

Washington Water Code

Hirst Limelight

Water Supply Development

Survey of Perspectives

Water Rights Development

Riparian Doctrine

WASHINGTON WATER CODE

PERSPECTIVES ON WASHINGTON STATE'S WATER CODE ON ITS 100TH ANNIVERSARY

by Joe Morrice, LHG, Associate Hydrogeologist, Aspect Consulting, LLC

Introduction

What a year Washington State's Water Code received for its 100th anniversary. Though the influence of water rights is vast — affecting people, farms, hydropower, and fish — it typically flies under the radar of public perception. This year, however, the Washington State Water Code has been thrust into the “limelight” like never before — becoming a key political sticking point. The Washington State Supreme Court's *Whatcom County v. Hirst* decision (*Hirst*: www.ecy.wa.gov/programs/wr/nwro/hirst.html) claimed center stage during this year's legislative session. At the time of this article's publication time, the decision kept Washington State's \$4 billion capital construction budget from being approved (www.seattletimes.com/seattle-news/politics/4-billion-construction-bill-tied-up-in-legislature-by-water-rights). [Editors' Note: In *Whatcom County vs. Hirst, Futurewise, et al.*, Case No. 91575-3 (Oct. 6, 2016) (usually referred to as the *Hirst* decision), the Washington Supreme Court ruled that the county failed to comply with the Growth Management Act (GMA) requirements to protect water resources. The Court ruled that to do so, a county's review of legal water availability must include permit-exempt wells and their cumulative impact on water rights, including minimum instream flow rights. The ruling requires the county to make an independent decision about legal water availability and cannot approve development by simply relying on the Washington Department of Ecology's instream flow rules to presume that water availability exists — where those rules fail to specifically address the impacts of permit-exempt wells on senior water rights. The result is that the decision applies an instream flow protection to county decisions on individual building permits.] For additional information about *Hirst*, see Moon, *TWR* #153; Interview with Christensen, *TWR* #153; and Ecology's website cited above, which includes access to a copy of the decision.

In addition to the *Hirst* decision, there have recently been other court decisions affecting major water policy changes and challenges in Washington including *Foster v. Dept. of Ecology, City of Yelm, and WA PCHB*, Case No. 90386-7 (Oct. 8, 2015) (known as either the *Foster or Yelm* decision (*Foster*: www.ecy.wa.gov/programs/wr/swro/fostervecolology.html — see Moon, *TWR* #141). Finally, there was *Swinomish Indian Tribal Community v. Dept. of Ecology*, Case No. 87672-0 (Oct. 3, 2013) (www.courts.wa.gov/opinions/pdf/876720.pdf — see Moon, *TWR* #116 and Water Briefs, *TWR* #117). These recent decisions, with far-reaching consequences to water supply development in Washington State, all hinged in some way on a common underlying concept — i.e., the Prior Appropriation Doctrine (“first in time, first in right”). Washington State's 1917 Water Code established that prior appropriation was the only way to create a water right — as opposed to the “riparian doctrine” (tying water use to adjoining land) that predominated in the territorial era and early statehood in Washington and which continues to be typical in the eastern United States.

With the spotlight bright on water law, Aspect Consulting, LCC (Aspect) reached out to a range of water purveyors, resource managers, and attorneys in Washington State to gain their perspectives on: how their work intersects with the water code; what is and isn't working; and how they anticipate management and development of water resources in Washington will (or should) change in the future.

This article was prepared to complement efforts to publicize the centennial of the water code and generate discussion about the future of water use and management in the Washington State. Other efforts focused on the 100th anniversary of the water code include a story map and video series by the Washington State Department of Ecology (see www.ecy.wa.gov/programs/wr/hq/waterlaw-100.html) and the upcoming American Water Resources Association – Washington Section (AWRA-WA) State Conference, scheduled for October 3, 2017 in Seattle, Washington (see Agenda, page 20 — further information and registration available at www.waawra.org).

