

# *Appendix*

## *A*

Ecology Budget Proviso

Section 21 (Pages 110-112) Water-related reports

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PART III  
NATURAL RESOURCES

Sec. 301. 2001 2nd sp.s. c 7 s 301 (uncodified) is amended to read as follows:

FOR THE COLUMBIA RIVER GORGE COMMISSION

General Fund--State Appropriation (FY 2002) . . .	\$	398,000
General Fund--State Appropriation (FY 2003) . . .	\$	<del>((391,000))</del>
		<u>379,000</u>
General Fund--Private/Local Appropriation . . .	\$	749,000
TOTAL APPROPRIATION . . . . .	\$	<del>((1,538,000))</del>
		<u>1,526,000</u>

The appropriations in this section are subject to the following conditions and limitations: \$40,000 of the general fund--state appropriation for fiscal year 2002 and \$40,000 of the general fund--state appropriation for fiscal year 2003 are provided solely to implement the scenic area management plan for Klickitat county. If Klickitat county adopts an ordinance to implement the scenic area management plan in accordance with the national scenic area act, P.L. 99-663, then the amounts provided in this subsection shall be provided as a grant to Klickitat county to implement its responsibilities under the act.

Sec. 302. 2001 2nd sp.s. c 7 s 302 (uncodified) is amended to read as follows:

FOR THE DEPARTMENT OF ECOLOGY

General Fund--State Appropriation (FY 2002) . . .	\$	<del>((46,633,000))</del>
		<u>39,404,000</u>
General Fund--State Appropriation (FY 2003) . . .	\$	<del>((44,481,000))</del>
		<u>34,283,000</u>
General Fund--Federal Appropriation . . . . .	\$	56,805,000
General Fund--Private/Local Appropriation \$		4,351,000
Special Grass Seed Burning Research Account--		
State Appropriation . . . . .	\$	14,000
Reclamation Revolving Account--State		
Appropriation . . . . .	\$	<del>((1,810,000))</del>
		<u>1,935,000</u>

1 (b) \$100,000 of the oil spill prevention account appropriation is  
2 provided solely for the department to conduct a vessel transponder  
3 feasibility study for Washington waters and undertake a trial vessel  
4 tracking program using transponders. In conducting the feasibility study  
5 and trial program, the department of ecology shall consult with state  
6 pilotage authorities, the maritime industry and the United States coast  
7 guard; and

8 (c) \$180,000 of the oil spill prevention account appropriation is  
9 provided solely to acquire vessel incident reporting information.

10 The governor shall request the federal government to provide ongoing  
11 resources to station a dedicated rescue tug at Neah Bay.

12 ~~((+21+))~~ (18) \$600,000 of the water quality account--state  
13 appropriation is provided solely for setting instream flows in six basins  
14 not currently planning under the watershed planning act.

15 (19) \$200,000 of the water quality account appropriation is provided  
16 solely for activities associated with development of the Willapa River total  
17 maximum daily load (TMDL). The activities shall include but are not limited  
18 to: (a) A contract with Pacific county to complete the oxygen/bacteria and  
19 temperature model for the TMDL, conduct a technical analysis of local  
20 options for waste load allocations, and develop the first draft of the waste  
21 load allocation plan; and (b) a contract for facilitation services for a  
22 public process for the TMDL, assist in reaching consensus between parties  
23 involved in the technical work, help ensure that there is an accurate public  
24 record, and provide a forum for the waste load allocation.

25 (20) \$175,000 of the biosolids permit account is provided solely to  
26 develop a statewide septage strategy. The department shall work with  
27 affected stakeholders to address septage permit requirements, changes to  
28 existing rules, clarification of state and local responsibilities, and fee  
29 structure changes that are necessary to support the program in future  
30 biennia. The department shall report its findings to the governor and  
31 appropriate committees of the legislature by June 30, 2003.

32 (21) \$189,000 of the general fund--state appropriation for fiscal year  
33 2003 is provided solely for facilitation services and the following  
34 activities:

35 (a)(i). A joint task force is created to study judicial and  
36 administrative alternatives for resolving water disputes. The task force  
37 shall be organized and led by the office of the attorney general. In  
38 addition to the office of the attorney general, members of the task force  
39 shall include:

1 (A) Representatives of the legislature, including one member from each  
2 caucus appointed by the president of the senate and the speaker of the house  
3 of representatives;

4 (B) Representatives of the superior courts appointed by the president  
5 of the superior court judges association, and shall include two judicial  
6 officers of the superior court from eastern Washington and two judicial  
7 officers of the superior court from western Washington;

8 (C) A representative of the state court of appeals appointed by the  
9 chief justice of the state supreme court;

10 (D) A representative of the environmental hearings office; and

11 (E) A representative of the department of ecology.

12 (ii) The objectives of the task force are to:

13 (A) Examine and characterize the types of water disputes to be  
14 resolved;

15 (B) Examine the approach of other states to water dispute resolution;

16 (C) Recommend one or more methods to resolve water disputes,  
17 including, but not limited to, an administrative resolution process; a  
18 judicial resolution process such as water court; or any combination thereof;  
19 and

20 (D) Recommend an implementation plan that will address:

21 (I) A specific administrative structure for each method used to  
22 resolve water disputes;

23 (II) The cost to implement the plan; and

24 (III) The changes to statutes and administrative rules necessary to  
25 implement the plan.

26 (iii) The office of the attorney general shall work with the staff of  
27 the standing committees of the legislature with jurisdiction over water  
28 resources to research and compile information relevant to the mission of the  
29 task force by December 31, 2002.

30 (iv) The task force shall submit its report to the appropriate  
31 committees of the legislature no later than December 30, 2003.

32 (b) The department of ecology and the attorney general's office shall  
33 conduct a study to identify possible ways to streamline the water right  
34 general adjudication procedures. By December 1, 2002, the agencies will  
35 report on their findings and recommendations to the legislature.

36 (c) The legislature finds that it is in the public interest to  
37 investigate the feasibility of conducting negotiations with other states and  
38 Canada regarding use of water bodies they share with the state of  
39 Washington.

1 (ii) The governor, or the governor's designee, shall consult with the  
2 states that share water bodies with the state of Washington, with Canada,  
3 and with other states that have conducted similar negotiations, regarding  
4 issues and strategies in those negotiations and shall report to the standing  
5 committees of the legislature having jurisdiction over water resources by  
6 January 1, 2003.

7 (iii) In conducting the consultations under this subsection (c), the  
8 governor shall give priority consideration to the interstate issues  
9 affecting the Spokane-Rathdrum Prairie aquifer including those issues  
10 affecting a safe and adequate supply of public drinking water, as provided  
11 by municipal governments.

12 (d) By October 1, 2002, the department of ecology shall provide to the  
13 appropriate standing committees of the legislature, a plan, schedule, and  
14 budget for improving the administration of water right records held by the  
15 department of ecology. The department of ecology shall work with the  
16 department of revenue and with county auditors in developing recommendations  
17 for improving the administration of water rights ownership information and  
18 integrating this information with real property ownership records. The  
19 department of ecology shall evaluate the need for grants to counties to  
20 assist with recording and information management needs related to water  
21 rights ownership and title.

22 (22) For applicants that meet eligibility requirements, the department  
23 of ecology shall consider individual stormdrain treatment systems to be  
24 classified as "activity" projects and eligible for grant funding provided  
25 under section 319 the federal Clean Water Act. These projects shall be  
26 prioritized for funding along with other grant proposals. Receipt of  
27 funding shall be based on this prioritization.

