How Messed Up is Washington's Water Allocation System After *Swinomish Indian Tribal Community v. Ecology?*: How False Assumptions and Failure to Balance Water Priorities Led to a Surpise Closure of the State's Groundwater, Over-reliance on OCPI and the Need for Legislative Reform

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On October 3, 2013, the Washington Supreme Court decided *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) (hereinafter *Swinomish*), holding that the Department of Ecology (Ecology) exceeded its authority to use the "overriding considerations of public interest" (OCPI) exception to grant reservations for future water rights in the Skagit River basin. The decision invalidated an amended instream flow rule that had been relied upon for the construction of hundreds of homes on exempt wells in rural areas. This article describes how the decision is the product of forty years of problematic instream flow regulation, which led to an unexpected closure of groundwater to further appropriation and over-reliance on narrow statutory exceptions to fill the gaps. Also discussed are the likely impacts of the *Swinomish* decision and suggestions how the Legislature could address these problems.

A. SYNOPSIS OF THE DECISION.

In 2001 Ecology adopted the Skagit River Basin Instream Flow Rule, chapter 173-503 WAC, which included minimum instream flows (MIFs) for rivers and streams but did not allocate or reserve water for other future uses. Skagit County appealed the 2001 rule but dismissed its appeal after Ecology issued an amended rule in 2006. In the amended rule, Ecology used the OCPI exception in RCW 90.54.020(3)(a) to establish twenty-seven reservations of water for specified future uses, including exempt wells in rural areas and various municipal, domestic, irrigation, and stock watering uses.[1] Ecology and the Department of Fish and Wildlife found that the total quantity of the reservations was less than the amount that would have significant impacts on fish populations in the basin. The Swinomish Indian Tribal Community (Tribe) challenged the amended rule two years later under the Administrative Procedure Act, contending that Ecology's use of OCPI to establish the reservations exceeded its statutory authority. The superior court denied the Tribe's petition, but the Supreme Court reversed and invalidated the amended rule.

The principle basis for the Court's decision was its rejection of Ecology's interpretation of the OCPI exception. RCW 90.54.020(3)(a) requires Ecology to preserve the natural environment by retaining base flows in perennial rivers and streams, but includes this exception: "*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.*" The Court specifically rejected Ecology's simple economic balancing test[2] and found that the OCPI exception is a *narrow* exception, not a device for wide-ranging reweighing or reallocation of water . . . ." *Swinomish*, 178 Wn.2d at 585 (emphasis in decision). By declaring the amended rule invalid, over 475

new groundwater uses (primarily rural homes built since 2001 with exempt wells) established after adoption of the amended rule were instantly subject to uncertainty about the legal status of their water supplies.[3]

The Court went further in its analysis than was necessary to decide the case. It could have rejected Ecology's balancing test for OCPI as inconsistent with its statutory authority and invalidated the amended rule on that basis, but it went further by finding that the use of OCPI to allow impairment of an existing instream flow conflicted with the prior appropriation doctrine itself. *Id*. at 588-90. Even if this part of the majority opinion is regarded as dicta, its impact may be considerable because it is thoroughly analyzed and forcefully stated.

The Court's conclusion also has an inherent contradiction. Because the OCPI exception specifically refers to authorizing water uses that conflict with protected instream flows, the majority's "prior appropriation" analysis appears to contradict both RCW 90.54.020(3) and the Court's own conclusion, which states, "A narrow exception is found in the statute that permits impairment of minimum flows set by rule in situations where it is clear that overriding considerations of the public will be served." *Id.* at 602. To avoid the circular logic of one statute violating another, the majority opinion should be read not as eliminating OCPI, but as severely narrowing its scope, as indicated in the preface to the decision –"The exception is very narrow, however, and requires extraordinary circumstances before the minimum flow water right can be impaired." *Id.* at 576.

Thus the door is narrowly open for OCPI findings in the future. However, the potential for appeals has increased significantly, and may stymie decisions by Ecology and/or discourage watershed planning advocates and water right applicants from proceeding without legislative clarification on the scope of the exception. What constitutes "extraordinary circumstances," and how does one analyze the public interest?[4] Tribes and environmental groups may use the *Swinomish* decision to argue that OCPI cannot be used at all in the context of rule amendments or water rights application decisions when the new or changed water use would conflict in any way with existing MIFs. It could also prompt challenges to the implementation of adopted basin rules and prevent others from being finalized. This is an unfortunate cloud on the use of OCPI by an agency that has become dependent on it, and may lead to administrative dysfunction, conflicts involving property rights and growth management, increased litigation involving water right decisions, and multiple calls for legislative correction with differing objectives.[5]

The Court's opinion may have resolved one question about the scope of OCPI authority, but it raises several other questions that will have significant consequences for communities seeking new water rights and for counties engaged in watershed planning to allocate or reallocate water for future uses. As the author explains below, legislation is needed to clarify when and how OCPI can be used in the context of issuing new water rights or other water management decisions under Chapter 90.54 RCW. But one cannot reach that conclusion without examining Washington State's history of instream flow

protection, the incomplete implementation of state water allocation policy, and the recent evolution of groundwater science.

