

## **Potential Solutions to Washington State's Post-Swinomish Instream Flow Regulation/Rural Water Supply Dilemma<sup>1</sup>**

### **Introduction**

Department of Ecology officials and stakeholders have been meeting publicly for the last year to discuss post-Swinomish water allocation solutions for rural areas, but their efforts have been stymied by the lack of consensus on legislative or other solutions.<sup>2</sup> New ideas need to be explored and vetted to move beyond common misconceptions and a dysfunctional status quo. The state's minimum instream flow rules (MIFs) protect flow numbers and probabilities rather than instream values and qualities. In adopting MIFs, Ecology failed to balance the allocation of water between instream and out-of-stream uses as directed by the legislature. A judicially-created impairment standard for MIFs fails to recognize the distinction between MIFs and appropriative rights, and resulted in the accidental closure of entire basins to new water uses.

Resistance to changing the status quo is significant, ranging from the correlation between instream flow protection and the protection of treaty fishing rights, sensitivities to altering the prior appropriation system, the sheer complexity of the issues, and anti-growth objectives of some MIF proponents. In the author's opinion, the resistance to alter the status quo is based on misconceptions and a lack of stakeholder discussion about alternative standards that could yield positive consequences for both instream values and water supply for domestic, agricultural, and municipal uses.

**Abstract:** *The current inflexible impairment standard for protection of minimum flows in the state of Washington prevents the use of science and ingenuity to solve water allocation and protection issues by restricting access to a common and vital resource in contravention of state legislative policy. The regulatory status quo has produced excessive procedural burdens and costs, uncompensated externalities, artificial water markets, and legal uncertainties for new and changing water uses in a growing economy. That's not a status quo to be proud or protective of. Active resource management based on empirical evidence, utilizing more flexible legal standards, best available science, and realistic policy balances, would do a better job of allocating and managing water, including for protection of healthy fisheries.*

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<sup>1</sup> Caveat: the views expressed in this article are mine alone and not representative of or in pursuit of any particular clients' goals

<sup>2</sup> See "Finding Rural Domestic Water Solutions While Protecting Instream Resources," Ecology publication no. 15-11-007 (revised June 2015): <https://fortress.wa.gov/ecy/publications/SummaryPages/1511007.html>

## What is the Purpose and Policy for Protecting Instream Flows?

Protecting instream flows to preserve or enhance the functions and values of rivers, streams and lakes is one of the predominant policy goals of Washington's various water resources statutes. In 1969 the legislature authorized Ecology to adopt rules establishing "minimum flows and levels" to protect fish, game, birds, other wildlife resources, and recreational and aesthetic values. RCW 90.22.010-020. In 1971 the legislature mandated the protection of the natural environment by preserving "base flows" of perennial rivers and streams "necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a). In this environmental era, the state shifted from a pioneer policy of maximum utilization of resources to managing water resources for the "maximum net benefit of the people of the state." Without question, the people of the state benefit in numerous ways from the protection of instream flows.<sup>3</sup> The real question, however, is whether the state appropriately implemented the fundamentals of protecting and managing water resources for the maximum net benefit, or has it protected flows in a manner that unnecessarily excludes other uses or sound principles of water resource management. If the latter, how can four decades of instream flow protection be fixed? These are the post-*Swinomish* questions.

## How do Washington's Instream Flow Rules Diverge from State Policy?

Ecology adopted instream resource protection regulations using a methodology for setting and protecting MIFs that exceeds the legislature's mandate to preserve "base flows" and water resources according to the maximum net benefits for the people of the state. Rather than allocating waters actually present in rivers and streams, or identifying instream values to protect against subsequent water right applications, Ecology adopted MIFs at numerical levels that "would be beneficial for fish if those flows were present in the stream,"<sup>4</sup> unlike other appropriations that cannot exceed the availability of water. These aspirational numerical flows are then given the status of water rights with priority dates by operation of RCW 90.03.345. New water right permits, water right changes, and new exempt water uses are restricted from impairing those MIF water rights, which by design are not met at the time of their adoption up to 90% of the time.<sup>5</sup> Thus, rather than preserving base flows and allocating the remaining flow

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<sup>3</sup> Protection of instream flows also appears to serve the purpose of protecting tribal instream flow treaty rights, which tends to forestall the need to adjudicate such rights in state or federal court.