28 **Sec. 303.** 2001 2nd sp.s. c 7 s 303 (uncodified) is amended to read  
29 as follows:

30 **FOR THE STATE PARKS AND RECREATION COMMISSION**

31	General Fund--State Appropriation (FY 2002)	\$	<del>((32,298,000))</del>
32			<u>32,198,000</u>
33	General Fund--State Appropriation (FY 2003)	\$	<del>((32,366,000))</del>
34			<u>30,340,000</u>
35	General Fund--Federal Appropriation	\$	2,690,000
36	General Fund--Private/Local Appropriation	\$	50,000
37	Winter Recreation Program Account--State		
38	Appropriation	\$	<del>((327,000))</del>

Excerpt from AGO Budget Proviso

Section 4 = Reserved Rights Report

1	Appropriation . . . . .	\$	(( <del>1,789,000</del> ))
2			<u>1,753,000</u>
3	Tobacco Prevention and Control Account		
4	Appropriation . . . . .	\$	277,000
5	New Motor Vehicle Arbitration Account--State		
6	Appropriation . . . . .	\$	1,163,000
7	Legal Services Revolving Account--State		
8	Appropriation . . . . .	\$	(( <del>147,306,000</del> ))
9			<u>147,422,000</u>
10	TOTAL APPROPRIATION . . . . .	\$	(( <del>163,020,000</del> ))
11			<u>162,364,000</u>

12 The appropriations in this section are subject to the following  
13 conditions and limitations:

14 (1) The attorney general shall report each fiscal year on actual legal  
15 services expenditures and actual attorney staffing levels for each agency  
16 receiving legal services. The report shall be submitted to the office of  
17 financial management and the fiscal committees of the senate and house of  
18 representatives no later than ninety days after the end of each fiscal year.

19 (2) The attorney general and the office of financial management shall  
20 modify the attorney general billing system to meet the needs of user  
21 agencies for greater predictability, timeliness, and explanation of how  
22 legal services are being used by the agency. The attorney general shall  
23 provide the following information each month to agencies receiving legal  
24 services: (a) The full-time equivalent attorney services provided for the  
25 month; (b) the full-time equivalent investigator services provided for the  
26 month; (c) the full-time equivalent paralegal services provided for the  
27 month; and (d) direct legal costs, such as filing and docket fees, charged  
28 to the agency for the month.

29 (3) Prior to entering into any negotiated settlement of a claim against  
30 the state, that exceeds five million dollars, the attorney general shall  
31 notify the director of financial management and the chairs of the senate  
32 committee on ways and means and the house of representatives committee on  
33 appropriations.

\* 34 (4) (a) \$87,000 of the general fund--state appropriation for fiscal year  
35 2003 is provided solely for the office of the attorney general to prepare  
36 a report by October 1, 2002, on federal and Indian reserved water rights,  
37 and to submit the report to the standing committees of the legislature  
38 having jurisdiction over water resources. The objectives of the report  
39 shall be to:

- 1 (i) Examine and characterize the types of water rights issues involved;
- 2 (ii) Examine the approaches of other states to such issues and their
- 3 results;
- 4 (iii) Examine methods for addressing such issues including, but not
- 5 limited to, administrative, judicial, or other methods, or any combinations
- 6 thereof; and
- 7 (iv) Examine implementation and funding requirements.

8 (b) Following receipt of the report, the standing committees of the  
 9 legislature having jurisdiction over water resources shall seek and consider  
 10 the recommendations of the relevant departments and agencies of the United  
 11 States, the federally recognized Indian tribes with water-related interests  
 12 in the state, and water users in the state and shall develop  
 13 recommendations.

14 **Sec. 123.** 2001 2nd sp.s. c 7 s 126 (uncodified) is amended to read as  
 15 follows:

16 **FOR THE CASELOAD FORECAST COUNCIL**

17	General Fund--State Appropriation (FY 2002) . . . \$	631,000
18	General Fund--State Appropriation (FY 2003) . . . \$	<del>((619,000))</del>
19		<u>600,000</u>
20	TOTAL APPROPRIATION . . . . . \$	<del>((1,250,000))</del>
21		<u>1,231,000</u>

22 **NEW SECTION. Sec. 124.** A new section is added to 2001 2nd sp.s. c 7  
 23 (uncodified) to read as follows:

24 **FOR THE DEPARTMENT OF FINANCIAL INSTITUTIONS.** The department of financial  
 25 institutions shall reduce its fiscal year 2003 expenditures from the  
 26 financial services regulation account by the amount of \$357,000.

27 **Sec. 125.** 2001 2nd sp.s. c 7 s 127 (uncodified) is amended to read as  
 28 follows:

29 **FOR THE DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT**

30	General Fund--State Appropriation (FY 2002) . . . \$	<del>((71,083,500))</del>
31		<u>70,893,000</u>
32	General Fund--State Appropriation (FY 2003) . . . \$	<del>((70,873,500))</del>
33		<u>50,499,000</u>
34	General Fund--Federal Appropriation . . . . . \$	173,342,000
35	General Fund--Private/Local Appropriation . . . \$	7,980,000
36	Public Safety and Education Account--State	

# *Appendix*

## *B*



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary June 27, 2002 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Michael Cooper, Judge Richard Hicks, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Kelli Linville, Senator Jim Honeyford, Senator Karen Fraser, Keith Phillips (Department of Ecology Water Policy Specialist); Judge Linda Krese participated by telephone; Representative Bruce Chandler was not present.

#### ***Others in Attendance:***

From the Attorney General's Office (AGO): Rob Costello, Mary Sue Wilson, Alan Reichman, Bonnie Czepiel, Tammy Teeter.

#### ***Legislative Staff:***

Tom Davis, Caroleen Dineen, Ken Hurst, Genevieve Pisarski, John Stuhlmiller, Karen Terwilleger, Gary Wilburn.

#### ***Others:***

Dawn Vyvyan (representing the Yakama Nation), Mike Schwisow (representing the Washington State Water Resources Association).

*The meeting was called to order at approximately 1:00 p.m.*

#### ***Introductions***

Attorney General Gregoire welcomed the Task Force and invited members to introduce themselves and describe their experience on water issues. Attorney General Gregoire explained that she and her staff had compiled a set of materials that she believed would be useful for the Task Force. She explained that her description of items such as the types of disputes to be examined by the Task Force and the schedule for Task Force meetings were offered to begin discussion and she welcomed suggestions for alternative approaches. Because Representative Chandler was unable to attend, Assistant Attorney General Mary Sue Wilson spoke with him in advance of the meeting. During the Task Force discussion, Mary Sue conveyed Representative Chandler's perspective on several of the agenda topics.

#### ***"The Mission of the Task Force"***

Attorney General Gregoire noted that the Legislature and various other policy groups have attempted to tackle water issues for many years, repeatedly grappling with questions involving both policy and structure. She suggested that the Task Force focus on structure while

others work on issues of policy. She presented the following proposed Problem Statement to guide the efforts of the Task Force:

Develop a report to the Legislature that includes options and recommendations for a new water dispute resolution process that is fair and efficient and is less costly and time consuming for participants.

There was general consensus that this statement was a good representation of the mission of the Task Force.

