

## Potential Legislative and Regulatory Solutions to the Water Availability Train Wreck<sup>1</sup>

### Introduction

Preservation of the quality and quantity of water in natural rivers, streams and lakes is vital to the long-term health of our environment. The physical and legal availability of water is also essential to the economic health of our state and its diverse urban, suburban and rural communities. The lack of availability of water leads inevitably to building permit moratoriums, missed opportunities for industrial and agricultural development, and stripping of virtually all value from land that cannot be used or built upon without an adequate water supply. The public policy question is not whether to protect either the environment or growing communities, it is how to sustainably protect the health of both the environment and communities.

Despite the comparative abundance of manageable surface and groundwater in the State of Washington, it's water supply train has jumped the rails, making water legally unavailable for new uses wherever minimum flows have been established by regulation. The health of suburban and rural communities is being sacrificed to protect minimum instream flows in a manner that is unnecessary, unwise, and unsustainable. This article explains why and suggests both regulatory and legislative changes to accomplish water availability for both people and the environment, as originally intended by the Legislature in the Water Resources Act of 1971.

**Abstract:** *The current regulatory scheme for protection of minimum flows has evolved into an inflexible "legal impairment" standard that is inappropriate for the protection of environmental rights. It 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 status quo has produced excessive procedural burdens and costs, artificial water markets, and legal uncertainties for new and changing water uses in a growing economy. That is not a status quo the State should be proud or protective of. Active resource management, utilizing legal standards matched to the rights they are protecting, would do a better job of allocating and managing water, including for protection of healthy fisheries.*

### 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 the Department of Ecology (Ecology) to adopt rules

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<sup>1</sup> This article was originally presented by the author on July 27, 2015 at LSI's Water Law in Washington seminar. It has been updated to incorporate new case law (*Foster v. Ecology*) and new thinking about regulatory and legislative solutions. *Caveat: the views expressed in this article are the author's alone and not representative of or in pursuit of any particular client's goals.*

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. The real question, however, is whether Ecology appropriately implemented the fundamental policies of protecting and managing water resources for the maximum net benefit or whether it protected flows in a manner that unnecessarily excludes other uses and sound principles of water resource management. If the latter, how can four decades of legally flawed instream flow regulation be fixed? These are the post-*Swinomish* and post-*Foster* questions.

### **How do Washington’s Instream Flow Rules Diverge from State Policy Mandates?**

The problem began decades ago with Ecology’s failure to balance the public’s interest in water for instream and out-of-stream uses when it began adopting minimum instream flow rules in the 1970s. RCW 90.54.020(2) and 90.03.005 require that the State’s waters be allocated according to the “maximum net benefits” for the people of the state, including both instream and out-of-stream beneficial uses of water. Ecology did not comply with this directive before adopting its instream flow rules at Chapters 173-500, et. seq., opting instead to protect instream flows first and allocate remaining waters later according to the maximum net benefit (MNB) directive.<sup>2</sup> This has proven to be a short-sighted blunder, because Supreme Court precedent has essentially resulted in the inability to allocate water for any other uses in basins with adopted minimum flows. One unintended consequence of ignoring the MNB directive is the accidental and unprecedented closure of ground water to further appropriation in basins with minimum instream flow rules (MIFs). Even if Ecology wanted to reallocate water from minimum flows to other uses, the Supreme Court has determined that would be inconsistent with the prior appropriation doctrine and beyond Ecology’s statutory authority.<sup>3</sup> Thus, later turned out to be never.

The problem was compounded by Ecology’s failure to develop and apply unique impairment standards for groundwater applications in basins with minimum flow water rights and streams closed by rule. The need for a new regulatory impairment standard was implied by language in the MIFs relating to future groundwater applications. In the Puyallup basin rule, for example, WAC 173-510-050 provides: *“In future permitting actions relating to groundwater withdrawals, particularly from shallow aquifers, a determination shall be made as to whether the proposed withdrawal will have a direct, and measurable, impact on stream flows in streams for which closures and instream flows have been adopted ... If the determination affirms such*

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<sup>2</sup> See POL-2025, Ecology’s Water Resources Program Policy/Interpretive Statement on When to Perform a Maximum Net Benefits Analysis.

