

ESSB 6091 – PART 3: THE POTENTIAL FOR MITIGATION FLEXIBILITY IN WATER RIGHTS PERMITTING AFTER *FOSTER v. YELM*

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Introduction

On October 8, 2005, the Washington Supreme Court reversed a water right permit issued by the Department of Ecology (Ecology) to the City of Yelm.¹ The decision dramatically impacted the State’s water rights permitting program by denying authority to Ecology to allow any type of mitigation for potential impacts to adopted minimum instream flows (MIFs) other than 100% in-kind, in-time, in-place water replacement, even when the environmental benefits of other types of mitigation greatly outweigh impacts to minimum flows. The Court’s decision enlarged a growing disconnect between the function and intent of instream flow protection rules and the ability of the State to allocate the public’s water for any other purposes, including growing urban and suburban communities throughout the state. This paper begins with an examination of the history of instream flow protection and its effect on groundwater availability, describes the Yelm water right application decision, and the PCHB appeal and decision. It concludes with the *Foster* decision and its effects on water right permitting, and discusses the potential “Foster fix” in Part 3 of ESSB 6091, adopted by the Washington Legislature and signed into law in January 2108.

Background

The Effect of Instream Flow Regulation on Groundwater Availability

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. Four decades later, however, it is time to analyze whether Ecology’s instream flow protection rules appropriately implemented the Legislature’s directives for protecting and managing water resources for the maximum net benefit, or whether (particularly in light of several Supreme Court decisions described below) they unnecessarily restrict the use of groundwater and prevent public interest considerations in water resource management.

Maximum Net Benefits Ignored. Ecology began adopting minimum instream flow rules in the 1970s, but has repeatedly failed in the rule-making process to balance the public’s interest in water for both instream and out-of-stream uses. RCW 90.54.020(2) and 90.03.005 require that the State’s waters be allocated according to the “maximum net benefits” (MNB) for the people of

¹ *Sara Foster v. Dep’t of Ecology, City of Yelm and PCHB*, 184 Wn.2d 465; 362 P.3d 959 (2015).

the state, including both instream and out-of-stream beneficial uses of water. Ecology opted instead to protect instream flows first and allocate remaining waters “later.” Whether the resulting water availability crisis was intentional or accidental, or exceeded Ecology’s statutory authority for the protection of instream flows, as contested in the *Bassett* case,² public interest findings were missing in the allocation of water for streamflow protection without taking care of community water needs. This proved to be a short-sighted blunder after the Supreme Court whittled away Ecology’s authority to reallocate water for domestic and municipal uses, even when Ecology later found such uses to be in the overriding public interest.³

Minimum Flow Setting Methods Impact Groundwater Availability. Instream flows have been set by rule in less than half of the 62 drainage basins within the State. *See* WAC chapters 173-500 to 173-563. The primary method used by Ecology for creating and quantifying MIFs was to select “percentage of exceedance” flows, numbers that represented a probability that historical flows in a stream would be met on any given day. These exceedance flows generally ranged from 50 to 80% of historical flows, and in some cases as low as 10% exceedance during a low flow period. This means that on any given day there was a 50 to 20% probability that the MIF would not be met. For a 10% exceedance flow, there is a 90% probability of not being met.⁴ In other words, there is mathematical assurance that the MIFs adopted by rule in Washington State are not met all the time by design, which in turn means that connected groundwater cannot be appropriated without mitigation, which in turn become virtually impossible to achieve after the *Foster* decision.

New Science Applied to Old Rules Equals More Regulation of Groundwater. When the first MIF regulations were adopted in the mid-1970s, Ecology was aware of various degrees of connection between surface and ground waters, known as hydraulic continuity. The department generally drew a distinction between “direct continuity” involving measurable effects on surface water, which would be subject to the MIF rules, and aquifers that were deeper or further away from streams with lesser or unmeasurable effects on streamflow, which would be available for new water rights for municipal growth and other future uses of water.⁵ The advent of sophisticated computer modelling in the early 1990s changed Ecology’s perception of

² *See Bassett v. Dep’t of Ecology*, WA Court of Appeals, Div. II, Case No. 512211-II, a pending APA appeal of Ecology’s Dungeness River Basin instream flow rule, Ch. 173-518 WAC. Ecology’s failure to allocate water for other uses when adopting rules to protect minimum flows has only recently been challenged as exceeding Ecology’s rule-making authority, but there is still no appellate decision focused on these fundamental mistakes in the rule-making process.

