

The Place for Ethics in the Resolution of *Hirst* and Other Water Conflicts in Washington State

by Thomas M. Pors

This year's legislative efforts to restore groundwater availability after the Washington Supreme Court's decision in *Whatcom County v. Hirst* resulted in a partisan deadlock that also side-lined the state's \$4 billion capital budget. Economic impacts of the deadlock are now estimated to run to \$11 billion and cause a \$37 billion decrease in the value of undeveloped land,¹ which will dramatically shift property tax burdens to urban areas. Legislative compromise efforts stalled pending the November special election and are now unlikely to resolve these issues without a new set of tools and ideas to bring disparate viewpoints and objectives together.

This paper explains how natural resource conflict problems such as the *Hirst* and *Foster* decisions can be resolved using recognized ethical principles and shared community values. The ability to resolve a conflict ethically implies that to not resolve the conflict violates these same ethical principles. This is not just a challenge to state lawmakers and the stakeholders who lobby them, it is a comment on the current state of polarizing politics in our nation and state. In both the creation of this state's water resource conflicts and in the process of avoiding workable compromises, we have sacrificed community moral values and ignored ethical principles. The author contends that in order to change course for the public good, we need to increase our collective awareness of the connection between water availability conflicts and these recognized ethical values.

An effort is made in this article to explain the relevance of ethical principles to current water availability conflicts without promoting any particular solution, because solutions should be developed by the processes employing these principles. A synopsis of the *Hirst* and *Foster* decisions that most impact water availability in Washington is provided at the end of this paper.

What are the Ethical Principles that Inform Natural Resource Conflicts?

Different ways of conceptualizing what water is and how human beings should use it have different ethical implications. Viewing water as a component of an ecosystem commons implicates principles of sufficiency/equity and proportionality, as explained below. Treating water as a commodity to be bought and sold, or as property to be controlled unilaterally, implicates human rights and social and environmental justice. For instance, the prior appropriation doctrine establishes property rights in water, including instream flow water rights, which can conflict with the basic human right to access drinking water.² In 2010, the human right to water was officially recognized by both the UN's General Assembly³ and the Human Rights Council.⁴

Ethicist James Martin-Schramm presented four key ethical values as relevant to the resolution of water conflicts at a 2004 seminar sponsored by Seattle University School of Theology and the Center for Water

¹ "Economic Impact Research of Exempt Wells," HR2 Research and Analytics and BIAW (Sept. 7, 2017).

² The state's integration of instream flow protection into the Water Code and the prior appropriation doctrine utilize an ownership-based policy of exclusion, treating water as a commodity rather than a resource.

³ General Assembly Resolution 64/292 of July 28, 2010; cited in Neelke Doorn, "Water and Justice: Towards an Ethics of Water Governance," Public Reason 5 (1): 97-114 (2013).

⁴ Human Rights Council Resolution 15/9 of September 30, 2010.

and Ethics: *sustainability, sufficiency, participation, and solidarity*.⁵ The identification and exploration of these principles was based on decades of work by theologians and ethicists dealing with environmental health and social justice issues.⁶ The object of an ethical negotiation or compromise relating to water allocation is to incorporate these values in a meaningful discussion with the appropriate stakeholder interests.

Why Employ Ethical Principles in Water Allocation Conflict Resolution?

Ethics is concerned with what human beings ought or ought not to do. Water resource conflicts have been identified as a “metaphysical blindspot in ethics,” which is remarkable given that water is vital to all human endeavors and their effect on nature.⁷ As evidenced by the 2017 Legislature’s failure to adopt a *Hirst* fix or a capital budget through three extra sessions, water management is contentious and not easily accomplished in a top-down process.