B. INSTREAM FLOW PROTECTION IN WASHINGTON STATE.

There is no question that instream flow protection serves vital interests by protecting the health of natural watersheds, including preservation of fish production, water quality, recreation, navigation, power production, and scenic and aesthetic values. Hundreds of millions of dollars have been appropriated and spent by the federal and state governments to preserve and enhance the quality and quantity of water in natural rivers, streams, and lakes in Washington State, with economic, ecological, and myriad other benefits that are beyond dispute.

In 1955 the Legislature declared the policy of the state to have sufficient water in streams to support fish populations and authorized rejection of water right applications that would impair these flows.[6] In 1969 the Legislature authorized the newly created Department of Ecology to establish MIFs and lake levels throughout the state. RCW 90.22.010.

The Water Resources Act of 1971 (the Act) established fundamental state policy for the utilization and management of the waters of the state including, but by no means limited to, the retention of base flows in perennial rivers and streams. RCW 90.54.020(3). The primary purpose of the Act was to insure that waters of the state are both protected and fully utilized for the greatest benefit to the people of the state. Among the other beneficial uses of water enumerated in this law, the Legislature declared that, "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." RCW 90.54.020(5). The Act established a balancing test for choices between competing uses of water, providing that, "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." RCW 90.54.020(2). This does not mean economic benefits alone. *Swinomish*, 178 Wn.2d at 600.

The maximum net benefits policy was elaborated by a 1979 statute that was codified at RCW 90.03.005, which states in part:

> [i]t is the policy of the state to promote the use of public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and retention of waters within streams and lakes in sufficient quantity to protect instream and natural values and rights.

This balancing test may favor leaving water in streams and lakes in certain cases, leading to denial of water right applications, but it does not mandate that result exclusively. RCW 90.03.005 also supports new appropriations for out of stream uses that might impact instream flows if they have a greater benefit.

Instream flows have been set by rule in less than half of the sixty-two drainage basins within the state. *See* WAC chapters 173-500 to 173-563.[7] Once established by rule, MIFs constitute an appropriation like other water rights with a priority date, and cannot be impaired by subsequent surface or groundwater withdrawals. *Swinomish,*, 178 Wn.2d at 584; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000);. The priority date of a MIF is the date of its establishment by rule. RCW 90.03.345.

There are many possible methods for creating and quantifying MIFs, but the primary method used by Ecology was to select percentage of exceedence flows, numbers that represented a likelihood that historical flows would be met on a given day. These exceedence flows generally ranged from 50 to 80% of historical flows, meaning that on any given day there was a 50 to 20% chance that the MIF would not be met.[8] This method provides mathematical assurance that the MIFs adopted by rule in Washington State are not met all the time, which means that any water right thereafter issued which withdraws from or impacts a MIF is subject to curtailment whenever actual flows are below the MIF set by rule. Groundwater withdrawals with effects on MIFs that cannot be eliminated or mitigated when minimum flows are not met would likely be denied as an impairment of the MIF water right.

Unfortunately, the maximum net benefits policy was not employed when Ecology adopted MIF regulations. Ecology apparently decided that there were no criteria for determining maximum net benefits, so it didn't bother with it.[9] Ecology's Instream Resources Protection Program (IRPP) for Western Washington, created in 1979, was the framework for Ecology's adoption of minimum flow regulations in dozens of Washington river basins in Western Washington, but it did not attempt to balance the needs for future surface or groundwater rights for other purposes before adopting MIFs.[10] In fact, Ecology interpreted the various laws relating to instream flow protection as creating a priority for instream flow protection before evaluating other potential uses of the state's waters.[11,] The statutory language, however, does not support this interpretation.

Water allocation policies at RCW 90.54.010 and 90.54.020(2) are phrased in terms of providing the greatest benefit to the people of the state. RCW 90.54.020(3) follows those policies in the ordering of the statute, and provides for the protection of "base flows," a term the Supreme Court has used interchangeably with "minimum flows." *See Swinomish*, 178 Wn.2d at 580. As demonstrated by the de facto ground water closure described in the next section of this article, one cannot balance the allocation of water between instream flows and other uses if all water, including groundwater, is committed to protecting instream flows first. That is like offering to share the crumbs in the pie tin after eating the pie.

Ecology's past interpretation of RCW 90.03.005 (to protect instream flows first and then allocate remaining waters according to maximum net benefits) violates two important canons of statutory interpretation. First, statutes related to the same subject

matter or having the same purpose should be read *in pari materia*, or as together constituting one law. *State v. Yokley (In re Yim)*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999); *Premera v. Kreidler*, 133 Wn. App. 23, 36, 131 P.3d 930 (2006). Second, and very critical here, is the canon that a court (or administrative agency) must not interpret a statute in a way that renders any portion of the statute meaningless or superfluous. *Broughton Lumber Co. v. BNSF Ry*., 174 Wn.2d 619, 634, 278 P.3d 173 (2012); *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001); The "maximum net benefits" provision has no meaning if interpreted to apply only after MIFs are protected, precisely because all other uses of water were made junior to MIFs by the adoption of those rules and subsequent court rulings.