<sup>4</sup> Ecology, "Introduction to Instream Flows and Instream Flow Rules,"

<http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html>

<sup>5</sup> Ecology's August 27, 2014 presentation to the Rural Water Supply Strategies Workgroup on instream flow science admitted to capping fish-friendly instream flow levels at the 10% exceedance level during low flow seasons, typically August through September. A 10% exceedance flow means that it is predicted to be available in the river only 10% of the time. Conversely, such flows are predicted to be unmet 90% of the time.

<http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/pacheco-08272014-instreamflow.pdf>

between MIFs and other uses according to maximum net benefits, Ecology adopted aspirational MIFs knowing that actual stream flows were already insufficient to satisfy them. This effectively closed the basins to new appropriations because any new effect on the rivers and streams would automatically worsen the probability or degree of those unmet aspirational flows. It is often overlooked (or misrepresented as a sign of already over-appropriated rivers and streams) that MIFs which are not consistently met were designed that way from the outset.

If there was an impairment standard matched to the unique nature of these aspirational MIF water rights, Ecology could still allocate waters for other uses while protecting the values inherent in the MIF water rights. However, in *Postema v. PCHB*,<sup>6</sup> the Washington Supreme Court established a zero tolerance impairment standard that treats MIF water rights the same as appropriative water rights.<sup>7</sup> As a result, all other new consumptive uses of water in a watershed are virtually foreclosed after the adoption of MIF rules, unless strict water-for-water mitigation standards can be met. This general ground and surface water closure was not foreseeable when the first generation of MIF rules were adopted prior to 2001. It occurred without public notice or a rulemaking specific to the ground waters being closed to protect MIFs, in apparent contradiction to RCW 90.54.050. There was no “maximum net benefits” evaluation of this allocation of all available waters in a basin to instream flow protection while foreclosing future allocations of water to domestic and other uses.<sup>8</sup> As of the date of this article, neither the legislature nor the courts have reviewed whether these MIF flows exceed Ecology’s authority to allocate water according to legislative policy declarations in the Water Resources Act, including the maximum net benefits policy.<sup>9</sup>

## **What are the Contemporary Consequences of this Problem?**

Since the Washington Supreme Court’s *Postema* decision, Ecology has had to rely on various disappearing tools to make water available for new out-of-stream uses in basins with MIF rules, including for rural domestic supply from exempt wells. In several basins it amended instream flow rules to adopt reservations of water for future out-of-stream uses that were exempt from the effect of the MIF rules, using the “overriding considerations of public interest” exception (OCPI) at RCW 90.54.030(a). One such set of reservations in the 2006 amended Skagit Basin MIF Rule, Chapter 173-503 WAC, was overturned by the Supreme Court in the *Swinomish* case,

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<sup>6</sup> *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).

<sup>7</sup> “The statutes do not authorize a *de minimis* impairment of an existing right.” 142 Wn.2d at 81.

<sup>8</sup> For a more in depth discussion of the instream flow rule/ground water closure problem, see my article, “How Messed Up is Washington’s Water Allocation System After *Swinomish Indian Tribal Community v. Ecology*?” <http://www.porslaw.com/wp-content/uploads/2015/01/Pors-Swinomish-Article.pdf>

<sup>9</sup> A challenge to the validity of the Dungeness River MIF rule (chapter 173-518 WAC) is pending in Thurston County Superior Court. *Bassett and Olympic Resource Protection Council v. Ecology* seeks invalidation of the Dungeness Rule under the Administrative Procedure Act for, among other claims, exceeding Ecology’s statutory authority.

where the Court found that Ecology had no authority to adopt reservations using the OCPI exception after MIFs were already adopted in a basin.<sup>10</sup> Since the *Swinomish* ruling, Ecology informed local governments in the Wenatchee Basin that a similar set of reservations in the Wenatchee Basin MIF Rule, Chapter 173-545, would not survive a legal challenge and to cease processing applications to allocate the reservations to several local governments and rural areas in need of water. The lesson of *Swinomish* is that once a MIF rule is adopted, it is too late to balance the needs for water between instream and out-of-stream uses. That leaves rural areas in places like Skagit and Wenatchee Counties, and growing communities and rural areas statewide, with few options other than purchasing existing water rights, which may not be available.