Why has the legislative process in Washington State failed thus far to resolve water availability issues? Stakeholder positions in a top down process are typically one-sided and issues are presented to legislators as existential crises, while competing users’ positions are presented as threats rather than community concerns that deserve equal attention. Groundwater management and the effects of small withdrawals on stream flow are also complex technically and subject to oversimplification and outright misrepresentation by non-technical advocacy groups. Most legislators are not well educated on the technical side of water resources and with so many competing legislative objectives, they tend to default to favored constituent or caucus leadership positions rather than debate competing ideas or engage in conflict resolution with affected parties.

Centralized management of groundwater resources in the Washington State Department of Ecology (Ecology) has failed to anticipate and avoid the prevailing judicial interpretations regarding water resource allocation and protection, including Ecology’s losing positions in the *Foster* and *Hirst* cases. (See Background section, below). Many or most of Ecology’s instream flow rules failed to anticipate the conflict between surface water protection and groundwater availability, yet Ecology has failed thus far to recognize that its rules are outdated and need substantial revision in light of new science and subsequent court decisions. Finally, Ecology has failed to draft or introduce any comprehensive solutions, despite facilitating a two-year stakeholder process to find specific solutions to rural water availability issues.⁸ Stakeholder views were solicited by Ecology, but efforts were not made to engage stakeholders in dispute resolution or recognition of shared community values.

The failure of state agencies and the Legislature to resolve water resource conflicts raises the question whether it may be appropriate to place the management of water in the hands of those who have a stake in it. “Groundwater management should be in the hands of the stakeholders of the aquifer, under

⁵ James Martin Schramm, “Toward and Ethic of EcoJustice,” from Moral Issues and Christian Responses, at pp. 259-63, by Patricia Beattie Jung and L. Shannon Jung, 8th ed. (2013).

⁶ Dieter T. Hessel, “Religion and Ethics Focused on Sustainability,” *Environmental Law Reporter*, 39 ELR 10291 at 92 (April 2009).

⁷ Jeremy J. Schmidt and Christiana Z. Peppard, “Water Ethics on a Human-Dominated Planet: Rationality, Context and Values in Global Governance,” *WIREs Water* 2014. doi: 10.1002/wat2.1043.

⁸ “Finding Rural Domestic Water Solutions While Protecting Instream Resources,” Dept. of Ecology Publication 15-11-007 (August 2016). <https://fortress.wa.gov/ecy/publications/documents/1511007.pdf>

the supervision of the corresponding water authority. The stakeholders' participation has to be promoted bottom-up and not top-down."⁹

How to Develop Solutions Employing Ethical Principles?

As described elsewhere in this article, an ethical approach to resolving the state's water resource conflicts involves initiating a process with stakeholder representatives and other decision-makers rather than relying on tried and failed top-down legislative or centralized management processes. The process used and persons invited to participate should also be guided by the same ethical values, which can be described as moral norms because they conform to our collective sense of a just society. This includes procedural and decision-making process values, such as democratic governance rights, active participation, transparency, accountability, and public-private collaboration and partnership. These values can provide answers to such questions as: Who participates in the decision-making process? How is a balance determined between the needs of human development and the need to preserve our natural resources? This process could be used to resolve specific issues, such as legislatively adopted mitigation standards for groundwater applications affecting instream flows, for future water allocations on a watershed basis, or for individual conflicts.

Ethical Principles Applied to Water Allocation Problems

Sustainability. This value expresses concern for future generations and the planet, emphasizing that an adequate and acceptable quality of life today must not jeopardize prospects for future generations. Sustainability precludes short-sited emphasis on economic growth that harms ecological systems, but also excludes long-term conservation efforts that ignore human needs and costs.¹⁰ The balance between conservation and human access is different for each watershed and evolves over time, because watersheds have unique fisheries and recreational assets and communities within watersheds have unique population densities and settlement/development histories. This rules out a one-sized fits all approach to sustainable water usage and conservation and suggests a greater need for flexibility and local involvement.¹¹

Sufficiency. This value emphasizes that all forms of life (including people and fish) are entitled to those resources required to meet their basic needs, which is particularly relevant to such basic needs as clean air and access to drinking water. It repudiates wasteful consumption and encourages fairness and generosity.¹² Related to this is equal respect for human dignity, a fundamental principle of public health ethics.¹³