The Pre-Water Code Era was Truly the Wild West

The Oregon Territory, which included the current State of Washington, was incorporated by the federal government in 1848. Although generally recognizing existing property rights, water and water rights were not specifically addressed in the enacting legislation. Resolution of conflicts over water use was left to the courts. Washington Territory was created from portions of the Oregon Territory in 1853. In 1856, the Washington Territorial Legislature recognized common law in all civil cases not otherwise addressed under the law, setting Washington on its own path for developing and implementing water law.

Early courts in Washington applied the riparian doctrine, which was based originally on European and English common law. The American model of the riparian doctrine developed further in the eastern United States. Under the riparian doctrine, a water right is established by the presence of a (surface) water body

Washington Water Code

Riparian Rights

Appropriation System

Mixed System Conflicts

Dynamite Attempts

abutting a landholder's property. The riparian doctrine differs from the Prior Appropriation Doctrine in two principle ways:

- 1) Riparian rights attach only to the land bordering a stream and cannot be obtained for use on more distant, non-riparian lands; and
- 2) Riparian owners diverting from the same source all have equal rights to the source.

The Washington Territorial Legislature passed two statutes that contained elements of the Prior Appropriation Doctrine. The first statute, enacted in 1873, allowed appropriative (as opposed to riparian-only) use of surface water in Yakima County without regard for riparian statutes. The statute further declared that conflicts between water users shall be determined by dates of appropriation. This appropriative system was extended to Kittitas County in 1885; however, the riparian doctrine continued to apply in the rest of the state.

Following statehood in 1889, the state legislature enacted legislation authorizing non-riparian appropriation of surface water for irrigation and later for mining, manufacturing, and for supply to cities, towns and villages. This legislation included requirements to post notice of the intent to appropriate water at the point of diversion and to record the notice with the county in which it was posted. Critically, this legislation also established that, between appropriative rights, the first-in-time is the first-in-right.

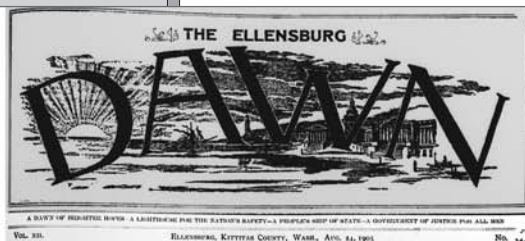
The mixed system of riparian rights, appropriative rights, and lack of a comprehensive permitting system — combined with a growing population and demands for water supplies for irrigation, mining, and municipal uses — increasingly led to conflicts between water users. Most disputes were resolved civilly, while some resorted to other tactics. Two examples of less-than-civil dispute resolution from the pre-water code era illustrate the hazards of water conflicts in those days. As reported in *The Ellensburg Dawn* of August 24, 1905, in Kittitas County dynamite was used by a rival irrigation company to try to blow up a dam at Cle Elum Lake in an effort to free up more water for downstream users.

“As the result of an attempt to blow up the dam of the Union Gap Irrigation company across the outlet of Lake Cle Elum... [an] engineer of the Washington Irrigation company, and five other men who, it is charged, were caught in the act of setting off dynamite under the dam were arrested and placed in the Cle Elum jail...[Upon hearing of the plan] Officers at Cle Elum were sent to the lake and lay in ambush and when the first charge of dynamite was set off Tiffany [the engineer] and his party were placed under arrest.”

The sub-headline for the article noted, “Liable to be Hot Time in Court.”

Meanwhile, in Chelan County, a rancher named Beecher attempted to blow up the Gibb's Ditch Company flume in 1908. A dispute between the rancher and the ditch company was brewing over a right-of-way dispute to enlarge the flume across Beecher's land, which resulted in a successful condemnation action by the ditch company to do so. The *Wenatchee Daily World* on May 8, 1908 reported that:

“...the ditch walker of the company [claimed] ...that he found dynamite sticks under the flume and sticks already lighted. He found Mr. Beecher there, and they indulged in an encounter which resulted in the ditch walker hitting Beecher over the head with a hammer. Beecher was arrested the next day...”