The Supreme Court's restriction of the OCPI tool has also impacted water rights permitting. Since the *Postema* case, Ecology has approved dozens of water right applications using OCPI to authorize some portion of a mitigation package that wasn't strictly in-kind, in-place, in-time, water for water mitigation of impacts to MIFs or closed streams. Such findings were criticized by tribes and environmental groups, but after *Swinomish* they have been challenged as exceeding Ecology's authority. One such finding is currently being reviewed by the Supreme Court. In *Foster v. Yelm*, Ecology approved a regional mitigation plan that included some out-of-kind habitat mitigation where in-kind mitigation was unavailable, finding that OCPI applied. The PCHB and Thurston County Superior Court upheld the OCPI finding and resulting water right,<sup>11</sup> but environmental groups appealed the decision to the Supreme Court. Oral arguments were held on May 21, 2015, and a decision is pending.<sup>12</sup> The case challenges Ecology's authority to approve a water right permit relying to any degree upon out-of-kind mitigation.

The trend toward elimination of exceptions and work-arounds to the MIF rules, including reservations and out-of-kind mitigation, pushes the process of allocating water for new uses to extremes that were not likely anticipated by the legislature in 1971 when it adopted the fundamentals in chapter 90.54 RCW. Rural property owners in the Skagit basin, for example, cannot obtain building permits for single family homes until mitigation projects beyond their control are implemented by Ecology and third parties, prompting lawsuits against county government and potential constitutional challenges.<sup>13</sup> Without a legislative solution, Ecology and many local governments must rely on expensive and incomplete mitigation solutions that penalize certain sectors of society and enrich others. Rural landowners, farmers, and communities without reserves of inchoate water rights are being forced by the continuation of

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<sup>10</sup> *Swinomish v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

<sup>11</sup> *Foster v. Ecology and City of Yelm*, PCHB No. 11-155 (Findings of Fact, Conclusions of Law, and Order, March 18, 2013).

<sup>12</sup> Supreme Court Case No. 90386-7.

<sup>13</sup> See, e.g., *Fox v. Skagit County*, appeal pending, Court of Appeals No. 733150-I.

the status quo to subsidize the purchase of private water rights and establish mitigation banks, which encourages speculation in water rights at the expense of the public and removes farm land from irrigation. Many believe that these funds would be more effectively spent on regional conservation, habitat measures and water quality mitigation. Many people, including legislators and Ecology officials, also believe that the level of administrative burden of enforcing MIF protections as against minute impacts is excessive and unsustainable.

Restated, the consequence of protecting aspirational flow numbers as water rights, instead of protecting instream functions and values, is an inflexible water allocation system built on false assumptions, inadequate public disclosure, and the failure to accomplish other fundamental state policy objectives for the allocation of state waters.

### **What's So Bad about the Status Quo?**

In my opinion the inertia behind the status quo, including resistance to finding solutions, is largely due to a broad misconception that the status quo supports the goals of Native American tribes and environmental groups, who may possess sufficient political capital to block legislative reforms. Why bother trying to fix it legislatively if it will be blocked from passage or vetoed? The misconception is that an inflexible numerical MIF standard is the best way to protect or enhance the instream values for which MIFs were adopted. First, using the status quo impairment standard to prevent new uses protects only the numerical, aspirational MIFs from becoming somewhat less probable than the probability level of their creation, without requiring evidence that any instream value (such as fish habitat) would be impacted, or allowing mitigation for the impacted value rather than the flow. Because the impairment standard regards "any effect" on a probability of numerical flow as requiring denial, there is no consideration of an application's ability to manage water or provide mitigation in a way that offsets or improves any instream values, such as water temperature or fish habitat. This leaves Ecology in the position of denying applications that have no appreciable impact on, or that could enhance, instream values. The ability to provide habitat or water quality enhancements is magnified for regional or county-wide projects, but the status quo does not give watershed planning groups, county governments, other resource management agencies, or innovative property owners/applicants a pathway for creating available water for new uses by improving instream values. The current inflexible numerical impairment standard does not permit this kind of trade-off, even though an effect on the probability of flow is itself only a probability, not a certainty, of an effect on instream values.