Related to the values of sustainability and sufficiency is the principle of equity and proportionality. Meeting the needs of all persons and the environment is important, but equity and proportionate response require, in the face of limited resources, to give priority to the least well off, those most immediately at risk, and those made vulnerable by past discrimination, exclusion, and powerlessness. This principle calls for protecting streams from over-appropriation, but also protecting ground water availability in rural areas and growing suburban communities where the most affordable housing

⁹ Llamas, Ramon. *Water and Ethics: Use of Groundwater*. France: UNESCO, 2004, p. 24.

¹⁰ Schramm, *ibid*, at 260-61.

¹¹ Llamas, et al, *ibid*, at 17-18.

¹² *Id.*

¹³ Bruce Jennings, "Principles of Water Ethics," from: *Minding Nature*: August 2009, Volume 2, Number 2.

alternatives are located. It seeks to prevent the inequities of so-called “have” and “have-not” communities. For instance, forcing individual property owners to pay for mitigation of impacts caused by prior users of surface and groundwater is neither equitable nor proportional to the impacts caused by each new permit-exempt groundwater use.

From a financial and public health perspective, closing the safest and most affordable water supply alternative for rural development appears to be disproportionate and inequitable, especially if there are regional solutions available to mitigate for incremental cumulative effects on instream functions and values. There is also a disproportionate administrative impact to counties and state agencies administering water allocation and mitigation processes for the smallest water systems with the smallest impacts on water resources. State funding and coordination of regional mitigation efforts for cumulative impacts from the smallest users would be far more financially efficient and fair than requiring each landowner to conduct an individual water availability analysis and mitigation plan to be reviewed by county officials and potentially appealed to the courts. It would also result in better stewardship of our water and salmon resources.¹⁴

Participation. The ecojustice norm of participation addresses the values inherent in the process of policymaking and decision making. Legislatures and courts may be influenced by powerful, well-organized, and well-funded groups on all sides of the political spectrum. For instance, there has been a rapid rise over the last decade of political contributions from federally-recognized Indian tribes, which in Washington State has been heavily tilted to the Democratic Party.¹⁵ The most significant water right appeals in Washington state over the last decade have been funded by tribes and environmental organizations, not by consumptive water users or public water systems.¹⁶ A dominant influence over government by any particular interest group is not well suited to the equitable distribution of water or any public resource. From an ethical point of view, governance mechanisms should involve a deliberative and participatory process marked by transparency, universal access to information, inclusiveness, and individual and community empowerment so that all may take advantage of the open information and the participatory opportunities.¹⁷ Participation implies equality of access to decision-making processes, and is not inconsistent with balancing the needs of human development with the need to preserve our natural resources and maintain a healthy ecosystem.

The water rights that most limit legal availability of water in Washington State are minimum instream flow water rights, which are established and managed by Ecology for the purpose of preserving environmental values such as water quality, fish habitat, recreation and aesthetics. Unfortunately, the rule-making processes for most of these instream flow rules did not allocate water for future human domestic needs despite statutory policy that water be allocated according to the maximum net benefits to the public. RCW 90.54.020(2), 90.03.005. These instream flow rules have not been updated despite new information linking groundwater and surface water and new court decisions affecting the availability of groundwater. The Washington Supreme Court has interpreted instream protection rules

¹⁴ Chris Pitre and Sharon Haensly, “Water for rural development: tapping the Hirst ruling,” Daily Journal of Commerce, Sept. 28, 2017.

¹⁵ See, e.g., Erik Smith, “Tribes Dumping Big Money into Legislative Campaigns,” Wash. State Wire, Sept. 5, 2012.