From
The Ellensburg Dawn
August 24, 1905

**ATTEMPT TO BLOW
OUT DAM AT CLE-ELUM LAKE**

Engineer of Washington Irrigation Company and Five Others Held to Answer

IN TWO THOUSAND AND FIVE HUNDRED

Bonds—Dynamite used—E. F. Blaine of Seattle, Counsel for Washington Company Is Threatened With Arrest Liable to be Hot Time in Court.



RANCHER ARRESTED

S. P. Beecher Charged with Blowing Up Flume with Dynamite.— Placed Under Bond.

S. P. Beecher, a prominent resident of Peshastin, was arrested Wednesday, charged with blowing up the flume of the Gibb's Ditch Co., near Peshastin, with dynamite, and is now under a \$2,500 bond.

The Gibb's Ditch Company brought an action against Beecher some time ago to secure a right of way across his land, so that they could enlarge the present flume which they now have, and which runs across Beecher's land. The case was tried at the last term of court and Beecher resisted the condemnation proceedings strenuously.

After a trial lasting a couple of days, and the jury being taken up to the locus operandi, a verdict was brought in allowing the company to proceed with their work, also a fine.

From
Wenatchee
Daily World
May 8, 1908

Washington Water Code

States' Codes

Commission Formed

Issues Faced

Certainty Needed

Riparian v. Beneficial Use

Comprehensive System

1917 Water Code Principles

Adoption of 1917 Water Code

While Washington State continued to develop under a mixed system of riparian and appropriative water rights, other western states were establishing comprehensive water codes to permit, allocate, and manage competing water uses. Idaho, in 1903, was among the first western states to adopt a comprehensive water code, followed by Nevada in 1905, Oregon in 1909, and California in 1914. [Editor's Note: Montana, on the other hand, didn't adopt a water code until 1973.]

In 1913, Governor Ernest Lister formed the Washington Water Code Commission (Commission) to study problems with the state's water management system and develop recommendations for the legislature. The work of this commission culminated in the enactment of the 1917 Water Code, the first comprehensive water code in the state.

The need for and goals of reforming the water rights system in the state, as described in reports from the Commission and newspaper reporting at that time, included:

- Much of the state's surface water had already been appropriated;
- The different water uses and needs in eastern and western Washington;
- Uncertainty over ownership and validity of pre-code water rights; and
- Whether and to what extent to recognize undeveloped riparian rights.

The following excerpt provides a flavor of the public discussion leading up to adoption of the water code. A 1914 *Report of the Washington Water Code Commission*, in reference to riparian water rights and over-appropriated surface waters, stated:

The appropriator's rights to use the water of this state are open to attack... There is no law limiting the amount of water that may be filed on from any stream. On some streams the appropriations now on file call for many times the amount of water in the stream and available for use, and yet, there is no law prohibiting further appropriations, and no officer whose duty it is to eliminate excess appropriations and protect water users against future encroachments upon their rights.

Ira Englehart, a member of the Commission, gave a speech in Yakima, reprinted in the 1915 *Pullman Herald*. This speech addressed some of the key goals and challenges for the Commission in recommending a new, comprehensive management code. In addressing certainty in water rights ownership, Mr. Englehart stated the goal of the Commission "...is some system whereby you will know what your water right is just the same as you know what the title to your land is, so that a stranger won't be buncoed, and when you say to a man, I have so much land and so much water ..., you can go to the records and show him, that it is so."

Mr. Englehart described the consequences of this uncertainty, noting "...in fact, already some of the mortgage companies can not show them what water rights belong to the land upon which the loan is desired. They say if we have to foreclose this we want something of record to show what the water right is, like they have in Wyoming and Utah and other states. The land is worthless without the water, and we want to know what water rights belong to the land."