### ***Initial Identification of Criteria for Assessing Strengths of a New System***

Next, the Task Force began identifying criteria that should be used to assess the advantages and disadvantages of alternative systems. The following criteria were suggested:

- Cost: for both participants and the public
- Unified system (which covers all types of water, *e.g.*, ground water, surface water, rain water)
- Recognizes limitations of interests and authorities of other jurisdictions (*e.g.*, other states, tribes, federal government claims)
- Appropriately comprehensive
- Provides access to all, especially pro se parties
- Timely & efficient
- Just & balanced
- Certainty about its scope (*e.g.*, does it cover interstate issues or not?)

It is expected that the Task Force will continue to discuss this topic and this list will be revised accordingly.

### ***Parallel Efforts***

Mary Sue explained that the 2002 Legislature directed a number of water study efforts. She provided a handout showing five activities: (1) the Water Disputes Task Force; (2) Tribal and federal water rights; (3) Streamlining adjudications; (4) Transboundary water rights; and (5) Water rights records administration.

Mary Sue then summarized the AGO's effort on the tribal and federal water rights report. This report is due to the Legislature by October 1, 2002. The report will examine and characterize the types of issues involved with federal and Indian reserved rights and how other states address these issues (*e.g.*, through litigation, settlement, or other innovative approaches). The AGO will conduct a survey of other western states to identify the approaches used elsewhere and the advantages and shortcomings of such approaches. The Solicitor General's Unit of the AGO will draft a report and circulate it for review to local law professors later this summer. The AGO has already received materials on this topic from a variety of sources, including from the Chehalis Tribe and from the Navy. The Department of Interior has assigned a contact for the AGO for this effort.

Next, Task Force Member Keith Phillips explained the status of Ecology's efforts on the other legislatively-directed reports. Ecology will submit a report to the Legislature on streamlining adjudications in December 2002, a report on transboundary water rights in January 2003, and a report on water rights records administration in October 2002.

Copies of the reports that are generated pursuant to each of these efforts will be provided to Task Force members. Authors of the reports will be asked to make presentations to the Task Force at the January 2003 meeting.

There was discussion about whether the reports were intended to inform the Legislature or the Task Force. Senator Fraser explained that each study was designed to be a separate, stand-alone document that informed the Legislature. She acknowledged that others (including this Task Force) would certainly review the reports. Attorney General Gregoire asked whether the 2003 Legislature was expected to pursue legislation in response to the reports, specifically the Streamlining Adjudications Report. Representative Linville indicated she thought the 2003 Legislature might make minor changes to the system in response to the report. Senator Fraser suggested that if it looks like the Task Force should be looking at the report, the Legislature might decline to act on the topic in 2003, but it would probably depend on whether the issue was ready for action and whether it had broad support.

Next, Keith Phillips provided background information on water legislation passed in 2001 and 2002. He provided members with a handout summarizing these new laws. He also provided a copy of an August 20, 2001 letter (signed by 11 Washington officials, including the 4 legislators who serve on this Task Force) identifying 4 specific topics that continue to be the focus of water policy efforts. These topics are: (1) instream flows, (2) water for growing communities, (3) use it or lose it policies, and (4) funding for water infrastructure, including storage and drinking water systems.

### ***Washington's Current System***

Assistant Attorney General Alan Reichman provided a presentation to the Task Force of Washington's administrative-judicial hybrid system of water rights dispute resolution. An outline of Alan's presentation is attached to this meeting summary. The presentation also made reference to background materials in the Task Force notebook, located at Tabs 6, 7, & 8A.

Questions, answers and discussion followed the presentation. One of the questions resulted in a discussion of the possibility that a judicial or quasi-judicial officer Task Force member might have to recuse himself or herself from participation in a case if he or she commented during Task Force discussions on the specifics of a pending matter. To avoid this possibility, Attorney General Gregoire emphasized that she saw no reason for the group to discuss the specifics of pending cases. She also urged the judicial and quasi-judicial officers to expressly state their concerns should Task Force discussions move in the direction of an active case.

### ***Report from Staff***

Mary Sue reported that she had been working with AGO law clerk Bonnie Czepiel, Ken Slattery from Ecology, and legislative staff to compile background information for the Task Force.

An initial set of background material was provided in the Task Force binder (Tabs 6-10). Mary Sue distributed two handouts. The first is a 6-27-02 List of Background Readings. All the materials on this list are available to Task Force members. Members should call or email Mary Sue to obtain copies of any of the items on this list. A revised version of this list will be distributed to the Task Force later this summer. Mary Sue also handed out a list of website resources that may be useful to Task Force members.

Mary Sue described the research effort to date. Staff undertook electronic searches of various databases such as WESTLAW to identify helpful law review articles and other publications. Staff also visited a number of websites for law schools and other organizations involved in water rights issues. Staff have contacted or are in the process of contacting the following organizations to obtain relevant background information: Western States Water Council; Dividing the Waters.org; Conference of Western Attorneys General; Council of State Governments (CSG); National Conference of State Legislatures (NCSL). Legislative staff gathered materials from old legislative files reflecting previous legislative efforts on adjudications and other related topics.

Mary Sue invited members to identify specific materials they are interested in obtaining. She also urged members to suggest other areas for staff research.

Staff will develop and conduct a survey of other western states to identify the methods used elsewhere for resolving water rights disputes and the strengths and weaknesses of these methods. The results of this survey will be reported at the October 2002 Task Force meeting.

Attorney General Gregoire will attend a meeting of the Conference of Western Attorneys General (CWAG) in late July. She will ask other Attorneys General for information and contacts on water disputes.

### ***Discussion of the Scope of the Task Force Effort***

The Task Force reviewed the Strategy Statement (Tab 4 in materials) and examples of pending cases involving water disputes (Tab 7). Members began to identify categories of disputes that will be considered as the focus of the Task Force. Some categories of disputes are described at page 2 of the Strategy Statement. Set forth below is an initial list and descriptions of the types of disputes the Task Force may examine.

#### ***Initial Identification of Disputes the Task Force May Examine:***

- (1) Two-party disputes (or private, small-scale disputes): disputes between individuals concerning the validity, seniority, and/or quantity of their rights; may also include disputes regarding the potential impairment by one water user of another water user's right.

- (2) Historic claims disputes: disputes involving a claimant who does not hold a permit or certificate, but whose claim pre-dates adoption of the water code and is filed in the claims registry.
- (3) Instream flow disputes: disputes may involve determining whether a particular water right is subject to an instream flow or how established flows can be met.
- (4) Federal and Indian reserved rights disputes: disputes concerning the existence, validity, and/or scope of federal or Indian reserved rights.
- (5) Water rights management disputes: includes disputes involving Ecology decisions to approve or deny applications for new water rights or applications to change water rights and disputes involving Ecology notices of relinquishment.
- (6) Water rights enforcement disputes: in watersheds that have not been adjudicated, includes disputes involving enforcement of terms of water right permits or conditions (e.g., cancellation of permit if water use not developed according to condition in permit); in addition, in watersheds that have been adjudicated, includes disputes involving enforcement of terms of court's final decree.

The Task Force discussed whether to address interstate issues. The Task Force made a tentative decision to proceed to address in-state issues only. This decision may be revisited after members review Ecology's transboundary report (due out in January 2003).

#### ***Discussion of the Schedule and Frequency of Meetings***

The Task Force agreed to meet in October 2002, January 2003, March 2003, May 2003, July 2003, and September 2003. At the next meeting (October 15, 2002), the Task Force will schedule meetings for the remainder of 2003.