¹⁶ Recent appeals by tribes and environmental organizations challenged Ecology’s authority to allocate water for out of stream uses when it conflicts with instream flow protection, which resulted in the *Swinomish*, *Foster* and *Hirst* decisions. These decisions protect instream flows but also impact water availability for people in rural and under-served urban areas of the state.

¹⁷ Jennings, *ibid*.

as excluding other uses of water, thus denying human access to water despite the failure to balance the public interests between water for instream and out of stream needs. Thus, the state's groundwater has essentially been closed to new uses in order to protect instream flows without any public notice or robust balancing of public interests between environmental and human water needs. This process excluded public participation in the closure of groundwater that is relied upon by rural property owners and growing communities. Some open and public balancing of interests in groundwater should have happened, but did not.

Solidarity. This moral norm emphasizes kinship and mutual interdependence, encourages assistance for those who suffer, discourages discrimination and oppression, and embodies a fundamental communal nature of life in contrast to individual rights and the pursuit of accumulation. The notion of solidarity and interdependence applies in both social and ecological contexts, between human communities and nature. In water ethics, solidarity reminds us of what may be called our "upstream and downstream interdependence."¹⁸

Treating water rights as private property implicates the conflict between self-interest and the social/ecological common good. There are situations in which the pursuit of rational self-interest leads to outcomes that are irrational and harmful to the interests of other individuals and communities, the so-called tragedy of the commons. In other words, the human interests served by sustainable and sufficient water supply and by biodiversity and maintenance of a healthy environment are often not well served by encouraging individual behaviors that seek to maximize their self-interest. Treating water as a commodity under the prior appropriation doctrine, and creating incentives to preserve private water rights for future markets may be inconsistent with several of the ethical principles described above. Understanding that water is a common resource and a fundamental need, and that sustainable water utilization is a common good, can provide the basis for ethically appropriate solutions to current and future water availability issues.

Conclusion

The ethical principles of sustainability, sufficiency, participation, and solidarity are a useful guide for both governmental and individual behavior in the resolution of water resource conflicts. The Washington legislature and governor, and the stakeholders/lobbyists who advise them, should consider these principles in the development of a participatory stakeholder process for resolving the most vexing groundwater availability issues in the state, rather than continuing to defend the self-interests of one stakeholder group or set of values in preference to others. Each ethical value or moral norm described in this article is as valid and worthy of protection as the others, and we all have an ethical responsibility to the larger communities we live and work in to join others and consider their needs in the process of resolving water availability disputes. That includes providing communities access to water based on achievable mitigation and public interest decision-making. It also means preventing cumulative impacts to rivers and streams without effective and adequate mitigation.

The state already possesses workable water policy fundamentals in the Water Resources Act of 1971 (chapter 90.54 RCW) for the allocation of water, but has strayed from them over the last several decades to maintain consistency with a preference for instream protection before allocating water to people and communities. As a result of the state's single-minded effort to protect instream flows, it has fallen into the trap of closing the state's ground waters to the public, at enormous cost to people and

¹⁸ Jennings, *ibid*.

water-short communities, without adequate public interest evaluation and with little hope of a solution.¹⁹ That missing public interest balance should be the focus of legislative and gubernatorial efforts to solve the water allocation problem, using stakeholders who agree to employ ethical principles to guide the decision-making process.

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¹⁹ It is ironic that progressive-leaning environmentalist politics have become most closely identified with this commodity driven view of "legal water availability" and that conservative-leaning rural property rights advocates have become most closely identified with the resource view of protecting human rights to access affordable water supplies.