Mr. Englehart also discussed issues surrounding undeveloped riparian rights:

There are a lot of people who settle down on a stream and won't use the water themselves nor let anybody else use it. They claim the riparian rights. They say, the old common law that we brought from England provides that the water flowing over our land is as much a part of our land as the stones on the land. If that theory is correct, of course they are correct. But in this western country we have claimed the proper use of water is what a man's rights should be based on. He should not be permitted to let it run by just because it is pretty to look at or to let ducks swim in it, but some beneficial use should be made of it. Without that use this country would be a desert.

Other reporting on consideration of the water code reinforces the emphasis on the economic benefits of a comprehensive water management system. The May 15, 1916 *Seattle Daily Times* reported on a meeting in Seattle of Commission members and other prominent citizens to discuss the water code. This reporting noted that "because it is impossible under present state law to give title to water in an abstract of sale... it is virtually impossible to sell irrigation bonds" — going on to identify storage and irrigation projects to serve more than one million acres throughout eastern Washington that were held up as a result of this problem. The reporting also noted the sense that "Idaho and Oregon, each with a water code, are making much more progress with irrigation matters than Washington."

In 1917, approximately four years after the Water Code Commission was established, the state legislature passed the Water Code (Session Laws, 1917, Chapter 117); this legislation is currently codified as Chapter 90.03 Revised Code of Washington (RCW). The 1917 Water Code addressed many of the deficiencies in the pre-code system and established that:

- All waters in the state belongs to the public, subject to existing rights;
- Prior appropriation is the only way to create a new water right;
- Unperfected riparian water rights were no longer valid. This was later modified by the Washington State Supreme Court to allow water users until 1931 to put to use riparian rights established before adoption of the water code;

Washington Water Code

Evolving Law

- Established a permitting system for water appropriation; and
- Established a system for adjudicating vested, pre-code rights to clear up ownership and validity uncertainties.

Post-1917 Water Code Legislation

Principles established in the 1917 Water Code continue to form the foundation for Washington State's evolving water administrative system. The Water Code's precedence can be seen from adoption of the 1945 Groundwater Code, establishment of instream flows as water rights, through the 2003 municipal water law and the 2006 Columbia River Program. Significant laws that have built on the 1917 Water Code are briefly described below.

Chapter 90.44 RCW – Regulation of Public Groundwaters, adopted in 1945. This legislation extended the surface water statutes of the 1917 Water Code to the appropriation and beneficial use of groundwater.

Chapter 90.14 RCW – Water Rights – Registration – Waiver and Relinquishment, adopted in 1967. Established system and filing period for registering pre-code claims to surface water and groundwater uses.

Chapter 90.22 RCW – Minimum Water Flows and Levels, adopted in 1969. Grants the Washington State Department of Ecology (Ecology) rulemaking authority to establish minimum flows or water levels for lakes, streams, and other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values. Adopted minimum flows represent appropriative water rights for instream flow purposes with priority dates equal to the date of rule adoption.

Chapter 90.54 RCW – Water Resources Act of 1971, adopted in 1971. Sets forth the fundamentals of water resource policy to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the State of Washington.

Chapter 5, Laws of 2003 – Municipal Water Supply, codified primarily in Chapter 90.03 RCW, defines previously undefined “municipal” purpose of water use and confirms protection from relinquishment for nonuse of municipal water rights. This legislation was challenged twice in the Washington State Supreme Court (*Lummi Nation, et al. v. Ecology*, 2010 and *Cornelius v. Ecology*, 2015). In both instances, the legislation was affirmed by the Court and remains in effect.

Chapter 90.90 RCW – Columbia River Basin Water Supply, adopted in 2006, established funding sources and directed Ecology to aggressively pursue the development of water supplies to benefit both instream and out-of-stream uses in the Columbia River basin in order to meet the economic and community development needs of people and the instream flow needs of fish. This law allowed for creation of Ecology's Office of Columbia River (OCR) to enact this mandate.