The meeting schedule is:

**Tuesday, October 15, 2002, 1:00 p.m. to 4:00 p.m. in Olympia**

**Wednesday, January 8, 2003, 1:00 p.m. to 4:00 p.m. in Olympia**

**Monday, March 24, 2003 or Tuesday, March 25, 2003, in Olympia**

**Thursday, May 22, 2003, 1:00 p.m. to 4:00 p.m. in Yakima**

**July 2003 (date to be selected at October 2002 meeting)**

**September 2003 (date to be selected at October 2002 meeting)**

#### ***Initial Identification of Possible Presenters to the Task Force***

The Task Force hopes to bring a speaker or speakers with experience in other methods of water dispute resolution to the October 2002 meeting.

Several members stated an interest in hearing from a person with experience in dispute resolution alternatives. Others suggested an interest in hearing from a water master or a special master. Representative Linville clarified that she was interested in hearing from a water master who had responsibility for resolving and enforcing water disputes in advance of any court process.

Following is a list of suggested speakers (this list includes suggestions provided by Commissioner Ottem following the meeting):

- **John E. Thorson** is an attorney and water policy consultant. He is a former special master in the Arizona General Stream Adjudication, where he acted as the chief judicial hearing officer in both the Gila River and Little River adjudications. He has served as regional counsel for the Western Governors' Conference; director of the Conference of Western Attorneys General; consultant to the Montana state government; and director of the Missouri River Management Project for the Northern Lights Institute.
- **Justice Gregory Hobbs** of the Colorado Supreme Court has served on the Colorado Supreme Court since 1996. He practiced law for 25 years, with an emphasis on water, environment, land use, and transportation. He has served as an adjunct professor of Environmental Law in the Masters Program in Environmental Policy and Management, at the University of Denver. He is a former member of the Governor's Water Roundtable.
- **Judge Bruce Loble** has served as the Chief Water Judge of the Montana Water Court for the last 11 years. He has reviewed over 14,000 state law based claims and five compacts involving federal and Indian reserved water rights. He frequently lectures on water right related matters.
- **Susan Cottingham** is the Program Manager of Montana's Department of Natural Resources and Conservation. She has 20 years experience in working on issues involving the Montana compact commission.
- **Judge Michael Nelson** serves as a Superior Court Judge for Apache County in Arizona. He has acted as a settlement judge in both the Little Colorado River and Gila River Adjudications. He has dealt with federal reserved rights.
- **Retired Judge Daniel Hurlbutt, Jr.** presided over Idaho's Snake River Basin Adjudication (SRBA) throughout the 1990's. The SRBA is the largest single lawsuit in Idaho history and involves more than 160,000 water rights.
- **Professor A. Dan Tarlock** is a Professor of Law and Co-Director of the Program in Environmental and Energy Law at the Chicago-Kent College of Law. Professor Tarlock is a recognized expert in environmental law. He has published a treatise, *Law of Water Rights and Resources* and is a co-author of four casebooks, *Water*

*Resource Management, Environmental Law, Land Use Controls, and Environmental Protection: Law and Policy.*

- **Judge Gary P. Hartman**, serves as a judge in the Fifth Judicial District in Wyoming. He has presided over the Big Horn River case, which will establish priority for use of all waters in the Wind and Big Horn rivers and their tributaries. The Big Horn case dates to 1977.
- **A. Reed Marbut** is the Federal and Indian Water Right Coordinator for the Oregon Water Resources Department. He is the team leader/facilitator for the Klamath Basin Alternative Dispute Resolution Program.
- **Ramsey Kropf** is an attorney who has practiced water law in Arizona, Wyoming, and Colorado. He served as Special Master in the Big Horn River Adjudication in Wyoming. He served as an attorney and case administrator for Arizona's General Stream Adjudications from 1992 to 1994.

Additional suggestions for speakers should be provided to Mary Sue by July 31, 2002. Thereafter, staff will informally interview the persons identified and determine who to invite based upon their experience and their ability to address issues in which the Task Force is interested.

***Public Involvement***

The Task Force decided that the primary opportunity for public involvement on water disputes issues will be during the legislative process following completion of the final report of the Task Force. People who want to submit materials or comments for the Task Force's consideration will be asked to submit comments in writing and direct them to Mary Sue. Mary Sue will then distribute the materials to members.

Keith Phillips and Mary Sue frequently attend monthly meetings of the Water Resources Advisory Committee (WRAC), a group organized by Ecology and made up of persons and groups interested in water rights issues. Keith suggested that he and/or Mary Sue could provide periodic reports on the status of the Task Force effort at WRAC meetings. The Task Force concurred.

The Task Force decided that meeting summaries should be available to the public upon request and should also be posted on an appropriate website.

*The meeting adjourned at approximately 4:00 p.m.*



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary October 15, 2002 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Michael Cooper, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Keith Phillips (Department of Ecology Water Policy Specialist); Judge John Schultheis was not present.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Alan Reichman, Steve North, Tammy Teeter.

*Legislative Staff:* Tom Davis, Caroleen Dineen, Ken Hurst, Genevieve Pisarski, John Stuhlmiller, Karen Terwilleger, Gary Wilburn.

*Others:* Dawn Vyvyan (representing the Yakama Nation), Kathleen Collins, Jon Hare (Chehalis Tribe), Stella Satter (Department of Ecology), and Fred Rajala (Department of Ecology).

*The meeting was called to order at approximately 1:15 p.m.*

#### ***Introductions***

Attorney General Gregoire welcomed the Task Force and the two guest speakers and invited Task Force members and audience members to introduce themselves.

#### ***Updates on Reports***

Attorney General Gregoire reported that the AGO Report on the topic of federal and Indian reserved water rights was out for review by area law professors. Keith Phillips reported on the status of two other reports, the joint Ecology/AGO report on Streamlining Adjudications, scheduled to be completed by December 1, 2002, and Ecology's report on negotiations involving transboundary water right issues, scheduled to be completed by January 1, 2003. Copies of these reports will be distributed to members before the next Task Force meeting.

#### ***Presentation by, and Discussion with, Justice Hobbs***

Attorney General Gregoire welcomed the first guest speaker, Colorado Supreme Court Justice Gregory Hobbs, with a special poem. Justice Hobbs was invited to describe Colorado's system of statewide water courts, including associated costs, frequent criticisms, particular advantages, and thoughts regarding the possibility of adopting a similar water court system elsewhere.

Prior to the Task Force meeting, Justice Hobbs provided each member by email: (1) responses to questions submitted to him in advance of the meeting, (2) Colorado statutes, (3) the *Empire Lodge* Colorado Supreme Court decision, and (4) a spread sheet showing Colorado water court costs. At the meeting, Justice Hobbs provided three handouts: (1) *Streamflow Information and Drought Impacts*, (2) *Colorado Division of Water Resources*, and (3) an additional copy of the water courts cost spread sheet. After the meeting, Justice Hobbs provided two additional handouts: (1) a one page document entitled: *What Exactly is a River Call?* and (2) a law review article entitled *Developing a Water Supply in Colorado: The Role of An Engineer*.

Justice Hobbs described the Colorado system in general and identified several specific elements. The state is divided into seven water divisions. A map of these divisions is included on page 5 of his *Streamflow Information and Drought Impacts* handout. A water judge and an alternate water judge are appointed for each of these divisions. The alternate judge may serve as a settlement judge on certain cases.