³ In *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571; 311 P.3d 6 (2013), the Court vacated the amended Skagit Basin rule, rejecting Ecology’s use of “overriding considerations of public interest” authority to establish groundwater reservations for out-of-stream uses after adopting the original instream flow rule.

⁴ *See* <https://fortress.wa.gov/ecy/publications/documents/1711002.pdf>

⁵ The Puyallup River Basin IRPP, adopted in March 1980, states: “it is believed that there are adequate groundwater resources to support future growth forecasts” and “future growth in demands for municipal and industrial water will fall upon groundwater supplies.” In the Snohomish River Basin IRPP, adopted in August 1979, alternative sources of groundwater were described as mitigation for any adverse effects of regulating minimum instream flows. The Chambers-Clover Basin IRPP, adopted in November 1979, states that “deeper aquifers appear to contain large quantities of water and do not readily affect surface waters.” The Green-Duwamish IRPP, adopted in April 1980, states: “Groundwater remains open for future appropriation in all the Green-Duwamish River Basin. It is anticipated that groundwater will be relied upon in many instances where surface water rights will not be available due to this program or because of water quality considerations.” There are many other such statements in instream flow rules adopted prior to 1990.

surface/groundwater connections. Without amending the existing MIF rules, Ecology denied over 600 groundwater applications in 1995 on the basis of “hydraulic continuity” between groundwater and surface water. Appeals of those batch denial decisions resulted in the *Postema* decision, which held that: (1) Ecology can use new scientific methods to manage water resources without amending rules; and (2) once established by rule, minimum flows constitute an appropriation like other water rights with a priority date, that cannot be “impaired” by subsequent surface or groundwater withdrawals. *Postema v. PCHB*, 142 Wn.2d 68, 81, 91, 11 P.3d 726 (2000). The Court also stated, “The statutes do not authorize a de minimus impairment of an existing right,” including MIF water rights. 142 Wn.2d at 81. However, the Court did not define how Ecology should determine that MIF water rights were “impaired.”

Impairment of MIFs Never Defined. The aftermath of the *Postema* decision 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 individually according to their intent to leave some groundwater available for appropriation.⁶ 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 “Why Instream Flow Water Rights Are Unlike Other Water Rights,” below. Instead, Ecology treated MIF water rights like any other water right and assumed that “any” diminishment of an MIF water right that could be modelled by a computer qualified as impairment, even if the amount of diminishment was too small to affect the functions and values protected by a MIF rule. Ecology’s focus shifted instead to mitigation plans and the use of the “overriding considerations of public interest” (OCPI) exception⁷ to authorize mitigation that was not 100% in-kind, in-place, and in-time water replacement. Ultimately, this strategy failed when Sara Foster challenged Yelm’s permit and the Supreme Court interpreted OCPI out of all usefulness.

Why Instream Flow Water Rights Are Unlike Other Water Rights

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 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. 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. MIFs are created by legislative direction and can be altered by legislative direction. It is therefore paradoxical that Ecology and the Supreme Court would reject an environmental injury/mitigation test for

⁶ See Footnote 4. 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 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.

⁷ RCW 90.54.020(3)(a) provides for protection of base flows to preserve instream functions and values, then states, “Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”

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.

Rather than allocating waters actually present in rivers and streams, Ecology’s MIF water rights were established at numerical levels that “would be beneficial for fish if those flows were present in the stream,” 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. It is absurd to protect “legal rights” to an aspirational “minimum flow” that nature itself does not supply much or most of the time. There is no precedent for a 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 by rule, 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.

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. 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 rather than impacts to flow. 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.⁸ Ultimately, while these differences between MIF water rights and other water rights did not change the results in the *Postema* and *Foster* decisions, they should be taken into account by the Legislature when it considers recommendations by the Joint Legislative Task Force. See ESSB 6091, Part 3.

