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Potential Legislative and Regulatory Solutions to the Water Availability Train Wreck[i]

Executive Summary

Recent Supreme Court decisions relating to minimum instream flow rules have resulted in the lack of "legal availability" of water in multiple basins and paralysis in the Department of Ecology's water rights permitting program. The problem began decades ago with the improper creation and administration of instream flow rules. Building permit moratoriums have resulted and will spread throughout the state of Washington if not fixed. Water issues have also become polarized into a fish/environment vs. people/communities contest, which makes it extremely difficult to alter the status quo into a workable permitting system. 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. The Department of Ecology has failed to meet this challenge and it is time the Legislature stepped in.

More specifically, the current regulatory scheme for protection of minimum flows has the unintended consequence of closing watersheds to new uses through an inflexible "legal impairment" standard that is inappropriate for the protection of environmental rights. It restricts access to water in violation of state legislative policy, results in excessive procedural burdens and costs, and prevents the allocation of water to new and changing uses in a growing economy, even where environmental impacts can be mitigated. Legislative and regulatory modifications can adapt this regulatory scheme into a workable program that protects streams without sacrificing growing communities and rural land development. Failure to fix the problem will result in more litigation against the State and uncertainty that stymies growth and hurts rural communities.

Instream Flows Are Different from Other Water Rights

The root concept behind instream flow protection is that the public benefits from preserving instream values, not that the streams are legal persons holding inherent rights entitled to the courts' protection. Minimum flow water rights are proxies for the environmental values they are adopted to protect. Contrary to the Supreme Court's assumption in the *Postema, Swinomish*, and *Foster* cases, minimum flows are very different by nature than out-of-stream water rights. Instead of deriving their value from the diversion of water for a use that has economic value to its owner, they provide environmental values to the public by being left in the stream. Minimum flows are environmental rights not legal rights. It is therefore paradoxical that Ecology and the Supreme Court would reject an environmental injury/mitigation test for impacts to minimum flows in favor of an overly restrictive and impossible to achieve "legal injury test" that rejects environmental mitigation such as habitat restoration. The existence of a "legal injury" to minimum flow water rights is a fiction created by the Court's misinterpretation

of the Legislature's intention and direction to preserve instream values while balancing the allocation of water for both instream and out-of-stream uses.

Out-of-stream water rights also require findings before they are created under the 4-part test of RCW 90.03.290, including determinations that water is available and the appropriation would serve the public interest. Minimum flows, on the other hand, were created by rule without the 4-part test and without evaluating the maximum net benefits for the people. If minimum flow appropriations are not limited to available waters and fail to evaluate the public interest, they should not be used to prevent the appropriation of water for other uses.

What Caused This Train Wreck?

Ignoring the Legislature's mandate in the Water Resources Act (chapter 90.54 RCW) to allocate the public's water for the "maximum net benefit of the people," Ecology chose to protect instream flows first and deal with the question of water for other uses later. This has proven to be a short-sighted blunder, because Supreme Court precedent has resulted in the inability to allocate water for any other uses in basins with adopted minimum flows. **It resulted in the accidental and unprecedented closure of ground water to further appropriation without public notice or any balancing of public interests**.

Ecology's later efforts to fix its mistake by determining the public interest after adopting minimum flows relied upon the "overriding considerations of public interest" (OCPI) exception, but was a failed policy. The Supreme Court determined that Ecology's use of OCPI to reallocate water already allocated to minimum flows was inconsistent with the prior appropriation doctrine and beyond Ecology's statutory authority. The lesson is that once a minimum flow rule is adopted, it is too late to balance the public's need for water between instream and out-of-stream uses. Ecology's unintentional closure of groundwater for other uses without public notice is a travesty of regulatory negligence.

The problem was compounded by Ecology's failure to develop and apply unique impairment standards for new groundwater applications in basins with minimum flows and streams closed by rule. Basin-specific standards should have been tailored to protect instream functions and values. Instead, Ecology assumed that any diminishment of a minimum flow water right, even a single molecule of water, constituted impairment and was grounds for denial of a water right. Despite efforts by the Legislature and the PCHB to recognize that minimum flows are environmental rights that can be mitigated with environmental mitigation,[ii] Ecology and the Supreme Court have failed to recognize and accept this rational strategy for managing and protecting minimum flows, to the exclusion of other potential uses of water.

Restated, the consequence of protecting optimal flows as legal rights instead of treating available minimum flows as environmental rights, is an inflexible and unsustainable 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.