Justice Hobbs made the following observations:

- Colorado's water court system is not a full-scale adjudication in the traditional sense. Rather it involves case-by-case processing, generally driven by water right transactions. For example, changes and transfers to water rights require approval of the water court and they are what frequently drive water court activity.
- Water courts do not create rights, they identify what rights exist.
- Colorado's state engineer serves the very important roles of administrator and enforcer. The engineer also encourages water users to make deals with each other (voluntarily allocate limited water) to avoid enforcement.
- Only holders of "decreed rights" can make calls for enforcement. If you do not hold a "decreed right," your water use can be shut off.
- 95% of the work of the water courts is done at the referee level, where uncontested decrees are issued in response to requests to change water rights.
- The concept of augmentation plans has been developed as a way for junior water right holders to avoid getting shut off in times of water shortages. The junior right holders acquire credits by augmenting the system in the off-season. By augmenting the system in the off-season, juniors are less likely to be curtailed in times of shortage.
- The total annual cost of the water court system for FY 2003 is \$1.08 million. This covers the judge, magistrate, and clerk costs. In terms of time spent, the total judge need across all 7 divisions is 0.35 (a little more than 1/3 of one judge's time); the total magistrate need is 3.23; and the total court staff need is 18.45. (See cost spreadsheet handout for additional details.) The revenue for the water courts comes from general legislative appropriations and a minimal filing fee. The filing fee per water transaction is approximately \$150.00.
- Colorado's water court experiences a very low rate of contested hearings. For example, in one of the seven divisions (division 6), there have been no contested hearings for ten years. This explains the small amount of time the judges devote to the water courts (previous bullet).

- Instream flows are established when the Water Conservation Board obtains an instream flow appropriation from the court.

***Presentation by Staff Regarding Water Rights Dispute Systems in Six Other States***

AGO and legislative staff conducted surveys of six western states, asking officials from each state the same set of questions. Results of the surveys were distributed at the meeting. Highlights regarding the states' responses included:

In **Oregon**, adjudications do not include post-1909 state permitted rights, meaning the scope of the adjudication is more limited than in Washington. Recent legislative actions have included appropriations of \$1 million to address permit backlogs and the establishment of timelines for permit processing. Adoption of a \$200 protest fee appears to be responsible for a dramatic reduction in the numbers and types of protests filed.

In **Idaho**, the Snake River Basin Adjudication (SRBA) began in 1987, involves about 160,000 state-law based claims as well as other rights and covers 85 percent of Idaho's land mass. Idaho's Department of Water Resources processes water right permit applications. Currently, administrative moratoria on permit processing are in place while two significant categories of issues are addressed in the SRBA. The issue of hydraulic continuity between the river and a very large aquifer is being mediated. Issues involving the Endangered Species Act (ESA) and federal reserved water rights are also being mediated. When Idaho's system was created, Idaho officials deferred to the federal government's position that federal rights could only be adjudicated through a judicially-based system. Oregon's experience has proven that an administratively-based system can also satisfy the McCarran Amendment and Idaho believes an administrative system may have proven more effective. The advantage of a judicially-based system is that the funding is likely to be more constant, whereas the funding of an administrative system is more easily subject to legislative cuts.

In **Arizona**, separate legal regimes govern the use of surface water and groundwater. Surface water rights are adjudicated in court proceedings, in which Arizona's Department of Water Resources serves in a neutral technical, support capacity. The Gila River (begun 1979) and Little Colorado River (begun 1981) adjudications are underway. The geographic area of these adjudications covers three quarters of the state. In these proceedings, there is substantial federal and Indian land to deal with and Arizona has attempted to settle those claims before reaching private claims. Groundwater is regulated under the 1980 Groundwater Management Code, which involves the administrative management of Active Management Areas (AMAs). Even though much of the regulated groundwater serves 80% of the state's population and is subject to overdraft, the groundwater management system enjoys the general support or "buy in" of the major interests.

In **California**, separate legal regimes govern surface water and groundwater use. Although general adjudication of stream systems is provided for by statute, there has been a trend away from general adjudications and toward individual actions on specific claims. The fact that California has not generally embarked on stream adjudications may be attributable to the fact that most large water users in the state receive their water from state and federal water projects. California's system is criticized for the lack of integration between surface water and

groundwater. It is praised for the public's access to the State Water Resources Control Board's decisions and the Board's integration of water quantity and quality issues.

In **Montana**, a water right permit system is administered by the Department of Natural Resources and Conservation. A state-wide adjudication is underway in Montana's water court, which was created in 1979 and is divided into four districts and presided over by a chief water judge assisted by four water masters. 220,000 claims have been filed in this proceeding, 16,000 of which have final decrees, 22,000 have preliminary decrees, and 84,000 have temporary preliminary decrees. The Department is not an advocate in the adjudication, but supplies data and acts as a reviewer of facts. Montana's system is criticized for the slow pace of its adjudication (only one water judge results in delays in rulings). It is praised for the quality of historical data maintained by the Department.

For **Colorado** highlights, refer to Justice Hobbs' remarks (above).

### ***Presentation and Discussion with Special Master Ramsey Kropf***

Attorney General Gregoire introduced the second guest speaker, Ms. Ramsey Kropf. Ms. Kropf practices water law in Colorado and Arizona and also serves as Special Master in Wyoming's Big Horn River Adjudication. She has chaired a number of CLEs and other conferences focusing on general stream adjudications. She has spoken to a number of groups including New Mexico's General Assembly on the topic of what works and what doesn't work in general stream adjudications.

Ms. Kropf was asked to address the following topics: her experience as a special master in the Wyoming general adjudication; the challenges she has observed as other western states have reformed their water rights systems; and her general ideas on what works and what doesn't work in general stream adjudications. Following her remarks, Ms. Kropf distributed copies of her power point presentation.

Ms. Kropf began her discussion describing the Big Horn River adjudication. It began in 1977 and she is the fifth special master to serve in the adjudication. She has held this position since 1995. Wyoming's general adjudication statute is one paragraph long and does not define the process for the adjudication. Therefore, the court has developed the process over time. At the outset, the Big Horn case was divided into three phases, (1) Indian reserved rights; (2) non-Indian federal reserved rights; and (3) state-based rights. Over the course of the proceeding, 6 appeals have gone to the state supreme court, all dealing with some aspect of Indian water law. The protracted and acrimonious nature of the Big Horn litigation gave rise to more incentive to pursue settlements. Ms. Kropf noted that the overlay of a court proceeding like an adjudication is helpful in facilitating settlement by establishing deadlines and imposing other process.

Next, Ms. Kropf noted Arizona's experience when the state overhauled its water code. After five years of litigation regarding the legislative changes, 22 of 33 statutory changes were invalidated as unconstitutional. In discussing Arizona's water right issues, Ms. Kropf noted the parallels between Arizona and Washington, including a similar number of tribes in the two states (26 recognized tribes in Arizona, 27 in Washington).

Ms. Kropf concluded her comments by discussing the following 10 observations about what does and doesn't work in general stream adjudications:

(1) Separate Federal and Indian Claims from State Claims: Federal and tribal rights should go first.

(2) The KISS principle (Keep it Simple Stupid):

(3) Foster a Dispute Resolution Process: Give it specific deadlines and consequences; evaluate whether local models (like watershed councils) can be used; capitalize on current focus on consensus models. Dispute resolution process can also work in tandem with litigation.

(4) Remove Ambiguity Regarding the State's Role: Don't be ambiguous; Designating the state as a party, not a neutral, enables the state to exercise leadership in helping to keep the process moving forward.

(5) Put State Based Rights on Back Burner: This will simplify the proceedings.

(6) Don't complicate the statutory set-up; simple is better. Complex structure increases cost and decreases flexibility.

(7) Carefully evaluate the option of interlocutory appeals. Several states provide for direct review to State Supreme Court. This can speed process up by providing quick answers to preliminary questions (in Idaho, the Supreme Court must decide appeals within 3-4 months). It can also slow the process down (in Arizona, review of 6 pretrial decisions have been pending for a long time).