<sup>3</sup> *Swinomish v. Ecology*, 178 Wn.2d 571, 602, 311 P.3d 6 (2013).

*interrelationship, the provisions of WAC 173-510-040 shall apply.*” The intent of this rule provision is to exempt a subset of future groundwater withdrawals (those that do not have a direct and measurable impact on stream flows) from the regulations protecting minimum flow water rights and closed streams. Similar intentions were expressed in many other early instream flow rules, but those exclusions of groundwater from MIF regulation have been largely ignored by Ecology in modern permitting decisions.

Basin-specific standards could have been tailored to meet the purpose of minimum flow regulations in each regulated basin, and could have recognized the unique nature of minimum flow water rights as proxies for environmental values they are intended to protect. (*See discussion below regarding how minimum flow water rights differ from out of stream water rights.*) However, in the early 1990’s Ecology established a hydraulic continuity policy that assumed any connection between a groundwater source and a regulated or closed surface water body was grounds for denial of ground water applications. Ecology subsequently denied over 600 such applications in one massive batch process that was appealed by over 130 applicants. The consolidated appeals resulted in the *Postema* decision, where the Washington Supreme Court held that hydraulic continuity was not enough by itself for Ecology to deny a groundwater application – it would also have to establish factually that the groundwater withdrawal would “impair” the minimum flow or cause diminishment of flow in a closed stream.<sup>4</sup>

In *Postema* the Supreme Court held, “The statutes do not authorize a de minimus impairment of an existing right,” including MIF water rights. 142 Wn.2d at 81. However, the Supreme Court did not define how Ecology should determine that MIF water rights were “impaired.” That would have been an ideal time for Ecology to define “impairment” specific to minimum flows, either on a case by case basis or by interpreting each of its MIF regulations. However, Ecology subsequently treated MIF water rights like any other water right and assumed that any diminishment of an MIF water right, even a single molecule of water, constituted impairment. Its focus shifted instead to mitigation plans and the use of the “overriding considerations of public interest” (OCPI) exception to authorize mitigation that was not 100% in-kind, in-place, and in-time water replacement.

Ecology also adopted regulations using a methodology for setting and protecting MIFs that exceeds the Legislature’s mandates to preserve “base flows” and allocate 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>5</sup> unlike other water rights that cannot exceed the availability of water. These aspirational numerical flows were 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

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<sup>4</sup> *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 93, 11 P.3d 726 (2000).

<sup>5</sup> Ecology, “Introduction to Instream Flows and Instream Flow Rules,” <http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html>

MIF water rights, which by design are not met at the time of their adoption up to 90% of the time.<sup>6</sup> Thus, Ecology adopted aspirational MIFs knowing that actual stream flows were already insufficient to satisfy them, and without allocating water for other future uses in those basins. 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 predictably unmet aspirational flows.<sup>7</sup> Coupled years later with the zero tolerance impairment standard of the *Postema* decision, this resulted in the accidental closure of ground water to protect MIFs without any new public notice or rulemaking, in apparent contradiction to the rulemaking requirement of RCW 90.54.050. There was also no “maximum net benefits” evaluation of this allocation of all available groundwater 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 rules exceed Ecology’s authority to allocate water according to legislative policy declarations in the Water Resources Act, including the maximum net benefits policy, but such reviews are overdue.<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 used the OCPI exception to amend instream flow rules to adopt new reservations of water for future out-of-stream uses. 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, where the Court found that Ecology had no authority to adopt reservations after MIFs were already adopted in a basin.<sup>10</sup> Since the *Swinomish* ruling, Ecology informed local governments in Chelan County 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, Chelan and Clallam Counties,

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<sup>6</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. In other words, 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>

<sup>7</sup> These aspirational flows are frequently misrepresented as a sign of already over-appropriated rivers and streams, but it is overlooked that MIFs that are not consistently met were designed that way from the outset.

<sup>8</sup> For a more in depth discussion of the instream flow rule/ground water closure problem, see Thomas Pors, “How Messed Up is Washington’s Water Allocation System After *Swinomish Indian Tribal Community v. Ecology*?” on the articles page of the author’s website, [www.porslaw.com](http://www.porslaw.com).