Second, aspirational MIF rules and the inflexible numerical impairment standard that stops growth have already caused the legislature to consider numerous bills to fix the problem, thereby upsetting the status quo or leaving it in jeopardy. This trend will continue as additional basins face the kind of issues seen recently in Skagit, Kittitas, Whatcom, and Clallam Counties.

Third, what about the externalities, or hidden costs, of the status quo on communities and rural property owners, including the agricultural community and businesses and trades based on agricultural services, home construction and sales? Assuming that the status quo (closure of water resources to new uses) is advantageous for citizens who live in water-abundant communities and like to travel, fish and recreate in areas with protected natural rivers and streams, is it ethical to transfer the cost of closing the resource to those who lack access to it, regardless of the ability to condition that access appropriately to avoid overuse and degradation? Access to water is widely considered to be a fundamental human right. Shouldn't there be compensation paid by the public to those denied access to a common resource in the name of protecting public values? Our bedrock legal concepts of due process, equal protection, and proscription against takings without just compensation are seemingly violated by artificial closures and inflexible impairment and mitigation standards. It's only a matter of time until these legal rights are asserted against state and local government by those most-affected by the status quo.

Finally, Ecology is tasked by the legislature with not only protecting instream values, but with **enhancing** them where possible. RCW 90.54.020(3). If the answer to an application or an exempt well water use that might impact a probability of a numerical flow has to be "no," Ecology is stymied in its ability to approve such applications and uses that could be conditioned to enhance the quality of river and streams. Thus the status quo is not helping Ecology accomplish the mandate to enhance instream quality.<sup>14</sup>

Why wouldn't Native American tribes and environmental groups support the concept of conditioning water rights or exempt well usage to maintain or improve instream values? Certainly there is considerable inertia behind the status quo and fear that creating new standards will cause a backsliding of instream protection.<sup>15</sup> Such fears, however, prevent the possibility of improving the quality of rivers and streams through a more flexible, values-based standard.

If allowed to persist, the misconception that the status quo adequately protects instream values will kick the problematic status of flawed numerical MIFs and impairment standards forever down the road, toward more piecemeal litigation, over-allocation of public funds and administrative energy on minute impacts, discrimination against rural land owners and land uses, an unfunded shifting of regulatory burdens from state to local governments, and creation of artificial markets for water rights that divert funding away from fish habitat restoration and

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<sup>14</sup> Ecology could still get there for water right applicants using OCPI, but under the status quo such decisions have been appealed and are likely to continue being appealed.

<sup>15</sup> A more skeptical view is that the status quo has been used as a means of controlling growth and land use changes in areas where opponents do not desire it, primarily in rural areas.

innovative water resource management techniques. Stakeholder, agency, and legislative recognition of this fact could speed discussion and development of long-term solutions that are more just, reasonable, and efficient than perpetuation of a flawed status quo.

The author proposes an alternative method of determining how instream flows and closed streams are impacted by new or changed water uses, and how those impacts can be mitigated. It would require legislative authorization to make these changes in basins with existing numerical MIF rules. Before describing the alternative, it is necessary to describe how MIF water rights differ from appropriative water rights, including how and why they merit a unique impairment standard.

### **How are Instream Flow Water Rights Different than Appropriative Water Rights?**

Contrary to the Supreme Court's assumption in *Postema* and *Swinomish*, MIFs are different by their nature than appropriative rights. The Pollution Control Hearings Board (PCHB) has recognized that MIFs are regulatory, with a different bundle of sticks representing different aspects of a property right than water rights diverted or withdrawn from a source, used for a specific purpose, and subject to a set of conditions and qualifications.<sup>16</sup> As with other regulations but unlike the priority system for appropriative rights, a MIF becomes a condition of all water right permits issued after the effective date of the rule, even if the priority date of the permit is senior to the MIF rule. To the contrary, the priority of appropriative water rights as against all other appropriative water rights is determined solely by the date of application. RCW 90.03.340.