The Water Code Today: A Complex Tool for Complex Times

We asked our respondents — representing both eastern and western Washington water managers, purveyors, regulators, and attorneys — a range of questions covering how the water code affects their organizations and customers; the biggest challenges and strengths of the water code; and where they see it heading in the next 100 years in the state. Several common themes emerged out of the discussion. The themes include a hunger for bigger, regional solutions to water resources issues. There is also an acknowledgment of the increased attention fish and habitat receive in the code since minimum instream flow rules have been adopted over the last several decades. Programs with a mandate to innovate and find solutions, like Ecology's OCR, were also pointed out as positive examples of trying to solve tricky water code problems with often adversarial stakeholders.

Our questions and some representative responses are now presented. Responses have been lightly edited for length and clarity.

How does the water code affect your organization?

How have you seen implementation and interpretation of the code evolve?

“Prior to the *Hirst* decision, Spokane County relied on Ecology to tell us if water was not legally available, and from our perspective no news was good news. *Hirst* has put the onus directly on the County to evaluate legal water availability for every building permit, an entirely new and often complicated inquiry for county staff at the permit counter.”

Mike Hermanson – Water Resources Manager
Spokane County Water Resources

Washington State WATER CODE 90.03

- 1891 ● First-In-Time, First-In-Right
- 1917 ● Surface Water Code Adopted
- 1945 ● Groundwater Code Adopted
- 1967 ● Water Right Claim Registration Act
- 1971 ● Water Resources Act
- 1977 ● Family Farm Act
- 1987 ● Water Storage
- 1989 ● Trust Water Created
- 1992 ● Water Reuse
- 2001 ● Conservancy Boards
- 2003 ● Municipal Suppliers
- 2006 ● Columbia River Program

A Timeline of Water Policy in Washington State

Washington Water Code

Availability Tightened

Municipal Rights

Climate Change

Instream Flows

Maximize Flexibility

Fish Habitat

Regional Solutions

Funding Issues

Simplification Sought

“[We’re seeing] changing roles in County government to take on responsibilities that were traditionally held by the State.”

Paul Jewell, County Commissioner
Kittitas County

“I have worked in water resource management for over 30 years, with SPU for more than 20 years, and have been involved with WWUC for many years. SPU has a portfolio of water rights that includes applications yet to be processed, permits, claims and certificates — both surface and groundwaters. For the most part, these pre-date instream flow rules. I’ve seen a tightening of water availability and the loss of new sources to tap into as the state grows and needs change. An important addition was the 2003 Municipal Water Law that provided more certainty for muni’s to grow into their water rights, allow for easier changes in places of use tied to service areas, and furthering of water use efficiency.”

Joan Kersnar, Manager of Drinking Water Planning for Seattle Public Utilities and Washington Water Utilities Council Chair

“As an attorney, the water code, and in particular the interpretation of the water code by the courts, requires the continued need of educating and counseling those who rely on the water resources for their businesses, development projects, fisheries needs, and recreational enjoyment. Our firm is also involved in climate change issues, which will I believe have an impact on implementing the water code to meet the changing cycle of water supply throughout the year, such as snowpack, earlier growing seasons and different seasonal stream flows.

Tom McDonald, Attorney
Cascadia Law Group

“Trout Unlimited has effectively used the Trust Water Rights Program to protect water rights as instream flow since the early 2000s. Most other western states cannot effectively protect water rights as instream flow so it has made Washington a leader in moving these types of projects forward. It has been challenging for many water right holders to understand paper water rights versus what is actually available under a water right due to historical use but it is helpful to us and our funders to know exactly what is being purchased or acquired for instream flow so that we can protect it.”

Lisa Pelly, Director
Trout Unlimited

“The code both helps and hinders our ability to serve. It requires a full understanding of the code to maximize flexibility to meet the needs of our community. The code is long and complicated and case law further complicates things.”