The Foster v. Yelm Case

City of Yelm’s Water Right Application and Regional Mitigation Plan

The City of Yelm applied for additional water rights in 1994 from a new well to supply current and future growth demands. Its well site and service areas are located between the Nisqually and Deschutes rivers, both of which have instream resource protection regulations adopted in the early 1980s. The Deschutes River and its tributaries, including Woodland Creek, were either closed year-round to further appropriation of surface water or minimum flows were

⁸ The Pollution Control Hearings Board (PCHB) has also 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. *OWL v. Ecology & KGH*, PCHB No. 13-146 (July 31, 2014 S.J. Order).

established by rule.⁹ In the Nisqually basin, Ecology established minimum flows for the Nisqually River and closed certain tributaries year-round, including McAllister Creek and Lake St. Clair.¹⁰ Both regulations provided that future groundwater withdrawals in the basin “will not be affected” by its stream closures and minimum flows “unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.”¹¹

Encouraged by the Nisqually Tribe and Ecology’s Water Resources Program, Yelm and the cities of Olympia and Lacey jointly studied the regional impacts of their combined groundwater withdrawals and developed a regional mitigation plan that covered both watersheds. These cities collaborated on the purchase and relinquishment of existing water rights and provision of water reclamation and groundwater recharge systems. The regional mitigation plan provided both “in-kind” mitigation of impacts, using purchased water rights and water reclamation, and “out-of-kind” mitigation through riparian protection and habitat improvements. The plan was negotiated with the Nisqually Tribe and reviewed for adequacy by the Squaxin Island Tribe, neither of whom appealed any of the new water right permits issued by Ecology based on the mitigation plan.

Ecology determined that certain shoulder season (late fall and early spring) streamflow impacts could not otherwise be mitigated with in-kind water replacement measures. It approved out-of-kind habitat mitigation for these shoulder season impacts using an OCPI finding under RCW 90.54.020(3)(a) to authorize what would otherwise be an impairment to streams and lakes protected by the Deschutes and Nisqually basin rules. Ecology found that the regional mitigation plan provided environmental benefits that substantially outweighed the impacts to surface waters and approved water right permits for all three cities.

The Foster Appeal and PCHB Decision

Sara Foster, a resident of Yelm and holder of a water right she claimed would be impaired by the Yelm permit, appealed. Water right permits issued to the cities of Olympia and Lacey were not appealed, and remain in effect. The Pollution Control Hearings Board criticized Ecology’s simple three-part balancing test for the OCPI finding, but nevertheless upheld the Yelm permit based on twelve factors in the record that were considered by Ecology in approving the mitigation plan.¹² Foster appealed the Board decision, after which the Supreme Court issued a landmark decision in a different case, *Swinomish Tribal Community v. Ecology*.¹³

In the superior court, Ecology and Yelm argued that *Swinomish* did not apply because Yelm’s “gold-plated mitigation plan” complied with the purpose and intent of the narrow OCPI exception as determined by the Board’s 12-factor test. Foster argued that *Swinomish* required

⁹ WAC 173-513-030 to 040.

¹⁰ WAC 173-511-030 to 040.

¹¹ WAC 173-511-050; WAC 173-513-050.

¹² *Foster v. Ecology*, PCHB No. 11-155 (2013).

¹³ In *Swinomish*, the Supreme Court declared the amended Skagit Basin instream flow rule invalid because Ecology used the OCPI exception to create reservations of water for future uses that would otherwise impair minimum flows adopted in the original basin rule several years earlier. *See footnote 2.*

reversal of the Board ruling. The Board decision was upheld by the Thurston County Superior Court, and Foster’s appeal to the Supreme Court followed.

“Withdrawals” Interpreted by Supreme Court as Temporary Uses

In its 6-3 decision in *Foster*, the Supreme Court first interpreted the term “withdrawals” in the Water Code and related statutes as temporary uses of water, in contrast with the term “appropriations” which refers to permanent water rights. Therefore, the Court determined, the use of the word “withdrawals” in the OCPI exception must mean that only temporary uses of water can be authorized by OCPI, such as drought year emergency authorizations, and not permanent water rights such as Yelm’s permit. 184 Wn.2d at 475. The minority opinion by Justice Wiggins sharply disagreed, pointing out multiple uses in the Water Code of the term “withdrawal” in reference to permanent water rights, including vested groundwater “withdrawals” at RCW 90.44.090, the groundwater change statute at RCW 90.44.100 (“*the holder of a valid right to withdraw public groundwaters may, without losing the holder’s priority of right, construct wells or other means of withdrawal at a new location*”), and the groundwater permit exemption statute, which provides: “*no withdrawal of public groundwaters of the state shall be begun ... unless an application to appropriate such waters has been made to the department and a permit has been granted*” RCW 90.44.050. This statute uses the term “withdrawal” in reference to exempt groundwater uses for stockwater, domestic and other purposes, and is the source of tens of thousands of water rights in the state that have heretofore been considered as permanent as any other water right created under state law.