Another significant difference is that appropriative rights require findings under the 4-part test of RCW 90.03.290 that water is available and its appropriation would serve the public interest. In creating MIFs, Ecology allocated water that was not available a large percentage of time, and Ecology did not make findings that MIFs would serve the maximum net benefits. MIFs were therefore established in a manner very different from appropriative rights under the Water Code.<sup>17</sup>

The Supreme Court acknowledged that MIFs can be modified by rule just as they are adopted by rule, and not only by increasing the flow.<sup>18</sup> In *OWL v. KGH* last year, the PCHB rejected

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<sup>16</sup> See *Okanogan Wilderness League v. Ecology and Kennewick General Hospital (OWL v. KGH)*, PCHB No 13-146, July 31, 2104 Order on Motions for Summary Judgment at footnote 9, p. 23.

<sup>17</sup> In *Swinomish*, the Supreme Court held that the adoption of reservations required application of the 4-part test of RCW 90.03.290 because reservations have the standing of appropriations under RCW 90.03.345. 178 Wn.2d at 588-89. RCW 90.03.345 applies equally to minimum flows, which creates legal uncertainty whether existing MIFs were appropriately adopted if there were no findings under the 4-part test.

<sup>18</sup> RCW 90.54.040(2); *Swinomish*, 178 Wn.2d at 591 fn. 13.

arguments that numeric MIFs are “perfected water rights” that must be protected irrespective of Ecology's authority to modify MIF rules. While the Supreme Court in *Postema* and *Swinomish* recognized that a MIF established in rule and a water right authorized through the permit process both have a priority date and are afforded protection from impairment by later issued or junior rights, they also recognized that other attributes are different. An appropriative water right is a vested property right for the water applied to beneficial use, and as such, it is alienable, transferable, and afforded the constitutional protection of due process and the prohibition against takings.<sup>19</sup> MIFs operate in a regulatory manner and do not have these same attributes. MIFs are tailored to address the instream flow needs for each basin and can and should be modified to ensure the rules are in accord with watershed plans and fundamental water resources principles.<sup>20</sup>

The legislature implicitly recognized a distinction between MIFs and appropriative rights in 1997 when it mandated an end to the moratorium on issuing new water rights from the Columbia River.<sup>21</sup> Ecology complied by amending the Columbia Basin MIF rules to create an alternative case-by-case consultation process for permits issued after July 27, 1997, the purpose of which was to evaluate impacts on fish from a proposed permit.<sup>22</sup> In other words, WAC 173-531A-060 authorized a values-based approach to determining impacts and mitigation on fish as an alternative to the numerical MIF rules. The implementation of this regulation was challenged last year in *OWL v. KGH* by environmental groups who opposed Ecology’s authority, even under the Columbia Basin rules, to authorize out-of-kind mitigation for new water rights impacting an MIF. The PCHB held that Ecology did possess the authority to allow out-of-kind mitigation. However, because of the lack of legislative guidance on impairment of MIFs, the PCHB’s strained attempt at finding a values-based approach that complied with *Swinomish* was enough to prompt the applicant to propose accepting the MIF conditions instead.<sup>23</sup>

Once before the PCHB opened the door to the evaluation of MIFs and stream closures differently than impairment of appropriative water rights. However, the threat of litigation to protect the status quo has apparently squelched this effort. In *Squaxin Island Tribe v. Ecology (Miller Land & Timber)* the PCHB reconciled the groundwater standard contained in the Deschutes River MIF at WAC 173-513-050 (“clear adverse impact upon the surface water system”) with the *Postema* standard for impacts to closed streams under the availability prong

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<sup>19</sup> *Ecology v. Grimes*, 121 Wn.2d 459, 477-78, 852 P.2d 1055 (1993); *Ecology v. Acquavella*, 100 Wn.2d 651,656, 674 P.2d 160 (1983).

<sup>20</sup> RCW 90.54.040(2); *Swinomish*, 178 Wn.2d at 591 n. 13.

<sup>21</sup> Washington State Laws of 1997, ch. 439 (ESHB 1110).

<sup>22</sup> Chapters 173-531A and 173-563 WAC.