Does the statutory balancing test, in the form of "maximum net benefits" or the OCPI exception, permit Ecology to allow new water uses it considers more valuable to impair or conflict with an existing MIF? The Supreme Court has twice answered "no" to this question while leaving the narrowest of doors open for the use of OCPI in the future. In *Postema*, the Court rejected arguments that MIFs were "limited" water rights containing a "direct and measurable impact" standard in order to account for, among other things, economic factors or the future availability of groundwater. The Court found that once established by rule, MIFs are "appropriations which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity." 142 Wn.2d at 82. However, the Court recognized that OCPI provided a "narrow exception." *Id.* at 81.

In *Swinomish*, the Court held that Ecology had no authority to establish reservations for future water rights that might impair established MIFs, either by using the OCPI exception or by applying the maximum net benefits policy. 178 Wn.2d at 585. The Court construed the entire statutory scheme for instream flow protection and water allocation, including OCPI and the maximum net benefits policy, and found no qualifications in the statutes that diminish MIF water rights once they are established by rule. *Id.* at 595.

Many of Ecology's instream flow rules included assumptions that significant portions of groundwater would *not* be regulated as a result of the minimum flow setting and stream closures, and include regulations stating that groundwater would not be subject to the MIF rules unless there was, for example, a "direct, and measurable, impact on stream flows in streams for which closures and instream flows have been adopted." *See, e.g.*, WAC 173-510-050. Perhaps it was this assumption—that urban, suburban and rural communities could still access groundwater after adoption of MIF regulations—that prompted Ecology to proceed with MIF rulemaking before determining the need for other future water uses, and without balancing the competing water uses as directed by the Legislature according to the maximum net benefits. If Ecology assumed that they were not allocating all groundwater to maintaining MIFs, and that most of it was still available for new uses, then they may also have assumed that allocating waters according the maximum net benefits was still possible and viable.[12] Regardless, the assumption that groundwater was available for new uses after adoption of MIF regulations has proven to be incorrect, as explained in the next section of this article.

C. THE MOVING GOALPOSTS FOR APPROPRIATING GROUNDWATER AND THE DE FACTO GROUNDWATER CLOSURE.

When the first MIF regulations were adopted in the mid-1970s, Ecology was aware of various degrees of connection between surface and ground waters, known as hydraulic continuity. Ecology generally drew a distinction between "direct continuity" with measurable effects on surface water, which would be subject to the MIF rules, and aquifers that were deeper or further away from streams with lesser or unmeasurable effects on streamflow, which would be available for new water rights for municipal growth and other future uses of water.[13] New permits for groundwater withdrawals were issued for projects throughout the state for many years following adoption of MIF rules, based on the assumption that they had negligible or unmeasurable effects on protected streams. However, advances in groundwater science over the next fifteen years led Ecology to change course. In November 1993 Ecology published guidelines for hydrogeologic investigations, including "minimum hydrogeologic conclusions common to all hydraulic continuity analyses." These guidelines included the following statement regarding "steady state" determinations:

> When pumping for a permit will occur year around, the effects of the pumping will eventually reach a steady-state condition. . . .The time needed to reach a steady-state may vary from less than a day to many thousands of years, depending upon the hydrogeologic setting. In the strict and exact sense, once the steady-state occurs, *100% of the pumped groundwater will be captured from streamflow, somewhere in the drainage basin and not necessarily from the closest stream reach*.[14]

This technical report and a later report by the U.S. Geological Survey[15] coincided with the reversal of Ecology's assumption that groundwater was available for appropriation and with the emergence of a new assumption that all groundwater pumping is eventually captured from streamflow. This article is not a scientific paper intended to dispute the steady-state assumption, or to finger it as the sole or leading cause for changing assumptions about groundwater availability. However, it was obvious for those involved in water rights permitting in the state of Washington during the mid-1990s that there was a sea change at Ecology regarding groundwater application processing based on these reports.

In 1995-96 Ecology issued a batch of over 600 decisions on pending groundwater applications in twelve watersheds throughout the state, most of which were denials based on simple findings of hydraulic continuity between groundwater and surface water protected by instream flow rules.[16] Over 130 of those denial decisions were appealed to the Pollution Control Hearings Board (PCHB), which consolidated the appeals and addressed eleven threshold issues on summary judgment. After final rulings, a number of these appeals were later consolidated for appeal to the Washington Supreme Court. The Court's decision on those appeals, in *Postema* , held that a finding of hydraulic continuity with a stream for which MIFs were not being met was not enough by itself to deny a groundwater application—there needed to be evidence and a finding of impairment.

Postema, 142 Wn.2d at at 78-79. However, the Court disagreed with the appellants' arguments that MIF rules must be interpreted as intended by Ecology years earlier, to allow appropriation of groundwater unless its withdrawal has a direct and measurable impact on stream flow using standard stream measurement equipment. Rejecting that argument, the Court stated:

> [T]he argument would effectively freeze Ecology's ability to implement the statutes, requiring it to rely on scientific knowledge which is now outdated. . . . It is true that all parties to this case originally expected that only nearby and shallow groundwater withdrawals would affect surface waters. However, expectation is not intent. While the undisputed facts show a change from the original manifestation of Ecology's intent, Ecology's intent was and is to prevent interference with instream flows.

Id. at 88-89.