(8) Minimize resource allocation. Address hot spot issues early. This may facilitate quicker resolution later. Use Internet and other technology for sharing of information and facilitating participation.

(9) Don't fight over forum. 20 year forum fight in Oregon. Fear of bias in either state or federal court does not appear well-founded.

(10) Always look for the possibility to craft a settlement of federal reserved water rights.

Attorney General Gregoire asked Ms. Kropf if she was familiar with the United States' recent pronouncement that the federal government would claim much less water in disputes involving federal (non-Indian) reservations. Ms. Kropf indicated the recent pronouncement involved the Gunnison National Forest in Colorado. Attorney General Gregoire asked that the federal government be contacted to determine whether this was a new federal water rights policy statement.

***Next Meeting (January 8, 2003)***

Task Force members discussed the agenda for the next meeting (scheduled for January 8, 2003 in Olympia, from 1:00 p.m. to 4:00 p.m.). It was suggested that Susan Cottingham, staff director of Montana's Compact Commission, be invited to speak to the Task Force. It was also suggested that Colorado's State Engineer be invited to speak to the Task Force, in either January or March. Also on the January 2003 agenda are presentations regarding the Reserved Rights Report, Streamlining Adjudications Report, and Transboundary Water Rights Report.

A request was made that data be compiled documenting the number of cases, an estimate of the state's current staff allocations, and an estimate of expenditures associated with water rights disputes. It was requested that the data include: PCHB water rights cases and subsequent appeals; Ecology water rights decisions; adjudications; other court actions involving water right issues; and watershed planning efforts. Staff will work on gathering this type of data for the March 2003 meeting.

It was suggested that the Task Force begin discussions regarding the scope of its efforts by determining whether it intends to design a system or systems aimed at resolving all categories of water rights "disputes," or whether a system would be designed to address only a subset of disputes. A discussion of this topic is expected to occur at either the January or March 2003 meeting.

It was suggested that staff work on a "white paper" describing several possible models to be considered by the Task Force in March 2003.

The January meeting will include a presentation by Susan Cottingham, presentations regarding the recently-completed reports, an update regarding the federal government's recently announced position regarding reserved water rights, and a summary of data if data gathering is completed by then.

*The meeting adjourned at approximately 4:10 p.m.*



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary January 8, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Michael Cooper, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Judge John Schultheis, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Tom Laurie as substitute for Keith Phillips on behalf of the Department of Ecology.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, James Pharris, Barbara Markham, Tammy Teeter.

*Legislative Staff:* John Charba, Caroleen Dineen, Ken Hirst, Evan Sheffels, John Stuhlmiller, Karen Terwilleger, Sam Thompson, Gary Wilburn.

*Others:* Guest speakers: Montana Reserved Rights Compact Commission Staff Director Susan Cottingham and Professor Robert Anderson, University of Washington School of Law.

*The meeting was called to order at approximately 1:15 p.m.*

#### ***Introductions***

Attorney General Gregoire welcomed the Task Force and the two guest speakers and invited Task Force members and audience members to introduce themselves.

#### ***Presentation on AGO Reserved Rights Report***

Senior Assistant Attorney General James Pharris provided an overview of the AGO *Federal and Indian Reserved Water Rights Report to the Legislature*. Copies of this report were distributed to members in early November. Senator Fraser praised the Attorney General's Office for presenting the report in a very readable, user-friendly format. Attorney General Gregoire also added that Tom McDonald, Bob Anderson, and Amy K. Kelley contributed to the report.

#### ***Presentation on Department of Ecology/AGO Streamlining Adjudications Report***

Assistant Attorney General Barbara Markham provided an overview of the Department of Ecology/AGO *Streamlining the Water Rights General Adjudications Procedures Report to the Legislature*. Electronic copies of this report were distributed to members in advance of the meeting. Hard copies were provided at the beginning of the meeting. Following the discussion of the report, Ecology was asked to prepare fiscal note type estimates of the recommendations.

AAG Markham focused her remarks on the nine recommendations included in the report. One member asked whether the result of certain recommendations would reduce work or instead shift work currently performed by the court to another entity such as Ecology or the PCHB. Ms. Markham explained that with respect to recommendation #1 (within the adjudication process, have Ecology make the tentative determinations on water rights and have claimants present fully documented claims at the outset), the idea was to eliminate certain work entirely by requiring that claims be proved early in the process and eliminating subsequent opportunities by a claimant to offer proof. Ms. Markham acknowledged that recommendation #2 (independent of the adjudication process, create a new process for Ecology to validate water right claims, such that when an area was subsequently adjudicated, the court would only need to consider evidence of water use post-dating Ecology's determination) would involve the shifting of a role currently served by the adjudication court to Ecology.

***Presentation and Discussion with Susan Cottingham of Montana's Reserved Water Rights Compact Commission***

Our first guest speaker from outside the AGO was Susan Cottingham. Ms. Cottingham has served as staff director for the Montana Reserved Water Rights Compact Commission since 1991. In this capacity she has directed the negotiation of five complex Indian water rights settlements and three other compacts for federal reserved rights for the National Park Service, the Bureau of Land Management, and the United States Fish and Wildlife Service. She previously served as historical/legal researcher for the Commission for five years. Before moving to Montana, she was a Planning Director for the Town of Crested Butte, Colorado.

Ms. Cottingham provided four handouts to the group: (1) Sections from the Montana Code: 2-15-212 (Reserved Water Rights Compact Commission) and 85-2-217 (Suspension of Adjudication); (2) Montana Adjudications Program Expenditures Since 1974; (3) Montana General Adjudication Map status as of May 2002; and (4) Memorandum of Understanding Between State of Montana Reserved Water Rights Compact Commission and Confederated Salish and Kootenai Tribes of the Flathead Nation. Ms. Cottingham also provided two maps to the Task Force, one showing federal and Indian lands in Montana claiming reserved water rights, the other showing places of use and points of diversion on the Flathead Indian Reservation.

Ms. Cottingham described Montana's Water Court and its Reserved Water Rights Compact Commission, both which were created by the state Legislature in 1979. Montana's Water Court is a statewide court. The decisions of the court are made by the Chief Water Judge (currently Judge Bruce Loble), who is appointed by the State Supreme Court, and three other district judges that are assigned to certain water cases along with their regular court workload. The Water Court is currently focused on state-based rights in basins in the state that are not the subject of Compact Commission negotiations. In basins where there are reserved rights claims, the court generally defers its work until settlements with the Commission have been reached. The expectation is that the state-based claims and the federal claims will eventually be brought together into a single court decision.

Montana's Compact Commission has nine members, four appointed by the governor, two appointed by the presiding officer of the state senate, two appointed by the speaker of the house of representatives and one appointed by the attorney general. The Commission is served by ten

staff, including attorneys, historical researchers, scientists, and administrative staff. On behalf of the State of Montana, the Commission negotiates in a sovereign to sovereign capacity with the United States and the particular tribe. For successful negotiations the Commission endeavors to understand the current state-based water rights so that it can protect the status quo of existing state-based water users while at the same time working to recognize tribal water claims.

All negotiations of the Commission are open to the public. Negotiations, even preliminary negotiations, take months, if not years, to complete. For example, the Memorandum of Understanding between the Commission and the Salish and Kootenai Tribes (one of Ms. Cottingham's handouts), which established ground rules for negotiations and covered topics like agenda setting and press contacts, itself took several years to negotiate.