<sup>23</sup> Order Denying Summary Judgment, Vacatur, and Final Judgment Under CR 54(b) (Dec. 12, 2014).



of the four-part test (“any effect on the flow or level of the surface water”) to create a values-based impairment standard as follows:

“[G]roundwater withdrawals in the Deschutes Basin constitute a clear adverse impact and are subject to that WAC chapter’s provisions, if the withdrawals produce any effects which adversely impact the values identified in WAC 173-513-020. If the Squaxin Tribe is able to demonstrate such an impact, then the water is not available within the meaning of RCW 90.03.290 and the groundwater permits at issue must be set aside. Consistent with the finding in Postema, the terms “verified” and “clearly” as used in this rule mean ascertainable through best available science.”<sup>24</sup>

This attempt at melding the Postema impairment standard with the values underlying an MIF rule failed to catch on as a basis for Ecology decisions on water right applications, but it could serve as a model for a legislatively-adopted impairment standard for MIF rules and closed streams.

## **What are the Potential Solutions to the Problem?**

### **1. Values-Based Impairment and Mitigation Standards for Instream Flows.**

As demonstrated above, there is precedent from the legislature and PCHB for a values-based approach to protecting instream flows and preserving protected fish species. This new approach begins with the recognition that MIFs are different than appropriative water rights, therefore to serve the maximum public interest the evaluation of impacts and mitigation needs to match the nature of these unique water rights.

Methodologies need to be developed for protecting instream flows by identifying and protecting instream qualities and values from degradation while opening the door to enhancing those values and providing new water uses for domestic, agricultural and other beneficial uses of water. Best available science should be used to substantiate findings of impact to values and mitigation of those impacts. This can lead to better results for instream values without closing entire basins to new water rights and exempt water uses. For example, enhancing streamside habitat to improve temperature, shading and holding areas for migrating salmon may accomplish far more protection of instream values than insisting on bucket for bucket in-kind, in-place, in-kind water replacement as with the current standards. Statutory authority should be created to authorize alternative standards for determining impairment and mitigation of instream values, so that MIF rules do not function solely as a means for protecting the status quo and preventing development.

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<sup>24</sup> *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006).

There is precedent for values-based water resource mitigation standards in our laws protecting wetlands and water quality. RCW 90.74.020 allows for compensatory mitigation approaches and recognizes the efficacy of out-of-kind/out of place mitigation in some scenarios. Ecology is required under this statute to “fully review and give due consideration to compensatory mitigation proposals that improve the overall biological functions and values of the watershed.” This approach works in the wetlands context because wetland functions and values aren’t protected by proxy water rights that are themselves protected by the prior appropriation impairment standard. The use of wetland classification systems, setbacks, buffers, and monitoring programs are examples of the ability to identify differing degrees of impact and mitigation and to provide for margins of safety and predictability.

The focus of protecting public water resources should similarly shift to identifying and protecting the functions and values of instream flows instead of using proxy water rights and a judicially-defined impairment standard that treats de minimus impacts to instream values the same as impairment of senior water rights.<sup>25</sup> This alternative would allow more flexibility and opportunity to manage water resources for new and more efficient uses while creating opportunities to restore and enhance watershed functions on a watershed level. It would provide tools to identify and finance mitigation projects, allowing valuable public and private resources to be used to restore fish habitat, water quality and other watershed functions instead of creating artificial water right markets that eliminate beneficial uses of water instead of restoring watershed functions.

One way to accomplish a values-based approach is to statutorily define “impairment” of a MIF or closed stream as “a proposed use of water that appreciably impacts or decreases a fundamental instream value which the MIF or stream closure was adopted to protect.” Best available science should be required to support such determinations. If an impact on one or more instream values is determined, mitigation could be proposed by an applicant to offset that impact (e.g., by providing fish habitat enhancements or recreational access), without necessarily requiring offset of the effect of a new water use on the probability of an aspirational flow.