<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.

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

and growing communities and rural areas statewide, with few options other than purchasing existing water rights for mitigation, which may not be available.

In *Foster v. Ecology*, the Supreme Court extended its already restrictive interpretation of OCPI and held that Ecology could not use that tool to authorize permanent water uses that would otherwise impair MIF water rights, or to authorize out-of-kind mitigation designed to mitigate for that impairment.<sup>11</sup> Since the *Postema* decision in 2000, Ecology 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 replacement. One consequence of the *Foster* decision is the removal of OCPI as Ecology's tool to work around the problem of having allocated all available water to minimum flows without preserving water supplies for domestic and other new uses. Another consequence is the Court's implied limitation of available mitigation to only water for water replacement, which will ultimately prove impossible to achieve in most permitting situations involving groundwater.

The elimination of exceptions and work-arounds to the MIF rules has pushed the process of allocating water for new uses to extremes that could not have been anticipated by the Legislature in 1971 when it adopted the water allocation 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. This has prompted at least one lawsuit against county government and could lead to constitutional challenges.<sup>12</sup> Without a legislative solution, Ecology and local governments must rely on expensive and incomplete mitigation solutions in order to avoid or end moratoriums, which unfairly penalizes some sectors of society and enriches others. Rural landowners, farmers, and communities without reserves of inchoate water rights are being forced by the continuation of 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 production. 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 from minute impacts of exempt wells is excessive and unsustainable.

Restated, the consequence of protecting aspirational flow numbers as legal rights, instead of treating minimum flows as environmental rights that are proxies for 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?**

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<sup>11</sup> *Sara Foster v. Dep't of Ecology and City of Yelm*, Wash. Supreme Court Case No. 90386-7, Slip Opinion dated October 8, 2015. See also, Tom Pors, "Supreme Court Bruises Department of Ecology in Foster Opinion," <http://www.porslaw.com/category/articles/> (Dec. 7, 2015).

<sup>12</sup> See, e.g., *Fox v. Skagit County*, appeal pending, Court of Appeals No. 733150-I.

Department of Ecology officials and stakeholders have been meeting publicly for the last two years 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. New ideas need to be explored and vetted to move beyond common misconceptions and a dysfunctional status quo. Resistance to changing the status quo, however, is significant. It ranges from the perceived 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, anti-growth objectives of some MIF proponents, and simple fear of change. In the author's opinion, the resistance to alter the status quo is primarily based on misconceptions about the history and purpose of MIFs, failure to recognize the consequences of a broken water allocation system, and lack of open-minded stakeholder discussion about alternative standards that could yield positive consequences for both instream values and water supply for other uses.

One broad misconception is that the status quo is the best way to protect or enhance the instream values for which MIFs were adopted. Without the ability to consider environmental mitigation, however, Ecology is not allowed to evaluate a proposal's ability to manage water or provide mitigation in a way that offsets impacts to or improves 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.

Second, the effect of aspirational MIF rules and the inflexible legal impairment standard 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 "legal unavailability of water" issues seen recently in Skagit, Kittitas, Whatcom, and Clallam Counties. Denying building permits due to legal unavailability of water in areas of water abundance like the Skagit Valley increases the likelihood of legal challenges to the MIF rules themselves, all of which creates uncertainty about the future effectiveness of existing MIF rules to accomplish their purpose. The status quo may be great for lawyers, but it hinders effective water management solutions.

Third, the status quo imposes the costs of protecting MIFs on suburban communities and rural property owners, including the agricultural community and businesses and trades based on agricultural services, home construction and sales. While 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, it is unethical to transfer the cost of closing the resource to those who lack access to it. Access to water is widely considered to be a fundamental human right. 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 that deny reasonable access to water. 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). Ecology is stymied in its ability to approve applications for new water uses that could be conditioned to enhance the quality of river and streams through environmental mitigation. Thus the status quo is not helping Ecology accomplish the mandate to enhance the quality of instream resources.

To summarize, the misconception that the status quo is necessary to protect instream values is leading toward more litigation against the State, over-use 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 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.

Before describing the potential legislative and regulatory solutions, it is necessary to describe how MIF water rights differ from out-of-stream water rights, including how and why they merit a unique impairment standard in order to fulfill the policy mandates of the Water Resources Act.