Once the three parties to a negotiation (tribe(s), state, and United States) reach an agreement, the agreement must go through an approval process before it is presented to the Water Court. This involves each party obtaining legislative approval for their commitments in the settlement agreement. Thus, the Commission seeks approval from the Montana Legislature, the United States seeks approval from Congress, and the tribe(s) seeks approval from its tribal council. Ms. Cottingham noted the value of the legislative Commission members in obtaining approval from the state Legislature. Ms. Cottingham noted that the federal approval process can be bumpy, particularly since many settlements involve federal funding of infrastructure projects that facilitate water use.

When the Water Court accepts a settlement, it is generally filed as a preliminary decree. (Ms. Cottingham noted that Tab 3 of the AGO Reserved Rights Report includes a copy of the Fort Peck decree.) The Water Court may only accept or reject the settlement, it may not add terms to the agreement.

Ms. Cottingham noted some aspects of recent settlement agreements. In all five completed negotiations over tribal rights, the tribes have agreed to subordinate their rights to other rights and the status quo of state-based rights has been confirmed.

Ms. Cottingham responded to the following questions from Members of the Task Force:

- What happens if the Legislature proposes an amendment to a settlement agreement?

None of the legislative bodies (state, federal or tribal) may unilaterally change a settlement agreement. If one of the legislative bodies proposes an amendment, the proposal is sent back to the three negotiating parties to decide whether to amend their agreement.

- Who has standing to challenge an agreement negotiated through this process?

Negotiations are open to the public, so any member of the public may raise issues with the negotiations as they are proceeding. The Commission engages in significant public outreach in an attempt to inform interested persons of negotiations as early in the process as possible. Members of the public offer input when a settlement agreement is

considered for approval by one of the legislative bodies. Finally, persons with standing can file objections when an agreement is submitted to the Water Court.

- Has the Endangered Species Act (ESA) impacted water right negotiations in Montana?

No. Montana has very few major ESA issues. There are some ESA listings in the Flathead area and for the Milk River.

- Are the settlements subject to review under an environmental review statute such as the National Environmental Policy Act (NEPA)?

No. A settlement agreement itself is not subject to review under NEPA or Montana's equivalent, MEPA. However, projects called for by a settlement agreement, such as a dam enlargement project, are subject to NEPA and MEPA review.

- Does Montana rely on basin closures or relinquishment?

Relinquishment of existing rights is not relied on to a significant degree and most of the Compacts result in maintaining the status quo of existing water rights. Several of the Compact agreements include some form of basin closure that prevents new water uses. While not fitting into the basin closure or relinquishment category, it is useful to note that a water bank was established in the Milk River area where water is short. The bank allows water users to temporarily bank water (not use for a period) in exchange for payments and without any permanent loss of banked rights.

***Presentation and Discussion with Professor Robert Anderson, University of Washington School of Law, Director of Native American Law Center***

Our second guest speaker from outside the AGO was University of Washington Law School Professor Robert Anderson. Professor Anderson directs the Native American Law Center. Between 1995 and 2001, Professor Anderson worked for the United States Department of Interior. He served as Associate Solicitor for Indian Affairs and as Counselor to the Secretary. He acted as lead federal negotiator on Indian water right claims involving the Snake River basin, the Klamath River basin, and the Lummi Indian Nation. Between 1983 and 1995, he served as Senior Staff Attorney for the Native American Rights Fund.

We asked Professor Anderson to describe his experiences working on the negotiations in the Snake River and Klamath River basins and those involving the Lummi Indian Nation's water right claims. We asked him to provide his perspective on whether negotiations of reserved rights can be successful when there is no overlying legal case. We also asked that he offer any comments or suggestions for developing new systems for resolving water rights disputes in Washington.

Professor Anderson made several general observations during his discussion with the Task Force. He noted that both federal courts and courts in Washington state have found tribal reserved rights to fisheries at off-reservation locations. Professor Anderson believes the existence of these rights should be taken as a given in negotiations addressing tribal water rights.

Professor Anderson discussed negotiations in Idaho involving the Idaho Power Hells Canyon Project. There, discussions involved establishing different target flows for different types of years (*e.g.*, dry, wet, average), identifying how much water was necessary in a given type of year and then determining ways to avoid impacting existing users during low water years.

Opportunities for success are presented, Professor Anderson noted, if negotiators look at a specific area such as a single drainage basin and attempt to identify the issues in that basin (in some basins the primary issue might be water quality instead of water quantity) and then identify measures that might address these issues.

Professor Anderson observed that agreements can be reached if the parties focus on what can be done and on the needs of the participating parties. The State of Idaho was willing to agree to a schedule of water to remain in the river but would not agree that the tribe had a reserved right to a particular quantity of water. The tribe was willing to consider accepting the state's approach because a schedule of water in the river would produce the same results as a reserved right to water in the river. This approach is similar to the approach taken in other negotiations where a tribe has been willing to subordinate its right to junior state users in exchange for commitments to provide wet water to the tribe.

Professor Anderson noted that, in the Idaho case, the overlay of the ESA enabled the Idaho Attorney General's Office to be instrumental in getting the irrigators to the table as a unified group. Also, the state and the local power company played a large role in getting the state legislature and congressional delegation to support the agreement.

In the context of the failed Lummi negotiations which occurred before the United States brought suit in federal court, Professor Anderson noted that the amount of water at issue was relatively small. At one point, the three main parties (the Lummi, U.S. and State) had an agreement that would have involved funding a \$35 million water treatment project. Ultimately, other groups prevented realization of the settlement and the United States eventually sued to provide the overlay of a case.

Professor Anderson emphasized that in our region, any water rights settlement needs to address both ESA and Indian water right concerns. He opined that a settlement could come up with a habitat conservation plan that satisfies ESA requirements but a state might still face tribal claims to a particular instream flow.

The following general observations regarding factors that effect the possibility of successful negotiations were offered by Professor Anderson:

- Both unpermitted and illegal water use should be considered when looking at how to address water rights issues in a particular basin.
- Both the *Rettkowski* case and limited funding restrict the state's ability to take enforcement actions.

- Where parties obtain technical information up front and agree on the scope of necessary studies, negotiations are more likely to be successful.
- A Cedar River HCP-type model has potential for resolving some water rights disputes.
- Given the presence of ESA concerns and that many basins in Washington are overappropriated, Professor Anderson expressed doubt about the likelihood that Washington could find success with a Montana-like compact commission.
- Negotiations with tribes can be enhanced if discussions address future permitting and the state is willing to consider not issuing new water rights in water short areas.

Professor Anderson responded to the following questions from Members of the Task Force:

- What do you (Professor Anderson) think about the recommendations contained in the *Streamlining Adjudications* report?

The recommendations that include having the agency do as much work in advance as possible but with the court still retaining the decision-making role appear the most promising in terms of making the process go more quickly and also making sure it is the court who makes the final decision. Professor Anderson noted that Oregon's system is primarily administrative, but it does not preclude McCarran Amendment state court jurisdiction.

- In what forum should the State engage tribes on water rights issues?

There is not a particular forum that is better than others. With respect to tribal interests, Professor Anderson emphasized the key is getting a dialogue going with the tribes. He believes most tribes are willing to talk about ways to avoid litigation over ESA and instream flow issues if there is a real policy commitment on behalf of the state legislature and the executive to work together on these issues.