An important benefit to defining impairment of a MIF is that it does not necessitate invalidating or amending existing MIF rules. They can remain on the books as proxies for instream values,

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<sup>25</sup> It is helpful in this context to remember that MIFs are proxies for the instream values, including aesthetics, recreation, water quality, and fish habitat, that are protected by adoption of a MIF. An effect on the proxy, especially a small one, does not necessarily equate to an effect on the values protected by the proxy. An effect in one place may be offset by a benefit in another, such that one or more values being protected by the proxy may in fact be unaffected or even improved. On the other hand, if impairment (and hence mitigation) are based solely on protecting a proxy flow by use of the prior appropriation system, then opportunities to do a better job protecting the values inherent in the proxy are lost.

including the importance of flow itself as a component of fish habitat and water quality. MIFs will continue to serve as important conditions on existing water right permits, and such conditions may be appropriate either outright or as mitigation triggers for new applications in the future.

A MIF-specific impairment definition and values-based mitigation standard does not need to replace numeric MIFs or the *Postema* standard, but could be authorized by the legislature as an alternative to the application of the current MIFs and standards. This is essentially what the legislature and Ecology did with the 1998 amendments to the Columbia River MIFs. The PCHB has recognized the legality in principle of this alternative, and has opened the door to protecting MIF values as an alternative to protecting aspirational flow numbers. In *OWL v. KGH*, the PCHB concluded:

Thus, while the numeric flows of WAC 173-563-040 do not apply to the Permit, the values that gave rise to the permit in the first instance must be protected. In other words, Ecology cannot issue a permit pursuant to the consultation process that impairs the instream flow values that stand behind the established minimum instream flows, and Ecology must demonstrate how such values are adequately protected and how the water right associated with those values is not impaired. This conclusion is consistent with the Board's parallel conclusion above, that with the consultation process, Ecology is bound to ensure base flows in the Columbia River are protected. In the absence of a showing by Ecology that the conditions of the Permit protect base flows necessary for the preservation of the instream flow values, the Board cannot assess whether the mitigation conditions offered by an applicant for a water right address the recognized depletion of water in the Columbia River (or any other river) by the permit at hand, or in perpetuity and cumulatively.<sup>26</sup>

This ruling highlights the difficulty of changing or bypassing impairment/mitigation standards without affecting the fundamentals of water resource policy. It also demonstrates the opportunity for accomplishing the task. The goal is to find suitable standards and practices, adopted by the legislature to avoid future litigation, that result in real and effective mitigation of impacts on instream functions and values. One way to find the right projects and compromises on a watershed level is to authorize watershed planning units to propose and Ecology to adopt alternative standards to existing MIFs, using protection of functions and values in place of numerical flows. The legislature could authorize and fund one or more pilot projects to develop such standards and put them into practice. Planning units in already impacted watersheds including the Skagit, Nooksack, Wenatchee and Dungeness WRIs may be

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<sup>26</sup> PCHB No 13-146, July 31, 2104 Order on Motions for Summary Judgment, p. 24.

a good place to start this process, which would involve stakeholders from across the spectrum of water users.

## **2. Mitigation Flexibility without New Impairment Standard.**

A less universal and less useful alternative to defining impairment of a MIF is for the legislature to authorize additional means of mitigating or avoiding impacts to MIFs, without changing the impairment standard. This alternative would be harder to square with *Postema* and *Swinomish*, and could lead to litigation or constitutional challenges based on the concept that MIFs are the same as appropriative water rights and must be protected from impairment in the same manner. Nevertheless, the legislature can authorize or direct Ecology to consider alternatives to in-kind, in-place, in-time mitigation of impacts to MIFs. RCW 90.03.255 and 90.44.055 already require Ecology to consider the provision of water impoundments and “other resource management techniques” as a means of offsetting or avoiding impacts to MIFs and senior water rights. These statutes could be expanded to provide for out-of-kind mitigation of smaller withdrawals and flexibility in the time and place of in-kind mitigation with respect to resolving impairment of MIFs and effects on closed streams.