## **How are Instream Flow Water Rights Different than Out-of-Stream Water Rights?**

The root concept behind instream flow protection is that the public benefits from protecting instream values, not that the streams are legal persons holding inherent rights entitled to the courts' protection. Contrary to the Supreme Court's assumption in *Postema*, *Swinomish*, and *Foster*, MIFs are different by their nature than out-of-stream water 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>13</sup>

Unlike other water rights, minimum flows do not derive their value from the diversion of water from a stream for a use that has economic value to its owner. The value of minimum flow water rights is the environmental value provided to the public by being left in the stream. It is therefore paradoxical that Ecology and the Supreme Court would reject an environmental injury/mitigation test for minimum flows in favor of a legal injury test, especially where the existence of any legal right or "legal injury" to minimum flow water rights is only hypothetical. It is also absurd to protect "legal rights" to an aspirational "minimum flow" that nature itself does

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<sup>13</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. The *OWL v. KGH* decision is of questionable value as precedent after *Foster*, but in the author's opinion the PCHB was on the right track by determining that Ecology had authority to approve out-of-kind mitigation and opening the door to a unique impairment standard for protection of MIFs.

not supply much or most of the time. There is no constitutionally protectable legal right to a flow level that exists only 10% of the time.

Another significant difference is that out-of-stream water rights require findings under the 4-part test of RCW 90.03.290, including 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 were consistent with the public interest, i.e., with the maximum net benefits for the people of the state. MIFs were therefore established in a manner very different from out-of-stream water rights under the Water Code.<sup>14</sup>

The Legislature implicitly recognized a distinction between MIFs and out-of-stream water rights in 1997 when it mandated an end to the moratorium on issuing new water rights from the Columbia River.<sup>15</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>16</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. This would not be possible under the prior appropriation doctrine if MIFs were identical to out-of-stream water rights.

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

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

Once before the PCHB opened the door to the evaluation of MIFs and stream closures differently than impairment of out-of-stream water rights. 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 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

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<sup>14</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>15</sup> Washington State Laws of 1997, ch. 439 (ESHB 1110).

<sup>16</sup> Chapters 173-531A and 173-563 WAC.

with the finding in *Postema*, the terms “verified” and “clearly” as used in this rule mean ascertainable through best available science.”<sup>17</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 new regulatory impairment standard through interpretation of MIF rules, or as a legislatively-adopted impairment standard for MIF water rights and closed streams. This values-based approach begins with the recognition that MIFs are different than out-of-stream water rights, therefore to serve the public interest the evaluation of impacts and mitigation needs to match the environmental 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. 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 prior appropriation and an inflexible legal impairment standard. The use of wetland classification systems, setbacks, buffers, and monitoring programs are examples of the ability to identify differing values and degrees of impact and mitigation, as well as margins of safety and predictability.

The values-based impact/mitigation approach can lead to better results for instream values without closing entire basins to new water rights and exempt water uses, as happened in the Skagit and Dungeness watersheds. For example, enhancing streamside habitat to improve temperature, shading and holding areas for migrating salmon may accomplish better protection of instream values than insisting on bucket for bucket in-kind, in-place, in-kind water replacement as with the current standards. It 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.

Ecology has the authority to create these standards through interpretation of many of its own MIF rules, but not without potential opposition from environmental groups and litigation in favor of the status quo. The Legislature could solve that problem by clarifying the nature of

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<sup>17</sup> *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006) (emphasis added).

MIFs as environmental rights and creating statutory authority for Ecology to authorize alternative standards for determining impairment and mitigation of instream values.

It is helpful in this context to remember that MIFs are proxies for instream values, including aesthetics, recreation, water quality, and fish habitat. An effect on the proxy, especially a small one, does not necessarily equate to an effect on the values protected by the proxy. In reality, 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 and MIFs will continue to function primarily as a means of preventing development.

A statutory values-based impairment and 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 alternative consultation process in the 1998 amendments to the Columbia Basin MIF rules at Chapters 173-531A and 174-563 WAC.