Ecology has not adopted a rule establishing hydraulic continuity as a sufficient basis for finding impairment and denying groundwater applications, therefore impairment must be established factually in each case. However, because of the combination of steady-state theory and the manner in which MIF rules were established, impairment can be found in virtually every case where an aquifer is in continuity with a stream that has a MIF rule, unless the applicant proposes adequate mitigation to prevent any diminishment in flow. Even minor or "de minimis" effects on MIFs would be grounds for denial due to the priority date of the instream flow water right. "The statutes do not authorize a de minimis impairment of an existing right." *Id*. at 92. With respect to streams administratively closed to further appropriation in the instream flow rules, the Supreme Court concluded that "a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have *any effect* on the flow or level of the surface water." *Id*. at 95 (emphasis added.) "Any effect" taken literally could mean a computer model demonstration that continuous pumping of a well would result in one less molecule of water reaching any part of a stream that is closed, an impossible standard to disprove.

The Supreme Court did not address whether the instream flow rules relevant to the applications in *Postema* were based on false assumptions or violated the maximum net benefits statute. The Court also did not address more recent arguments that the instream flow rules themselves violated the four-part test of RCW 90.03.290 and are therefore *ultra vires*.[17] These arguments were not made in the *Postema* case. But the Court's decision in *Postema* effectively killed the default balance struck in Ecology's MIF regulations (setting minimum flows but not closing groundwater to further appropriation) by requiring Ecology to use new information (e.g., steady state theory) and scientific methodology (computer modelling) for determining hydraulic continuity and protecting MIFs. It created a de facto closure of unappropriated groundwater throughout the state, without any public debate or appeal regarding the appropriateness of allocating all unappropriated groundwater to the sole purpose of maintaining MIFs. These standards do not distinguish between a large municipal or industrial well and a much

smaller exempt well for a single domestic or small group domestic use. Steady-state theory and computer modeling analysis could conclude that both have impacts to minimum flows or closed streams in continuity.[18] When groundwater is closed even for single family domestic wells in rural areas, then the issue of MIF protection and water allocation crosses over into the realms of growth management and property rights.

The de facto groundwater closure ushered in a new era of water rights permitting based on mitigation plans that included various methods for eliminating or offsetting the impacts of new appropriations on instream flows, such as pumping additional water to streams, groundwater infiltration, storage projects, and relinquishing existing water rights or placing them in trust to protect instream flows. Several cases inconclusively shaped the boundaries of water right decisions incorporating mitigation plans.[19] Ecology issued guidance on the subject, but it did not adopt, and was not compelled to adopt, rules regarding mitigation plan contents or approval standards.[20] Municipal and other water users also turned to water right transfers as the means to increase their supplies, which led to several cases involving relinquishment of existing water rights for nonuse and the determined future development and municipal purposes exceptions to relinquishment found in RCW 90.14.140(2). This direction, however, did not answer the larger problem of the de facto groundwater closure and noncompliance with the maximum net benefits policy.

D. IS OCPI THE APPROPRIATE RELIEF VALVE?

After *Postema*, how did Ecology go about approving new groundwater applications and allocating water for future municipal, industrial, domestic, and irrigation uses in basins with MIF rules? Despite the de facto groundwater closure, Ecology continued to regard instream flow protection as its primary responsibility and saw no need to update or replace MIF rules to reallocate water in compliance with the maximum net benefits policy. Instead, it began to use the OCPI exception as a relief valve for communities and applicants in need of additional water. This section of the article describes how continued reliance on the narrow OCPI exception is a failed policy.

Ecology has the authority to amend instream flow rules, and is even encouraged or mandated to update them as needed. RCW 90.54.040(2) provides:

> [T]he department is further directed to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord with the water resource policy of this chapter . . . .

The Legislature even made this process financially viable by adopting the Watershed Planning Act, chapter 90.82 RCW, and appropriating tens of millions of dollars from 1998 through and including the current biennium for grants to local watershed planning groups for planning, technical assistance, and implementation. The Watershed Planning Act may be the closest the state has come to a process for implementing maximum net benefits in the allocation of water. Thirty-four of the state's sixty-one watersheds adopted plans under the authority of the Watershed Planning Act and another thirteen watershed plans are in some stage of completion or adoption. Not all of these watershed

plans led to instream flow rule amendments, but some of them did, like the 2006 Amended Rule for the Skagit watershed. As noted above, the Supreme Court rejected Ecology's use of the OCPI exception for reservations in the 2006 Amended Rule, even though Ecology determined that the environmental impacts of reservations for future uses were minor and the economic benefits were significant.

There are other adopted MIF rules in Washington with similar fact patterns and similar reliance on OCPI that may be vulnerable to challenge. Many of these implemented watershed plans by planning units that carefully balanced the need for instream flow protection with the need for additional water for communities. In some of these basins, establishment of reservations for domestic and municipal uses may have been a compromise or "relief valve" for establishing minimum flows and stream closures with draconian effects that would prevent the grant of surface and groundwater rights.[21]

With respect to water right applications for municipal growth, Ecology has also used OCPI, typically when proposed mitigation achieves substantially greater environmental and other public benefits than the harm to MIFs and closed streams. Even where mitigation plans effectively over-mitigate impacts on instream flows, OCPI findings are probably required whenever hydrogeologic studies predict any effect on remote streams or lakes that are closed or have MIFs. Especially in remote and upper reaches of watersheds, it may be impossible to effectively mitigate all impacts at all times of the year. However, OCPI cannot be characterized as a "narrow" exception when it is required for every groundwater application decision that uses comprehensive hydrogeologic analysis.