Dave Brown, Water/Irrigation Division Manager
City of Yakima

“We need water to serve over 600,000 people in Snohomish County. We have a multitude of water rights on the Sultan River. The implementation of the water code has evolved to be much more protective of fish habitat.”

Jim Miller, Engineering Superintendent
City of Everett

What’s the biggest challenge (s) to the Water Code? What are its greatest strengths/successes?

“It takes a long time to see progress with the current tools in the water code. Global solutions tend to be much more effective than one-off, small-scale solutions, but it is hard to keep people at the table often for a decade or longer to achieve the end result. It takes a lot of effort to develop the personal relationships, build coalitions, and secure diverse funding to accomplish results. The final product is often very rewarding, but there is a societal cost that acts as a depressant for the next effort. Elected officials, funders, and the public only have a finite amount of bandwidth for regional solutions — even if the upside is huge. It’s easier to play small-ball with targeted projects, even if their benefit is marginal relative to the bigger problems we’re trying to solve.

It can also be difficult finding entities with a broad enough mission and funding to carry the global solution to fruition. For example, many funding programs exist at the state, local, and federal levels. However, fitting a global solution into each program’s requirements often leaves key project elements out that are critical to retain in order to keep the local coalition together. Someone still needs to fund project elements that may not have the optimal benefits, or be more expensive than other options, so the best project for the most people can move forward.”

Mike Kaputa, Director
Chelan County Department of Natural Resources

“Simplification would be great. But it’s hard to build the coalitions to gain traction on it. The Legislative process isn’t often conducive to understanding all of the ramifications of changes.”

Paul Jewell, County Commissioner
Kittitas County

“On one hand, the water code provides for permanency and certainty in exchange for flexibility under

Washington Water Code

Flexibility Loss

changing conditions — either how we're growing and changing economically or with climate change. Some tools that do exist include the MWL [municipal water law], change applications, trust water rights donations, etc. However, the flexibility that was once there isn't there anymore given the *Foster* decision, loss of OCPI [overriding consideration of public interest] and so on.

Some utilities are finding it difficult to take on the role of running smaller, failing water systems through system consolidations because of the water rights changes that are needed. They are finding that water that was associated with the smaller system is not legally available once the system is consolidated."

Joan Kersnar, Manager of Drinking Water Planning for Seattle Public Utilities and Washington Water Utilities Council Chair

Interpretation

"It can be challenging as folks interpret language in the water code differently at times. Part of this is due to language derived from actual statute language but different regional staff sometimes have a different interpretation. The water code's strength is that it does not leave anyone or any user out."

Lisa Pelly, Director
Trout Unlimited

Outdated Code

"Accomplishing meaningful progress on OCR's mission given the increasing complexity in the water code and case law is like shooting a basket with a smaller rim each year. The biggest challenge today is using a code intended for a different time to meet today's challenges. Additionally, it feels like our business needs to meet population growth, agricultural needs, and fisheries needs are always 10 to 20 years ahead of the tools in the water code we have to work with. The water code is not very nimble and does not change very fast in response to crises."

Tom Tebb, Director
Office of Columbia River (OCR)

Water Supply Uncertainty

"The biggest challenges to the water code are addressing the water supply for the growing population while still protecting the natural environment and fishery resource. This is against a backdrop of uncertainty of the future water supply because of the inability to predict with a great level of certainty the available water supply both seasonally and annually and the lack of clear understanding of the existing water rights in most of the state due to the limited number of general adjudications and quantification of tribal rights. Without the certainty, the state will continue to have difficulty achieving consistent application of the requirements in the water code and appropriate implementation of the code to provide greater certainty regarding existing water use and future supplies."

Tom McDonald, Attorney
Cascadia Law Group

Legislative Inertia

"Lots of different entities want changes to the law: environmentalists, cities, irrigation districts and others and we seldom agree on what change is needed. As we all lobby for a particular change it usually does not get through the legislative process."