It is not an easy task to change or bypass existing impairment/mitigation standards without affecting the fundamentals of water resource policy. The goal is to find suitable standards and practices, preferably 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 a good place to start this process, which would involve stakeholders from across the spectrum of water users.

## **2. Mitigation Flexibility.**

The Legislature could also focus on authorizing additional means of mitigating or avoiding 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. Consideration of Full Hydrologic Cycle.**

Another alternative solution is a requirement that Ecology consider the full hydrologic cycle for new uses of water, both water right applications and exempt groundwater uses. This could increase the potential for new development without changing existing impairment standards.

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, 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 of groundwater, from the regulatory effect of minimum instream flows and stream closures.<sup>18</sup>

#### **4. OCPI**

The use of the “overriding considerations of the public interest” exception has been criticized and litigated because it has assumed the position of the primary safety valve for Ecology from the accidental closure of groundwater and the otherwise unworkable instream flow impairment standard. The Supreme Court appears to have nailed the OCPI coffin lid shut with the *Foster* decision, but motions for reconsideration were still pending in that case as of the publication date of this paper.

The Supreme Court’s primary objection to the use of OCPI for granting reservations and new water rights is their view that it is inconsistent with the prior appropriation doctrine. This view is itself based on the belief that instream flow water rights are the same as out-of-stream water rights. If the Legislature clarifies the nature of MIF water rights as environmental rights and directs Ecology to consider appropriate environmental mitigation measures, there may still be a limited role for OCPI in the permitting and rule development processes. Legislative preservation of OCPI findings in existing instream flow rules after *Swinomish* would also 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.<sup>19</sup>

OCPI is not a complete solution to the current conflicts, however, and should not be relied upon as the most practical alternative. The Supreme Court’s interpretation of the exception as extremely limited and available only in extraordinary circumstances, which does not include water for municipal growth in the Court’s view, and its recent interpretation in *Foster* that OCPI only applies to temporary withdrawals, severely limits its usefulness.

### **The Effect of Values-Based Standards on Treaty Rights**

Any effort to reform instream flow protection and water rights permitting law must take into account the treaty rights of Washington’s Native American tribes, including their senior

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<sup>18</sup> Exceptions may be needed in the Yakima Basin in order to protect adjudicated senior water rights, which could also be impaired by new groundwater uses.

<sup>19</sup> SB 5491 passed both houses of the 2015 Legislature in different versions, and will be reintroduced for the 2016 Session.

instream flow water rights associated with treaty fishing rights. How would a new values-based impairment standard and set of mitigation tools affect the treaty rights and associated instream flow water rights of Native American tribes? First, it must be understood that minimum flows adopted by regulation are not proxies for treaty water rights – they serve different purposes and are junior to most other water rights in the same watersheds – although they do function to prevent further appropriation of water. Second, the Tribes’ implied instream flow water rights are not adjudicated as to quantity except in the Yakima Basin, and relate to the health of native fisheries in their “usual and accustomed places” rather than to historic flow rates. Thus, these senior unadjudicated water rights have at least as much correlation to fish habitat and water quality/temperature as they do to flow. Both flow and habitat are essential to fish, but there is no magic flow number that guarantees the Tribes’ treaty rights. With or without a change to a values-based impairment standard for state-established MIF water rights, the Tribes’ treaty water rights will be unaffected and remain the most senior rights in each basin.

In consultations with treaty tribes concerning pending water right applications, the author has learned that the creation or enhancement of fish habitat is often preferred by tribes to the exhaustive and expensive process of groundwater 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 precedent in 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 was not contested by the Columbia River tribes as an alternative to replacing flow. A functions and values approach to mitigation of impacts to instream flows could also 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.

## **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. The status quo, however, already violates state water resource policy and has painted Ecology’s water rights permitting program into a corner where few options remain to appropriate water for any purpose other than instream flow protection. There is precedent for the use of an environmental values-based approach to protecting instream flows from the effects of new water rights and exempt water uses. Preserving the status quo, on the other hand, will perpetuate and worsen the following consequences of the current MIF regulations and “legal impairment standard,” which:

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

2. Overspends scarce state and local financial and personnel resources on marginal impacts from permit-exempt wells for domestic uses, which should be refocused 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 of instream values.

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Thomas 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)