When applicants prepare mitigation plans in consultation with affected tribes and environmental groups, OCPI findings tend not to be appealed.[22] However, tribes and environmental groups have routinely criticized Ecology for over-using OCPI. The *Swinomish* decision adds force and precedent to their complaints.

Sara Foster v. Ecology, PCHB No. 11-155 (2012) may provide a model for how OCPI can be used for water right permit application decisions in the future. In *Foster*, the PCHP upheld an OCPI finding for a groundwater right granted to the City of Yelm. Yelm had participated in regional mitigation planning for new water rights with the cities of Olympia and Lacey. The OCPI finding used the same or a similar "balancing test" by Ecology as the one rejected by the Supreme Court in *Swinomish*. The PCHB might have rejected that balancing test, but upheld the water right decision and OCPI finding based on evidence that Ecology had considered twelve additional factors in its decision, which it considered comprehensive and consistent with Ecology's statutory authority.[23] The decision noted that the OCPI finding would not have been sustainable were it based merely on the need to serve additional populations with increased water supplies or if the mitigation offered was "frail in comparison to the effects on instream flows and closures." These factors distinguish the *Foster* case from the Supreme Court opinion in *Swinomish*, and provide guidance for how a similar OCPI finding could be made and upheld in other water right applications.[24] However, after the *Swinomish* decision it is hard to imagine that more than a rare handful of municipal water right applications will

be approved. Ecology's OCPI authority needs to be clarified if communities are to be given any chance to appropriate groundwater with comprehensive mitigation plans.

E. WHY IS THIS IMPORTANT AND WHY SHOULD ANYONE CARE?

There is no question that instream flow protection was a top, if not the top environmental priority and public policy goal of the late 1960s, the 1970s, and beyond. The benefits are innumerable and beyond rational calculation using economic metrics alone. In fact, the goals of instream flow protection are not fully met due to many rivers and streams having been over-appropriated before MIF rules were adopted. The state continues to purchase water rights in fish critical basins to restore instream flows, improve fish habitat and water quality, and decrease the economic impacts of drought. Why not leave MIF rules and the de facto groundwater closure alone and let communities, businesses, and individuals who need more water either pay for water transfers and mitigation, or move their proposed water-consumptive uses where water is already appropriated by public utilities and available for purchase?

If that is the cost of instream flow protection, it was not disclosed or debated when the MIF rules were adopted. Affected communities and their residents, and property owners in water-deficient areas cannot be expected to have guessed the outcome of future Supreme Court decisions and groundwater science when they decided to locate or remain in their communities decades ago. Should they now be forced to bear a disproportionate financial burden of protecting instream flows? The current status of instream flow protection rules and de facto ground water closures with no OCPI relief valve is creating widespread uncertainty for local land use planning authorities and property owners. It is imposing significant regulatory and transaction costs that are out of proportion to the benefits the regulatory system provides to the protection of instream values. Without OCPI or similar authority to set aside allocations of water for rural growth or the expansion of towns and cities, planning units throughout the state may have little incentive to update MIF regulations, including measures that would improve water quality and fish habitat. This was not the Legislature's intention when it created and funded the Watershed Planning Act.

More troubling is the prospect of a growing economic divide in the state of Washington between "have" and "have not" communities based on whether they have adequate senior water rights or need additional water supplies to meet the demands of planned growth. Many older cities gained substantial water capacity with the closing of industrial mills and implementation of conservation programs, but other cities and suburban and rural communities have not had the same opportunities and now have a tougher time finding new water supplies for growth. It is expensive and complicated for cities and other water utilities to obtain additional water rights through the application process, but this ability provides these communities with self-determination and self-governance of their water systems and the rates to be charged to their customers for water. To the extent these "have not" communities are forced by the failure of state water allocation policy to buy water from the "have" communities, they may have no

control over the price of water. Their residents and commercial/industrial customers may also be forced to pay for massive infrastructure investments by other cities, whether or not those investments were wise or the use of unappropriated groundwater sources may have fewer impacts to instream flows. They may also lose opportunities for new jobs and industries if they have insufficient water or if new customers must pay higher water system development charges caused by expensive wholesale water contracts.

To the extent OCPI continues to be relied upon to approve applications for new mitigated groundwater rights, legal uncertainties remain and expensive appeals are a significant risk. Interested parties may legitimately comment on water right applications and appeal those they believe violate the Water Code, chapter 90.03 RCW, but they should not have a virtual veto authority over land use plans and water right applications in growth areas with future water needs. Public policy, not fiat, should govern the allocation of water between instream flows and other uses. Best available science and fair, predictable rules and standards should govern the process for deciding groundwater applications and judging mitigation plans, not threats of litigation and unpredictable regulatory standards. Unless the state is willing to inform "have not" local governments and rural communities that self-determination and self-governance are no longer desirable and attainable, the problems discussed in this article need to be fixed.