Ecology and Yelm filed motions for reconsideration, claiming that the term “withdrawal” had been used synonymously with “diversion” in numerous water rights statutes and regulations, and is not a term of art designating only temporary uses. The Supreme Court, however, denied reconsideration of its decision. This has introduced considerable uncertainty as to the permanent or temporary nature of tens of thousands of water rights potentially affected by the Court’s controversial interpretation of “withdrawal.” At a minimum, the Court’s questionable interpretation makes the *Foster* decision ripe for legislative clarification of the meaning of terms used in the Water Code, including “withdrawal” and “diversion.”

Mitigation Plan “Irrelevant” to “Legal Injury”

The most significant aspect of the *Foster* decision is the final paragraph before the conclusion of the majority’s opinion, in which the Court essentially held that the Yelm-Olympia-Lacey mitigation plan was “largely irrelevant” to the analysis of impairment of minimum flow water rights. First, the Court disregarded the breadth and depth of the mitigation plan and its environmental benefits by finding that any municipal water right application designed to meet the needs of a growing population was not the “extraordinary circumstances” meant to justify use of the OCPI exemption. 184 Wn.2d at 576-77. The Court found that municipal water needs are “far from extraordinary,” they are “common and likely to occur frequently as strains on limited water resources increase throughout the state.” *Id.* “Extraordinary circumstances,” however, is the Court’s interpretation of OCPI, not the language used in the statute itself. Municipal water supply is synonymous with public water supply, the adequacy of which is a fundamental human

right and economic need that the Legislature sought to protect as much as minimum flows,¹⁴ but the Court’s decision paid this no heed.

Second, the majority opinion in *Foster* protected the minimum flow water rights from any type of mitigation plan that involves out-of-kind habitat or environmental mitigation by concluding that the Water Code and the OCPI exemption are concerned only with the “legal injury” caused by impairment of senior water rights, not with any notion of “ecological” injury.¹⁵ This conclusion no doubt stems from the Court’s view that minimum flow water rights are not limited water rights and that they function in most respects like any other appropriation when it comes to the “first in time, first in right” approach to water law. The prior appropriation doctrine, according to the majority opinion, “does not permit any impairment, even a de minimus impairment, of a senior water right.”¹⁶

As a result of these legal rulings, the Supreme Court reversed and voided the water right issued to Yelm by Ecology. Groundwater permitting has virtually ground to a halt because 100% water replacement mitigation is simply unavailable everywhere that a computer model can predict that a groundwater withdrawal will affect streamflow or a shallow aquifer connected to streams.

The Legislative Joint Task Force is directed to reconsider the *Foster* decision under Section 301 of ESSB 6091. While it could clarify the scope and intent of the OCPI provision to enable flexible mitigation for municipal water right applications, there appears to be little political appetite in the state to resurrect OCPI as a tool for authorizing out-of-kind mitigation. ESSB 6091 takes a different approach, discussed in more detail below. It provides statewide planning and funding of streamflow and habitat enhancement projects and opens the door to mitigation sequencing authority that can include out-of-kind compensatory mitigation.

Fixing Foster – Why and How

Why the Legislature Should Review the *Foster* Decision

The *Foster* decision is a lesson in the consequences of delaying the inevitable and avoiding reality. The current collision between instream flow protection and water rights permitting is a result of multiple administrative errors, judicial misinterpretations, and legislative indifference over the last four decades.¹⁷ In hindsight, it is obvious that Ecology’s minimum flow rules have unintended consequences, overreached Ecology’s statutory authority, and failed to anticipate later Supreme Court decisions that have now crippled the State’s water rights permitting program. The result has created the problem of “legal water availability” and immediately shifted its costs to counties, rural landowners, and municipalities with inadequate water rights. Because Ecology’s OCPI safety valve is no longer available, its beleaguered Water Resources Program is faced with a no-win situation in which virtually any administrative

¹⁴ RCW 90.54.020(5).