Dave Brown, Water/Irrigation Division Manager
City of Yakima

Instream Flow Imbalance

"The biggest challenge is balancing the instream and out-of-stream needs. Where instream flows have been set, they are so high that Mother Nature cannot meet them a large portion of the time. This means that virtually no water is available for any out-of-stream needs because meeting these needs would 'impair' the instream flows. This is what led to the *Hirst* decision essentially shutting down all exempt well drilling."

Jim Miller, Engineering Superintendent
City of Everett

What does the increasing shift towards groundwater (or mitigated rights or changes over new rights) mean?

Groundwater Issues

"Groundwater has some inherent issues including having the information available on the amount, as well as understanding well how groundwater is connected to surface water. Washington state lacks a network of groundwater level data, comprehensive metering and reporting of groundwater withdrawals, and other things important to water management. Given that, it's difficult to have a comprehensive strategy for groundwater use. Because of this, studying groundwater is expensive and pumping of groundwater is energy intensive, so I see its use as costly."

Joan Kersnar, Manager of Drinking Water Planning for Seattle Public Utilities and Washington Water Utilities Council (WWUC) Chair

Supply Audit

"OCR just completed a recent audit of groundwater supplies that are declining in the state and is working with partner agencies to take steps to protect the resource."

Tom Tebb, Director
Office of Columbia River

Aquifer Recharge

"Shifting to groundwater without firm aquifer recharge (either artificially or natural) is not the solution. Surface water is more readily replenished."

Dave Brown, Water/Irrigation Division Manager
City of Yakima

Washington Water Code

Mitigation Need

“[It means] that most new rights will require mitigation either with other water or habitat improvements.”

Jim Miller, Engineering Superintendent
City of Everett

“We need to understand groundwater and the effects of groundwater withdrawals on instream flows.”

Lisa Pelly, Director
Trout Unlimited

What would you like the broader public to know about the water code and water resource management in Washington?

Ownership

“We take many calls from property owners that have the perception that they ‘own’ the water on their property, and then explain to them that the Washington Legislature established that the waters of the state belong to the public, and the right to use the water can be granted for a beneficial use, subject to the doctrine of prior appropriation.”

Mike Hermanson – Water Resources Manager
Spokane County Water Resources

Public Perceptions

“Utilities, especially larger public water systems, struggle with the fact that many of our customers don’t know where their water comes from, and may take it for granted that clean and ample amounts of water will flow from their faucets. Even so, customers in the Seattle and greater Puget Sound area do connect their water use with salmon.

I don’t think the general public knows about the water code. I think that property owners believe that use of water, either from wells or from streams next to their property, is a right attached to the property just by the fact of ownership.”

Joan Kersnar, Manager of Drinking Water Planning for Seattle Public Utilities and Washington Water Utilities Council Chair

Fairness & Complexity

“The public struggles with the fairness of the water code at times. With increasing times of shortage, the conflict around perceived hierarchies in beneficial uses in the state that don’t exist under the prior appropriation system can be tough to communicate. Similarly, the complexity of the code does not lend itself to easy messaging.”

Tom Tebb, Director
Office of Columbia River

Public Response

“The water code broadly sets out a management program and general policies for the use of state waters, which is a public resource. The source of many conflicts is in how the water code is interpreted and implemented. The water code is not applied in isolation. The management of the water resources requires more than a knowledge and application of the water code itself. The Department of Health regulations on public water systems, the local planning under the Growth Management Act, and the federal and tribal rights and roles, among many other state and federal laws, impact the implementation of the water code. The courts will therefore continue to have a very important role in the implementation of the law.”

Tom McDonald, Attorney
Cascadia Law Group

Public Focus Needed

“I think the public could better understand water resource management. However, with all the other competing issues we face I am afraid the public will not focus on it until it is too late and the water is in very short supply. Water folks usually work to keep the supply in place without much fanfare.”

Dave Brown, Water/Irrigation Division Manager
City of Yakima

Environmental Protection

“It is very complex and, in general, is set up to protect the environment.”