F. CAN THE LEGISLATURE COME TO THE RESCUE?

Footnote 13 of the Supreme Court's majority opinion in *Swinomish* acknowledges that MIFs can be modified, up or down, according to the same process as for establishing them in the first place. What is less clear is the allowable impact that such amendments can have on existing MIFs. The Court recognized the complexity of this issue and virtually invited the Legislature to address the problem, stating:

> The overriding-considerations exception and Ecology's use of it to justify appropriations of water that otherwise could not be approved presents complex issues of water law and policy. We have considered the questions posed in the context of the many relevant provisions of the state water code. Insofar as this case implicates policy determinations about reallocating the water that is presently needed to satisfy minimum flow water rights to other uses . . . *the policy determinations are for the legislature*. If reallocation of instream flow necessary to meet minimum flow water rights is to be a part of state water policy, *it should come by way of legislative action***.**

Swinomish, 178 Wn.2d at 601 (emphasis added).

An interesting question raised in other recent cases is whether the Legislature can authorize changes to MIF regulations or expand the use of exceptions like OCPI in a manner that allows existing MIFs to be impaired or diminished. The prior appropriation doctrine is the foundation of the Water Code and protects existing water rights from impairment by new water rights (first in time is first in right). Can the Legislature

modify instream flow water rights that have a priority date or authorize Ecology to do so, unlike other water rights in the priority system that are owned by private entities or municipal corporations? Indian tribes and environmental groups have argued in multiple cases that instream flow rights are "vested rights" in the sense that they cannot be diminished once they are created without upsetting the priority system inherent in the Water Code. Contrary arguments have been made by state and municipal water systems that instream flow rights are not immutable and can be modified by subsequent legislation or rulemakings. These are not simple issues from either a policy or legal perspective, but the Legislature has taken on such issues before, with the blessing and approval of the Supreme Court.

When the Legislature adopted the Municipal Water Law in 2003, several Native American tribes and environmental organizations challenged the constitutionality of the law, among other reasons, because they perceived that it diminished existing MIF water rights. They also challenged the Municipal Water Law as a violation of separation of powers, alleging that the law altered the Supreme Court's decision in *Theodoratus v. Ecology*, 152 Wn.2d 582, 957 P.2d 1241 (1998) regarding the manner in which water rights are perfected. The Supreme Court unanimously upheld the Municipal Water Law from these facial constitutional challenges in *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010), granting considerable deference to the Legislature's policy choices and clarifications of existing legal uncertainties. That decision provides a pathway to legislative clarification of the water allocation statutory scheme and the scope of Ecology's OCPI authority, so long as the Legislature does not attempt to change the result in *Swinomish*, which could violate the separation of powers doctrine.[25]

There are multiple alternatives for providing solutions to the unplanned state-wide closure of groundwater and failure to allocate sufficient waters for domestic, municipal, and other out-of-stream needs in individual basins. The following suggestions do not exclude other possible mechanisms or decision processes.

For basins without existing instream flow rules, Ecology has the authority to allocate or reserve water for future uses before adopting MIFs, using the maximum net benefits policy. The watershed planning process under chapter 90.82 RCW is one way to determine maximum net benefits through best available science, local planning, and consensus decision-making. OCPI findings are not required for these allocations if they are established prior to MIF water rights.

For basins with existing MIF regulations, the Legislature needs to clarify Ecology's authority to modify MIFs or allow exceptions through watershed planning, OCPI or otherwise, so that uninterruptible water can be made available for other purposes concurrently with efforts to improve conservation practices, habitat, and water quality. The state's maximum net benefits policy should be implemented in whichever manner the Legislature chooses to modify existing MIFs, such as the watershed planning process.

With regard to impacts on closed streams, there is a conflict between OCPI and the availability prong of the four-part test that the Legislature also needs to resolve. Legislation could clarify Ecology's authority to use OCPI for the purpose of reserving future uses or approving water right applications that have insignificant effects on closed streams that cannot practically be mitigated. Tribes and environmental groups will likely argue that permitting numerous minor impacts to closed streams or MIFs will result in significant impacts to streams already over-appropriated and violate state policy to protect and enhance base flows. However, best available science should be the tool for addressing individual and cumulative impacts on streamflow, implemented in rule-making or on a case-by-case basis for water right applications.

Alternatively, the Legislature could leave existing MIFs alone but clarify state water allocation policy in light of *Swinomish* and define criteria for permitting "exceptions" to established minimum flows, lake levels, and surface water closures. One possible mechanism is to define "vital public water uses" that can be approved despite minor unmitigated impacts to MIFs or streams closed by rule.

G. CONCLUSION.

Failure to implement state policy, mistaken reliance on the availability of groundwater, and overuse of narrow statutory exceptions is no way to allocate valuable water resources between instream flow protection and other uses. The system is not working as intended by the Legislature, and needs to be fixed. The significant benefits of legislative clarification are obvious. Scarce public financial resources and the efforts of community volunteers are better spent on planning processes that are not fodder for litigation, or lead to invalidation like the Skagit Basin amended rule in *Swinomish.* As more and more stakeholders realize that the current water allocation policies are broken, the debate over whether and how to fix these problems will be lively and lead to more articles on this topic.

The author is hosting a discussion forum regarding the Swinomish case, its impacts, new developments, and potential solutions. The public is invited to review and post comments on www.tomswaterblog.wordpress.com. This and future articles relating to instream flow protection, the groundwater closure, watershed planning, OCPI, water rights permitting and legislative fixes will also be posted on the author's website, www.porslaw.com.