¹⁵ 184 Wn.2d at 476-77.

¹⁶ *Id.*; see *Postema v. PCHB*, 142 Wn.2d 68, 82, 11 P.3d. 726 (2000).

¹⁷ 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.

solution for rural and urban water availability has a high likelihood of being challenged. So yes, the Legislature needs to revisit *Foster* and fix the disconnect between MIF protection and drinking water supply. Here are the top four reasons:

1. 100% In-Kind Replacement Mitigation is a Unicorn. Defining the impairment of an environmental right as a “legal injury” rather than an environmental injury has led to absurd results and economic injuries to communities throughout the state. For instance, the removal of a trickle of water from a stream with a 1000 cubic foot per second flow rate could be considered a legal impairment that cannot be permitted, despite the fact that it could not injure any environmental values for which minimum flows were established. On the other hand, a robust habitat restoration program that insures no net loss or even improvement of fish survival cannot be considered under current law as a means of approving a new groundwater right with miniscule effects on surface flows, regardless of tribal preference and the public interest in approving the water right. Simply put, the *Foster* decision prevents new water rights and water right changes that are needed to authorize mitigation banks and new municipal wells, because the kind of mitigation required by the *Foster* decision is unavailable in most cases.

2. Disconnect Between Purpose of MIFs and How They Are Protected. The *Foster* decision has been criticized, especially among municipal water suppliers, for establishing a disconnect between the purpose of minimum flow water rights and the manner in which they are being protected by Ecology and the Supreme Court. Treating environmental/regulatory rights as “legal rights” hopelessly confuses the problem and solutions for instream flow protection. As a result, even water right change applications to add a new well to an existing municipal water right have been impossible to obtain.¹⁸ Ecology could have side-stepped the OCPI and legal injury issues for Yelm’s application by interpreting the Nisqually and Deschutes instream flow rules and their groundwater exemption language as a flexible impairment standard, one where not all future uses of groundwater are subject to the minimum flow water rights or stream closures. The Legislature can consider the option of re-examining the meaning of “impairment” of instream flow water rights and closed streams within the broad authority of ESSB 6091. Flexible mitigation standards and priorities have been approved by the Legislature for other aquatic resources (see chapter 90.74 RCW). The *Foster* pilot projects can now demonstrate how mitigation sequencing can achieve “net ecological benefits” as a more direct way to compensate for impacts to instream functions and values.

3. Remember the Missing Public Interest Findings. Somehow lost in the litigation over the meaning and use of the OCPI exemption in the *Foster* appeal was the fundamental problem with Ecology’s instream flow regulations to begin with – that they failed to balance the public’s need for water for both instream and out-of-stream purposes. Minimum flow rules have also been interpreted after the fact in a manner that closes groundwater to further appropriation without any additional public notice or rulemaking. That was contrary to the intent of most minimum flow rules and contrary to the state’s water allocation policy.¹⁹ Municipal water systems need to be able to upgrade water supply systems, including new wells, to protect the public health and increase water system security. Impossible mitigation standards like *Foster*

¹⁸ One such example is the City of Sumner’s Central Well change application, which could not be approved under the *Foster* standard but may now provide an example for flexible mitigation as an ESSB 6091 Pilot Project.

¹⁹ The multiple fundamentals for water allocation policy are enumerated in RCW 90.54.020, including the “maximum net benefits” directive at RCW 90.54.020(2) and 90.03.005.

impede the ability to provide safe and reliable drinking water to the public, which is contrary to the public interest.

4. *Hirst and Foster Should Not Be a Tool for Land Use Regulation*. The impossibility of obtaining 100% replacement water mitigation should not be the tool of choice for environmental groups or tribes to control growth and land use. Yet that is how the *Hirst v. Whatcom County*²⁰ case played out, with the Nooksack MIF Rule being used to achieve a moratorium on rural home construction with permit-exempt groundwater supplies. Land use planning should be left to state and local government with broad public participation through comprehensive planning and development regulations, not thwarted by a judicial misunderstanding about the nature of instream flow water rights and Ecology's failure to make timely public interest findings when protecting instream flows.