Background on *Hirst* and *Foster* and the Lack of Water Availability in Washington

Hirst. The *Hirst* decision affects water availability in rural areas by requiring counties to protect surface waters and to independently determine whether groundwater from permit-exempt wells is “legally available” before issuing building permits or subdivision approvals under the Growth Management Act (GMA).²⁰ The Court previously determined that there is no “de minimus” impairment of minimum instream flow water rights, and that “any impact” whatever to closed streams is grounds for denial of groundwater permit applications. Because a water right application is not required for permit-exempt uses of groundwater, county decisions on building permits did not previously consider legal water availability or impairment from permit-exempt wells, and counties relied on Ecology’s advice whether such wells were regulated or not by Ecology’s instream flow rules. In *Hirst*, Ecology advised Whatcom County and then the courts that permit exempt wells were not regulated by the Nooksack basin instream flow rule. However, over 1600 exempt wells in the basin undoubtedly had a cumulative impact on instream flows of the Nooksack River and tributaries, which would be worsened by another 600 or more pending applications for new exempt wells. This proliferation of unregulated and unmitigated wells prompted a challenge by environmental organizations to Whatcom County under GMA.

The Growth Management Hearings Board determined that Whatcom County’s GMA Plan and development regulations failed to protect groundwater and minimum instream flows. The Board decision was upheld by the Supreme Court, despite Ecology’s interpretation that the Nooksack Rule did not regulate exempt wells. While the Court’s ruling applies only to Whatcom County, its interpretation of GMA is assumed to apply to other counties as well. The Yakama Tribe has already sued Okanogan County claiming that *Hirst* requires the county to protect instream flows in the Okanogan and Methow River basins from impairment by permit-exempt wells.

Since *Hirst*, some counties have adopted building permit moratoriums for new groundwater-based uses, and others are requiring permit applicants to prove that groundwater is legally available or will not “impair” regulatory minimum flows and closed streams. This could add over \$10,000 to the cost of building a home yet still result in appeals and legal uncertainty for both property owners and counties.

Some banks have announced they will no longer issue mortgages in rural areas for properties with wells drilled after the *Hirst* decision. The problem with legal availability, however, logically extends to all properties with wells drilled after the adoption of minimum flow rules, beginning in the 1970s, because the Court’s interpretation is that permit-exempt water supplies are interruptible if junior in priority date to a minimum instream flow, and thus not suitable for domestic water supply. This is significant, because if the Legislature does not clarify the nature of permit-exempt and instream flow water rights and resolve this interruptibility question, new cases could arise that would impact permitting for home expansion or replacement and interrupt financing or refinancing for hundreds of thousands of homes state-wide.

Foster. For urban and suburban areas with inadequate water for future growth, and for rural areas seeking approval of new mitigation banks to deal with *Hirst* issues, an equally problematic Supreme Court decision is *Foster v. Dept. of Ecology and City of Yelm*.²¹ In *Foster*, the Court reversed a water right approved by Ecology for the City of Yelm, despite an extensive regional mitigation plan designed to offset impacts from a new municipal well on instream flows in the Deschutes and Nisqually Basins. The Court found that Ecology had no statutory authority to allow out-of-kind mitigation for “legal impacts” to instream flow water rights and interpreted the “overriding considerations of public interest” (OCPI)

²⁰ *Whatcom County v. W. Wash. Growth Mgmt. Hr’gs Bd.* (“*Hirst*”), 186 Wn.2d 648 (2016).

²¹ *Foster v. Dept. of Ecology*, 184 Wn.2d 465 (2015).

statute as applying only to temporary water uses. It is rare that year-round water for water mitigation is available to offset the impact of any groundwater use on regulated surface waters. As a result, the issuance of new municipal water rights and water rights changes, including the creation of mitigation banks to allow permit-exempt wells in rural areas, often depends on finding the unfindable: year-round water rights available to purchase for mitigation in all areas of a basin that are potentially impacted by a groundwater withdrawal. Expensive storage and engineered aquifer recharge options may be needed to offset small flow impacts that may not impede the environmental functions of regulated streams, instead of allowing habitat or aquatic function mitigation for impacts to habitat and other aquatic functions. These legal and financial uncertainties have caused communities like Sumner and Spanaway in Pierce County to suspend or abandon plans for new wells needed to provide safe and adequate water to the populations they serve. It also dramatically increases the costs for public water systems to upgrade aging water sources in order to provide safe and secure water to the public.