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[1] Reservations of water for future uses are authorized by RCW 90.54.050. Following adoption of a reservation, applicants may file water right applications for beneficial uses authorized by a reservation, and if granted they have a priority date that relates back to the effective date of Ecology's reservation rule. In the Skagit Basin Amended Rule, the reservations were for "uninterruptible" water rights, i.e., rights that were not subject to MIFs established by an earlier rule.

[2] In its balancing "test," Ecology determined whether and to what extent important public interests were served by the proposed reservations, whether and to what extent the reservations would harm any public interests, and whether the public interests served clearly override harm to public interests. *Swinomish*, 178 Wn.2d at 583.

[3] Ecology and the Swinomish Tribe have since announced measures to resolve this legal ambiguity. The status of the Skagit River Instream Flow Rule is periodically updated on Ecology's website at: http://www.ecy.wa.gov/programs/wr/instream-flows/skagitbasin.html.

[4] Whether a proposed use is even "public" and qualifies for OCPI is also questioned by the majority opinion in *Swinomish*, which characterized exempt wells for domestic use as a "private use, generally speaking, not a public use." *Swinomish*, 178 Wn.2d at 587

[5] This kind of impact from a Washington Supreme Court water law decision is not unprecedented. Dicta in the Supreme Court's opinion in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) suggesting that the holding might apply to municipal water rights led to changes in administrative practices and substantial uncertainties about the scope of unperfected municipal water rights, which in turn led to the Municipal Water Law of 2003 (SESSHB 1338, 58th Leg., Reg. Sess. (Wash. 2003)). The Court then decided constitutional challenges to the law in *Lummi Indian Nation v. State*, 170 Wn.2d 247; 241 P.3d 1220 (2010). In the author's opinion, the potential impact of the dicta in *Swinomish* is likely to be as great as or greater than *Theodoratus*.

[6] Laws of 1955, ch. 12, §75.20.050 (codified as amended at RCW 77.57.020).

[7] Information about the status of instream flows is periodically updated on Ecology's website at http://www.ecy.wa.gov/programs/wr/instream-flows/isf-rule.html.

[8] *See* Final Environmental Impact Statement and Program Overview, Western Washington Instream Resources Protection Program, Ecology, June 1979, at Appendix D. In some minimum flow regulations, the exceedence flows were used as a "first cut" and adjusted based on Washington State Department of Fish and Wildlife recommendations and public comments, but the principle that minimum flows would predictably not be met all the time is accurate.

[9] In the Water Resources Management Program for the Colville River Basin, developed in 1977, Ecology wrote, "Because there are no specific criteria to determine 'maximum net benefit' in the allocation of available surface water, public input through public meetings, questionnaires, and the citizen advisory committee have been utilized for establishing water use preferences." In most other basin regulations, such as the Puyallup-White River Basin, "maximum net benefits" is not mentioned as a criterion and no balancing test was documented as the basis for allocating water among instream flows and other uses. *See, e.g.*, Puyallup River Basin IRPP, March 1980.

[10] See Footnote 7.

[11] The Snohomish River Basin IRPP, adopted in August 1979, includes a comment by then Seattle Mayor Charles Royer that the documents provided no indication of any assessment regarding maximum net benefits, or that sufficient data had been collected upon which to make this determination. Ecology's response was, essentially, that they were setting instream flows first and would assess maximum net benefits later. Specifically, Ecology stated: "[I]t has been the department's view that in the implementation of the acts, it is necessary to provide a base level of' protection for instream resources from further water allocation activities, and that setting these levels does not require the test of' maximum benefits. The result is, in effect, reservation of water for these uses (uses that cannot readily be quantified in terms of dollars) and a de facto priority for these uses. The maximum net benefits test applies to appropriation of water to uses above these basic protection levels."

In 2005, Ecology adopted Policy/Interpretive Statement 2025 regarding when to perform a maximum net benefits analysis. While it declares that maximum net benefits will be implanted in rulemaking to create reservations for future uses under RCW 90.54.050(1) and watershed plans under chapter 90.82 RCW, it perpetuates Ecology's policy of not applying maximum net benefits to MIF setting.

[12] The existence of this assumption, false though it may have been, appears to be validated by a February 20, 1986, memorandum from former Senior Assistant Attorney General Charles B. Roe to the former Water Resources Program Manager for Ecology. Mr. Roe, one of the drafters of the 1971 Water Resources Act, interpreted RCW 90.22.020 and RCW 90.54.030(3) as embodying the first phase of instream flow protection by Ecology for the minimum or base flows necessary to insure that instream values are protected by "keeping streams alive." Such minimum or base flows, however, should not have been "greater than necessary to ensure continued existence of the instream values associated with the stream on a minimum basis." The second phase of instream flow retention, per Mr. Roe's memorandum, is contained in RCW 90.54.020(2), which sets forth the "maximum net benefits" test. Under this test, "a higher instream flow is required if it is determined by the department that instream values bring about the 'maximum net benefit'

usage of the waters of the stream." It is worth noting that many of the MIF regulations adopted before and after Mr. Roe's memorandum established minimum flows that were higher than base flows needed to keep streams alive, and did not engage in a maximum net benefits analysis to support these higher flows. Therefore, reliance on Mr. Roe's statutory interpretation to defend MIFs, set for example, at 50 to 80% exceedence of historic flows, would appear to be misplaced.