Jim Miller, Engineering Superintendent
City of Everett

Global Solutions

What will the next 100 water code years look like?

“The Office of Columbia River is an example of a program with the mission and funding ‘glue’ that can bridge the gap between other programs and therefore break political stalemates and achieve global solutions. More programs with this kind of leadership that can transcend individual mandates would be helpful.”

Mike Kaputa, Director
Chelan County Department of Natural Resources

Regional Tools Needed

“Regional tools are much more efficient and have to be more of the future (instead of case-by-case self-solving). [For example,] global back-mitigation of a region (Kittitas County settlement); Teanaway River mitigation as a regional no-impairment tool (to deal with out-of-season impacts); or State-sponsored water supplies like Office of Columbia River.

Paul Jewell, County Commissioner
Kittitas County

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Constraints & Crisis

“If climate change is going to change the hydrologic patterns, then the basis for setting many instream flows rules and the reliability of water supplies will change, yet the water code has constraints around what it can do.”

Joan Kersnar, Manager of Drinking Water Planning for Seattle Public Utilities and Washington Water Utilities Council Chair

“We end up managing by crisis and flashpoints a lot of the time. The recent Supreme Court cases like *Swinomish*, *Foster/Yelm*, and *Hirst* are good examples of the latest crisis. We could benefit from greater long-term visioning and state water planning.”

Tom Tebb, Director
Office of Columbia River

Transfers Required

“The water code will need continued refinement to address the fact that future water use will necessarily require the transfers of existing water rights. Water will become an even more expensive commodity and as they have said for many years, ‘water flows up to money.’ The localized impacts from water right transfers from agriculture to domestic and commercial will permanently affect the rural communities. Without an unlikely monumental movement to edit the water code to address adjudications, provide greater consistency throughout the many chapters in the RCW, and provide for greater certainty for addressing instream resources, among other issues, the existing water code will still be here in 100 years with the same patchwork amendments that solve isolated issues.”

Tom McDonald, Attorney
Cascadia Law Group

Overhaul Needed

“The code both evolves through changes in the law, and not always for the better. The legislative process is not always the most efficient (straight forward) way to change the law. [The] next 100 years will see even more complications as climate change makes water even more difficult to manage.”

Dave Brown, Water/Irrigation Division Manager
City of Yakima

Evolving Code Issues

Value Increases

“It will become much more contentious between instream and out-of-stream needs. There will be much more water right sales as the value of water increases. *Hirst* will expand to apply to most all users. Since Agriculture holds the highest percentage of water in the State, they will be in position to sell off some of this water as the water becomes more valuable to sell than to raise crops.”

Jim Miller, Engineering Superintendent
City of Everett

CONCLUSION

Adoption of the 1917 Water Code moved Washington state away from a riparian doctrine system of water rights ill-suited to a largely arid western state into a system based on prior appropriation. One hundred years later, the fundamental concepts of the water code continue to form the base for the state’s water rights water administrative system. However, as we heard from our respondents, increasing demands on a limited resource for the needs of people and the environment, combined with evolving legal interpretation of the 1917 Water Code and subsequent legislation, have led to an increasingly complex and uncertain system for securing or transferring water rights. Continued state leadership through programs like the Office of the Columbia River (OCR) will be critical for addressing the next 100 years of water rights management in Washington. As the impacts of major legal cases, like *Hirst*, continue to ripple throughout the state, public outreach and education on important water resources issues will continue to be a pressing need for water system managers, purveyors, regulators, consultants, and attorneys.

FOR ADDITIONAL INFORMATION:

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Washington State Department of Ecology website on “100 Years of Water Law” at:
www.ecy.wa.gov/programs/wr/hq/waterlaw-100.html

Washington State Department of Ecology website on “Water Resources - Related Case Law” at:
www.ecy.wa.gov/programs/wr/caselaw/cl-home.html

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