Fixing these problems will not be easy given the general lack of knowledge concerning complicated instream flow/groundwater issues, not to mention the presence of so many other legislative priorities (e.g., education funding, climate change, budget, and transportation). Powerful interest groups are fighting hard to preserve the status quo of protecting minimum flows ahead of allocating water for communities. Rural communities and their legislators are fighting back – as seen in the 2017 legislative session which deadlocked on a *Hirst* fix and failed to pass a capital budget as a result. ESSB 6091 may be imperfect, but it is an opportunity to examine the alternatives to the status quo, including the means to protect and enhance instream values and fishery resources while permitting some appropriate new water uses that are consistent with the public interest.

How Does ESSB 6091 Address the *Foster* Issues?

Part 3 of ESSB 6091 establishes a Joint Legislative Task Force on water resource mitigation. The bill requires the Task Force to: (1) review the treatment of surface and groundwater appropriations (water rights permitting) as they relate to instream flows and fish habitat; (2) develop and recommend a mitigation sequencing process and scoring system to address such permitting; and (3) to review the Supreme Court's *Foster* decision. The Task Force has a designated membership by organization, will be led by two legislative co-chairs from different political parties, and will be staffed by existing legislative staff research services. It must hold its first meeting by June 30, 2018 and make recommendations to the legislature by November 15, 2019 by a 60% majority of the Task Force members, excluding representatives of some state agencies.

The Task Force's statutory mission is quite broad and could lead to substantial changes to water rights permitting law regarding mitigation for impairment of minimum flows and closed streams and lakes, but any such changes would need to survive the political tug of war inherent in Washington water politics. The work of the Task Force may be substantially informed by the five pilot projects described in the next section of this paper, which are expected to demonstrate how a mitigation sequencing program with appropriate habitat mitigation can be successfully implemented.

²⁰ *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn. App. 32, 344 P.3d 1256 (2015)

Pilot Projects and Mitigation Sequencing

Section 301(8) of ESSB 6091 directs Ecology to issue permit decisions for up to five mitigation pilot projects.²¹ The intent is to inform the Joint Legislative Task Force concerning mitigation sequencing that includes out-of-kind mitigation while enhancing instream functions and values, and to enable processing of applications that address water supply needs. To enable the use of this mitigation sequencing authority for the pilot projects, Sections 302 and 303 of the bill exempt the pilot project applications from some key Water Code provisions that, under current law, would require denial of applications due to unmitigated “impairment” of MIF water rights or closed streams. This includes amending RCW 90.03.247 to allow the pilot project permits to use the mitigation sequencing in lieu of being conditioned to protect flows, and amending RCW 90.03.290 to eliminate subsections requiring impairment and water availability findings.

The statutory mitigation sequence is:

1. Avoiding impacts by complying with instream flow rules or making permits subject to applicable minimum flows;
2. Where avoidance is not “**reasonably attainable**,” minimizing impacts by providing trust water rights or other replacement water resulting in “**no net annual increase in the quantity of water diverted or withdrawn from the stream**” and “**no net detrimental impacts to fish and related aquatic resources**”; or
3. Where avoidance and minimization are not “**reasonably attainable**,” compensating for impacts by providing “**net ecological benefits** to fish and related aquatic resources” in the WRIA ... “**that improves the function and productivity of affected fish populations and related aquatic habitat**.” This includes out-of-kind mitigation that improve or enhance water quality, riparian habitat, or other instream functions and values for which minimum flows or closures were established in that WRIA.

Defining new terms and standards. One of the objects of the pilot projects is to establish meaning for the undefined terms above in bold type, which are essentially the new standards for allowing mitigation flexibility and sequencing. The statute does not spell out a process for how these standards should be defined, but these terms and the sequencing scoring system will need to be discussed or even negotiated among the pilot project applicants, Ecology, and locally-affected tribes in order for the pilots to be a successful example leading to a statewide permanent solution to *Foster*. Conceptual mitigation plans must be submitted to the Joint Legislative Task Force by November 15, 2018, and Ecology has already conducted state-wide consultations with tribal and municipal representatives to develop guidance for the “net ecological benefits” standard.

²¹ Narrowly defined eligibility criteria in the bill resulted in the five pilots being restricted to the cities of Yelm, Sumner and Port Orchard, Spanaway Water Company, and Burton Irrigation District.