Who is Affected?

When the 2006 amended Skagit Basin Rule was overturned by the Supreme Court in the *Swinomish* case in 2013, hundreds of rural property owners with exempt wells developed after 2001 suddenly lacked a legal water supply and could no longer qualify for a loan or building permit or sell their properties. Skagit County had to devalue hundreds more properties by up to 90% because of the lack of legal water. After the *Swinomish* ruling, Ecology informed local governments in Chelan County that a similar set of reservations in the Wenatchee Basin Rule 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. Rural property owners in Whatcom County face similar uncertainty regarding the availability of water and parts of Clallam, Walla Walla and Kittitas Counties are effectively in building permit moratoriums unless mitigation banks can sell mitigation rights to property owners, which are not universally available. All other watersheds with minimum flow rules will face similar issues if the Supreme Court rules against Ecology and Whatcom County in the *Hirst* case, which was argued in October 2015.

Growing cities, water districts, and PUDs are also impacted if they need more water to supply their communities' needs. In *Foster v. Ecology*, the Supreme Court rejected a new water right issued to the City of Yelm on the basis that some of the mitigation provided was for habitat protection and conservation rather than water for water replacement of winter season effects on numerical minimum flows. If Yelm could not get additional water rights to serve the public with its "gold-plated" regional mitigation plan, it will not be possible for water systems in other basins to get additional water rights until this problem is fixed.

What are the Potential Solutions?

1. <u>Values-Based Impairment and Mitigation Standards for Instream Flows</u>.

If minimum flows and stream closures are treated like environmental rights rather than legal rights, then appropriate environmental impact/mitigation standards can both protect instream values and reopen watersheds to properly mitigated water rights. An environmental values-based approach begins with the recognition that minimum flows 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 can be developed for protecting instream flows by identifying and protecting instream qualities and values from degradation while opening the door to enhancing those values as new water rights are considered. This approach works in the wetlands context because wetland functions and values aren't protected by proxy water rights 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.

A 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. 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-time water replacement as with the current standards. 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 markets to fund mitigation banks. The mitigation banking approach is flawed after the *Foster* decision, eliminates beneficial uses of water for agriculture, and encourages speculation in water instead of restoring watershed functions.

Ecology has the authority to create these standards through interpretation of many of its own rules, but not without potential opposition and litigation from environmental groups or tribes. The Legislature could solve that problem by clarifying the nature of minimum flows as environmental rights and creating statutory authority for Ecology to authorize alternative standards for determining impairment and mitigation. The Legislature could also 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 WRIAs may be a good place to start this process, which would involve stakeholders from across the spectrum of water users.

2. <u>Mitigation Flexibility</u>.

The Legislature could also focus on authorizing additional means of mitigating or avoiding impacts to minimum flows. 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 minimum flows and senior water rights. These statutes could be expanded to provide for more flexible mitigation of smaller withdrawals and flexibility in the time and place of in-kind mitigation in order to avoid moratoriums in rural areas and to make the approval of new mitigated water right applications possible.

3. <u>Consideration of Full Hydrologic Cycle</u>.

The current impairment standards are overly precautious 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. 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.

4. <u>OCPI</u>

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 failure to allocate water for other uses. 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.

There may still be a limited role for OCPI in the permitting and rule development processes if the Legislature clarifies the nature of minimum flow water rights as environmental rights and directs Ecology to consider appropriate environmental mitigation measures. New municipal appropriations to meet the demands of growing populations should also qualify for OCPI, instead of being rejected by the Supreme Court's narrow "extraordinary circumstances" interpretation of the exemption. Legislative preservation of OCPI findings in existing instream flow rules such as the Wenatchee 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.

Conclusion

It is an enormous challenge to change an instream flow 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. The use of an environmental values-based approach to protecting instream flows from the effects of new water rights and exempt water uses would accomplish the dual objectives of preserving instream resources and allowing new water uses consistent with the public interest.

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[i] This is a summary of the article published on January 6, 2016, which is available to download at http://www.porslaw.com/wp-content/uploads/2016/01/Potential-Solutions-PORS.pdf. *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.*

[ii] See *Okanogan Wilderness League v. Ecology and Kennewick General Hospital*, PCHB No 13-146, July 31, 2104 Order on Motions for Summary Judgment at footnote 9, p. 23; and the 1998 amendments to the Columbia Basin instream flow rules at Chapters 173-531A and 174-563 WAC.