## **3. Effect of Values-Based Standards on Treaty Rights.**

How would a new impairment standard and set of mitigation tools help to protect the treaty fishing rights of Native American tribes? In consultations with treaty tribes concerning pending water right applications, I have learned that the creation or enhancement of fish habitat is often preferred by tribes to the exhaustive and expensive process of modelling and compensating for diffuse impacts to instream flow from groundwater withdrawals. Why dribble water into a river with over 1000 times the flow when you can create riparian shade and rearing habitat instead? There is also the precedent of the 1998 amendments to the Columbia River MIFs, which require consultation with tribal and governmental fisheries managers to create a mitigation package that would be acceptable as an alternative to MIF conditions on a water right permit. The consultation for the irrigation water right in *OWL v. KGH* resulted in a \$6 million mitigation payment package that Ecology would use to fund habitat projects, and received the blessing of the Columbia River tribes. A functions and values approach to mitigation of impacts to instream flows would presumably integrate consultation with tribal, state and federal fisheries managers, as well as best available science, to insure that fisheries resources and tribal treaty rights were not impacted.

## **4. Consideration of Full Hydrological Cycle.**

Another alternative solution to consider in the context of protecting instream flows, which could increase the potential for new development without changing impairment standards, is a requirement to consider the full hydrological cycle for new uses of water. The current

impairment standards are overly precautionary in that they focus only on one aspect of the effect of new development – the withdrawal of water. New uses of groundwater not only withdraw water from an aquifer, they are also incidental to land use changes including land clearing, septic systems and storm water retention/infiltration that returns water to the aquifers, often at a higher elevation and greater quantity relative to streams than their withdrawals. The current standards ignore these benefits and offsets. Statutory directives to consider the full range of hydrologic cycle effects should be developed and recommended, perhaps as amendments to RCW 90.44.055 and the domestic ground water exemption at RCW 90.44.050. Serious consideration should also be given to exempting de minimus withdrawals, such as rural in-house domestic uses, from the regulatory effect of minimum instream flows and stream closures, consistent with constitutionally protected property rights and common sense use of our limited regulatory resources.<sup>27</sup>

## **5. OCPI**

The use of the “overriding considerations of the public interest” exception has been criticized and litigated because it has assumed the importance of a safety valve for Ecology from the otherwise unworkable numeric instream flow impairment standard. Legislative direction on the scope and use of OCPI would be helpful, and legislative preservation of OCPI findings in existing instream flow rules after *Swinomish* would preserve the tough bargains already made in several watersheds to increase instream flows in exchange for reservations of water for certain out-of-stream uses. OCPI is not a complete solution to the current conflicts, however, and should not be relied upon as the most practical alternative.

## **Conclusion**

It is an enormous challenge to change a water resource protection system four decades in the making, including several Supreme Court decisions interpreting key statutes and phrases. I’ve tried to explain why the status quo violates state water resource policy, the consequences of maintain the status quo, and how it could be changed for the better. I expect opposition but hope for constructive criticism and an open debate about the paths ahead. To summarize the reasons to move this discussion forward, there is precedent for the use of a values-based approach to protecting instream flows from the effects of new water rights and exempt water uses, whereas the current MIF regulatory system:

1. Fails to account for basic human water needs and economic development consistent with fundamentals of state water allocation policy and GMA planning;

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<sup>27</sup> Exceptions may be needed in the Yakima Basin in order to protect adjudicated senior water rights.

2. Overspends scarce state and local financial and personnel resources on marginal impacts from permit-exempt wells for domestic uses, when it could focus on protecting and enhancing instream values;
3. Fails to address the externalities of closing a common resource, one most people would agree to be a fundamental human right, or to account for basic constitutional limits of regulation on property owners, which are the underpinnings of the permit exemption; and
4. Fails to utilize appropriate science for managing the resource or to use available data and focused studies to make real-time, science-based decisions regarding impairment and mitigation.

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Tom Pors has been practicing law since 1982 and focuses on water rights permitting and transfers in the state of Washington, land use and environmental law, Endangered Species Act compliance, and real estate and regulatory work for water utilities, resorts, and local government. He is a frequent author and lecturer on the subject of water rights. You can visit his website at [www.porslaw.com](http://www.porslaw.com)

Water rights stakeholders, state and local officials, attorneys, consultants and the public are invited to comment on this article, other developments concerning the Swinomish decision and rural water supply issues, and potential legislative fixes at: <https://tomswaterblog.wordpress.com/>. Use the reply window following this article on the blog or click on “comment” to post your comments. You can also send me an email to [tompors@comcast.net](mailto:tompors@comcast.net).