parties, they will exacerbate low flow conditions.<sup>335</sup> Climate warming impacts on upstream snowpack and river hydrology will also further degrade flows.<sup>336</sup>

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<sup>330</sup> *Id.*

<sup>331</sup> *Postema*, 142 Wash.2d 68 (Wash. 2000); *SITC II*, 178 Wash. 2d 571 (Wash. 2013).

<sup>332</sup> The Court explained that it was following legislative intent, but the decision contained no discussion of the legislative history of the two statutes. *CELP v. Ecology*, 196 Wn.2d at 29. For example, the protection of "navigation values" did not appear in the original bill, HB 394, but was amended into the Water Resources Act during the session. H.B. 394, House Committee Amendment H-1034 (1971).

<sup>333</sup> *CELP v. Ecology*, 196 Wn.2d at 30-34, discussing RCW 90.54.020(3)(a).

<sup>334</sup> *Id.*

<sup>335</sup> Spokane County, Watershed Management Plan, Water Resource Inventory Area 55, Little Spokane River and Water Resource Inventory Area 57, Middle Spokane River at 31 (adopted Jan. 31, 2006) (inchoate water pumping scenarios).

<sup>336</sup> See U.S. GLOBAL CHANGE RESEARCH PROGRAM, 4<sup>TH</sup> NATIONAL CLIMATE ASSESSMENT, Ch. 3 (Water) and Ch. 24 (Northwest Region) (2018); N.J. Mantua, I. Tohver, A.F.

By declaring the Water Resources Act policy mandates unenforceable, *Center for Environmental Law & Policy* signifies continued decline of the vitality of the Water Resources Act's instream flow program, rendering it unusable to protect public values.

## CONCLUSION

The Water Resources Act of 1971 was heralded as a means to ameliorate the impacts of prior appropriation on Washington's rivers, recognize all public uses of water resources, and import ecological values into state water management. But the statute was predicated on a fatal flaw: the subordination of instream flow protection to pre-existing water rights. Because many of Washington's rivers were fully or over-appropriated in 1971, sufficient water was never available to fully protect public uses of rivers, including fish and aquatic uses, water quality, navigation, recreation and aesthetic enjoyment.

Conflicts between Washington's water rights program and instream flow rules have triggered many lawsuits and a mix of decisions. Initially, the Water Resources Act was upheld, often in elaborate decisions, as a key mechanism to protect instream flows as a form of water right.<sup>337</sup> Steady erosion of the program has undermined its positive aspects. The Act's "general declaration of fundamentals," RCW 90.54.020, sets out eleven rules for water utilization and management. Five are stated as direct mandate, but the courts have held three of those nonbinding.<sup>338</sup> The Supreme Court's most recent interpretation of the statute as a non-enforceable policy statement, bodes ill for protection of rivers. The Court's rhetoric on the intrinsic value of rivers, quoted at the top of this article, is a forgotten sentiment.<sup>339</sup>

The Court is not alone. The State Legislature has entertained many bills to weaken the instream flow program, to deny scientific principles, to encourage growth at the expense of rivers, and to promote resource

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Hamlet, *Climate change impacts on streamflow extremes and summertime stream temperature and their possible consequences for freshwater salmon habitat in Washington State*, 102 CLIMATIC CHANGE (1-2) 187-223 (2010).

<sup>337</sup> WASH. REV. CODE § 90.03.345.

<sup>338</sup> See PUD No. 1 of Pend Oreille County, *supra* Section II.B (rejecting mandate to consider public interest in "water planning and allocation discussions"); *Bassett*, *supra* Section II.K (rejecting mandate to base water allocation on "maximum net benefits") and *CELP*, *supra* Section II.L (rejecting mandate to retain instream flows for various public uses).

<sup>339</sup> The Court asked "[h]ow does one put a dollar value on being in the presence of crystal clear water coursing down a steep slope through a rock-lined, moss-edged stream bed among evergreen trees"? See *SITC II*, 178 Wash. 2d 571, n.15 (Wash. 2013).

extraction over resource protection. ESSB 6091, the 2018 bill reversing *Hirst*, cut deeply into the principle of priority protection for instream flows. Legislative tradition holds that many more cuts are coming now that the first one has been made.

Fifty years since enactment of the Water Resources Act, major water management challenges now confront policy makers. The junior priority of instream flow rules, lack of any protections at all for half the state's watersheds, climate change impacts on hydrology, inchoate municipal water rights, unadjudicated claims, agency incompetence – these are a few of the significant and difficult issues that the Washington Legislature must address if the public is even to hope for survival of salmon species, healthy water quality, and the continuing ability to use and enjoy rivers.

It is time for the State Legislature to enact a Washington State Water Resources/Climate Crisis Response Act. Adopting innovations befitting the 21<sup>st</sup> century climate crisis, the statute should:

- Manage water resources through the lens of climate change and the need to adapt to future changes;
- Create a new state agency to protect and enforce water resources *in situ*;
- Reprioritize instream flows vis-à-vis off-stream water rights, based on public trust principles and recognition of the 'time immemorial' priority of tribal treaty water rights;
- Embrace co-management of water resources with the Native American tribes located and with interests in Washington;
- Adopt mandatory and aggressive conservation standards applicable to all water users, with saved water re-dedicated to stream and aquifer restoration;
- Impose licensing fees based on the quantity of water claimed by users (to incentivize reduction in use);
- Require that all new water uses be satisfied via measures such as water conservation, water reuse, trust water rights, water exchanges and other mechanisms that avoid placing new demand on the resource;
- Base the code on a 'river net positive' policy (water budget neutral no longer suffices), and include margins of safety in all calculations to ensure protection *and* restoration of rivers and aquifers;
- Propound its policies as mandatory, hence more difficult for courts and agencies to erode legislative intent;
- Fund it;
- And always, use science-based management of the highest integrity.

Even with these innovations, the road ahead is difficult. Water use in Washington is out of balance with supply. The protections afforded by the Water Resources Act were never fully sufficient to address the problems of over-appropriation, and even the positive elements of the statute have been ignored or eroded by the courts.

Billy Frank Jr., the great Nisqually Indian leader and treaty activist, put it simply: “First we need to ask ourselves how much water the salmon need and then ask ourselves how much we can take.”<sup>340</sup> Until the Legislature, the agency, and the courts accept and act on the fact that water in Washington is a finite resource that is fully (if not over) appropriated, state law and policy will remain inadequate to protect state waters.

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<sup>340</sup> NW TREATY TRIBES, *Tell the Truth – The Collected Columns of Billy Frank Jr.* 169 (2015).