[13] The Puyallup River Basin IRPP, adopted in March 1980, states: "it is believed that there are adequate groundwater resources to support future growth forecasts" and "future growth in demands for municipal and industrial water will fall upon groundwater supplies." In the Snohomish River Basin IRPP, adopted in August 1979, alternative sources of groundwater were described as mitigation for any adverse effects of regulating MIFss. The Chambers-Clover Basin IRPP, adopted in November 1979, states that "deeper aquifers appear to contain large quantities of water and do not readily affect surface waters." The Green-Duwamish IRPP, adopted in April 1980, states: "Groundwater remains open for future appropriation in all the Green-Duwamish River Basin. It is anticipated that groundwater will be relied upon in many instances where surface water rights will not be available due to this program or because of water quality considerations." There are many other such statements in many instream flow rules.

[14] Procedural Guidelines for Hydrogeologic Investigations, Open File Technical Report 93-6, p. 4 (emphasis added).

[15] Numerical Model Analysis of the Effects of Ground-water Withdrawals on Discharge to Streams and Springs in Small Basins Typical of the Puget Sound Lowland, Washington, Morgan and Jones, (U.S.G.S., 1996).

[16] There are four tests for approval of a water right application, codified at RCW 90.03.290(3): (1) that the use of water is "beneficial"; (2) that water is "available" for appropriation; (3) that the proposed withdrawal of water will not "impair" existing rights (including MIFs); and (4) that the proposed use is not detrimental to the public welfare. Ecology must deny an application it finds that one or more of those elements cannot be satisfied.

[17] In *Swinomish*, the Supreme Court held that reservations of water must satisfy the four-part test because they are "appropriations of water" under RCW 90.03.345. 178 Wn.2d at 588-89. MIFs are also appropriations under RCW 90.03.345, which provides: "The establishment of reservations of water . . . or minimum flows or levels . . . shall constitute appropriations within the meaning of this chapter . . . ." One can argue that Ecology failed to make the required four-part test findings for each MIF it adopted by rule. For instance, if flows were set at a level that predicted they would not be met, how could Ecology find that water was available for such flows? Also, if a maximum net benefits test was omitted, how could Ecology find that the MIFs were not detrimental to the public welfare? These arguments are likely to be made in court if Ecology denies the petition to reopen the Dungeness River Basin instream flow rule. See Footnote 20 below.

[18] *See* Chapter 173-539a WAC, withdrawing all unappropriated groundwater in Upper Kittitas County and requiring mitigation and "water budget neutral" determinations for new exempt wells. Similar findings are affecting exempt well usage in the Skagit and Dungeness basins, requiring mitigation for single family exempt wells. There is no scientific basis for drawing the regulatory line at the edge of these watersheds, but little has been done to regulate the use of exempt wells in continuity with MIFs or closed streams in other basins with instream flow regulations. The regulatory trend, however, is expanding to other basins.

[19] *See, e.g.*, *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006) (Ecology has the authority under chapter 90.03 or chapter 90.44 RCW to grant a permit for groundwater consumption based on a mitigation proposal if it would otherwise be denied because of its adverse impact on surface water); and *CPM Development Corp. v. Ecology*, PCHB No. 03-071 (2007) (vegetation removal does not fall within the plain language of the reference in RCW 90.44.055 to "other resource management techniques").

[20] *See Squaxin Island Tribe*, PCHB No. 05-137 (2006).

[21] This position was taken in a recent petition to reopen instream flow rulemaking for the Dungeness River Basin, based on the *Swinomish* case. The January 23, 2104, petition by Olympic Resource Protection Council states, "Without the relief provided by the reservations, the attempted compromise embedded in the Dungeness rule is a failure." The petition also contends that adoption of MIFs violated the four-part test and is therefore *ultra vires*.

[22] For example, OCPI was used to approve the Cascade Water Alliance (CWA)'s Lake Tapps project, and the approved application, S2-29920, was not appealed by the Muckleshoot or Puyallup Tribes, who entered into a natural resources enhancement agreement with CWA. Neither did the Nisqually Tribe or Squaxin

Island Tribe appeal applications approved for the cities of Olympia, Lacey, and Yelm after they were consulted on and approved a regional mitigation plan for those cities' water right applications.

[23] The PCHB decision stated that Ecology should establish the framework of a policy or rule for the use of OCPI, but did not require that to uphold the Yelm permit.

[24] The *Foster* decision is on appeal and is currently being briefed to the Thurston County Superior Court (Case No. 13-2-01080-9; hearing date May 8, 2014). As of the date of this article, Ecology has stated that the *Swinomish* decision will not change how it applies OCPI in permitting cases like the City of Yelm's. However, the *Swinomish* decision will surely be briefed to the superior court by the parties to the *Foster* case, and it could have an effect on the outcome.

[25] Another recent example is the 2013 Fire Hydrant law, SHB 1512, that resolved issues resulting from *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) and *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 592, 269 P.3d 1017 (2012).