The State and the tribes claiming an interest in a particular watershed could work out an agreement up front that would govern activities during negotiations. Commitments might include: moratorium on new permits while negotiations are underway or, at least tribal consultation before new permits are issued; plan for developing a common database; and commitments to address ESA issues.

Ultimately, some type of lawsuit is probably necessary to confirm any final agreement that is reached, but it could be in the nature of a consent decree where all parties have reached a settlement before the lawsuit is filed.

### ***Miscellaneous Updates***

Assistant Attorney General Mary Sue Wilson reported on her recent communications with the Department of Interior. Rod Walston, Deputy Solicitor at the Department of Interior,

confirmed that Interior is developing a new approach to non-Indian reserved water rights claims. A written description of this new approach should be made public in the next couple of months. The new approach will involve Interior's attempt to work more closely with states and approaching non-Indian reserved rights claims "different than" the previous administration addressed them. Mr. Walston also confirmed that the federal government is approaching McCarran Amendment questions more judiciously these days. The federal government is less likely now than in the past to object to state court jurisdiction if a particular case is comprehensive enough and if the federal government agrees there is an interest in an adjudication.

Mary Sue distributed the Department of Ecology's Draft Executive Summary of a Legislative Report on the *Feasibility of Conducting Negotiations with Other States and Canada on Water Bodies Shared with Washington*. The draft executive summary describes existing agreements between Washington and Oregon, Washington and Idaho, and Washington and British Columbia addressing specific shared water bodies. It also addresses the status of consultations between Washington and Idaho regarding the shared Spokane-Rathdrum Prairie Aquifer. The draft concludes that additional agreements with bordering states or British Columbia do not appear necessary at this time.

#### ***Planning for Next Meeting (March 25, 2003)***

The next Task Force meeting is scheduled for Tuesday, March 25, 2003 in Olympia, from 1:00 p.m. to 4:00 p.m. **Note: This is a correction from the March date announced at the January meeting.**

Attorney General Gregoire referred Members to the *Initial Identification of Types of Disputes the Task Force May Examine* (from June 2002 Task Force meeting). The list includes seven categories of disputes for which the Task Force might want to develop new processes.

Attorney General Gregoire proposed that staff review data associated with each category. Based on criteria such as the numbers of cases in each category and the apparent need for alternative processes, staff will develop a paper that discusses each category and proposes whether or not the Task Force should address the category and explains the rationale for each proposal based on identified criteria. At the next meeting, the Task Force will review and discuss this analysis and decide whether any revisions are necessary. Then, the Task Force will prioritize the categories to be discussed. The staff paper referenced herein will be distributed to the Task Force by early March.

Attorney General Gregoire proposed that staff also prepare a working document to guide the Task Force's consideration of alternative processes for various categories of water rights disputes. Therefore, in advance of the next meeting, staff will distribute a spread sheet describing in narrative fashion: (1) the existing process for each type of dispute, (2) models used elsewhere, and (3) other options (such as options suggested by members, suggested in the literature, suggested by legislative proposals).

Other items on the agenda for the March meeting include:

- A report about data compiled in response to requests made at the October 2002 meeting. This data will document the number of water right cases, an estimate of the state's current staff allocations, and an estimate of expenditures associated with water rights disputes. To the extent possible, this will include: PCHB water rights cases and subsequent appeals; Ecology water rights decisions; adjudications; other court actions involving water right issues; and watershed planning efforts.
- Distribution of a map of Washington depicting tribal water claims.
- A summary of water bills pending before the Legislature.
- An estimate of costs associated with the various recommendations included in the *Streamlining Adjudications* report.

The meeting adjourned at approximately 4:10 p.m.



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary March 25, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Member Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Members not present: Judge Schultheis; Judge Cooper.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Alan Reichman, Tammy Teeter

*Legislative Staff:* John Charba, Ken Hirst, Karen Terwilleger, Gary Wilburn

*Others:* Jon Hare from the Chehalis Tribe

*The meeting was called to order at approximately 1:15 p.m.*

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. Participants and observers who had not attended previous meetings were introduced.

#### ***Legislative Update and Data Reports***

Senator Jim Honeyford provided an update on Senate water policy bills, using the list of bills in the handout entitled "Live Water Bills - March 20, 2003". Senator Honeyford explained the topics covered by each bill and why each had passed. For subjects addressed both in Senate and House bills but only passed by the House, he explained why Senate action was not taken.

Representative Bruce Chandler provided a similar explanation for the House bills (Rep. Linville had not arrived at this point in the meeting). He focused primarily on describing those bills that addressed a subject not addressed in the bills passed by the Senate, that were already described by Senator Honeyford. Representative Chandler said that at this point he was not aware of any agreement on a process for reconciling the differences in the House and Senate action on the water bills.

Attorney General Gregoire described an offer from U.S. Interior Secretary Gale Norton to initiate a joint effort of the federal government and Washington State to explore dispute resolution alternatives to the current methods being used to address federal reserved water rights, principally general stream adjudications. Secretary Norton's impression is that there is no "model" approach and that all of the Western states are experiencing high costs and lengthy time delays in resolving complex water management disputes.

Deputy Attorney General Rob Costello provided a briefing on the geographical extent of Indian reserved rights, distinguishing between the reservation of "land-based" rights for use on the reservations, and the reservation of "rights" with water use implications in the areas ceded by the treaties. He provided a state map depicting these ceded areas, entitled "Historical Tribal Land and Current Reservations", as well as a 1977 document prepared by the U.S. Bureau of Indian Affairs entitled "Usual and Accustomed Fishing Places of Certain Western Washington Treaty Tribes Adjudicated in *United States v. Washington* No. 9213 as of January 1, 1977."

Task Force Member Kaleen Cottingham described the report she and Robyn Bryant of the Environmental Hearings Office prepared. The report, entitled "Overview of Water Disputes Heard by the Pollution Control Hearings Board" (March 2003), was sent to all Task Force members in advance of the meeting. The report describes the water resources related activities handled by the Pollution Control Hearings Board over an eleven year period (1992-2002).

Assistant Attorney General Alan Reichman distributed three handouts, one entitled "Expected Efficiencies Resulting from the Alternatives Proposed by *Streamlining the Water Rights General Adjudication Procedures*." This report supplements the *Streamlining Adjudications Report* distributed and discussed at the January Task Force Meeting. AAG Reichman also distributed a one page document prepared by Ecology's Water Resources Program and entitled "Appeals/Enforcement Complaint Actions January 2001 through December 2002." This shows the number of enforcement actions (orders and penalties) taken and the number of water resource PCHB appeals during this time period. As the appeals number encompasses appeals of all Ecology water resource decisions (not just enforcement actions), we will supplement this information to show the total number of Ecology water resources actions during this time period. Finally, AAG Reichman distributed a map of Washington depicting the 62 Water Resource Inventory Areas (WRIAs) and, within each WRIA, the numbers of pending new water right applications, water right change applications, permits, certificates, and claims.

### ***Scoping Document Discussion***

The Task Force reviewed the *Proposed Scoping Table* (dated March 12, 2003), distributed in advance of the meeting. The Task Force reviewed the proposals for further action and tentatively accepted the recommendations listed in the last column of the table. As a result, the first and last categories listed (Two-party disputes and Interstate/International Disputes) were tentatively set aside as categories on which the Task Force will not focus. This decision was made with a caveat that the group will revisit these categories as alternatives for other categories are developed to determine whether any such alternatives could also be available for two-party or interstate/international disputes. In addition, with respect to interstate/international disputes, it was recommended that Ecology explore whether to engage in a dialogue with its counterpart in British Columbia to discuss international options.

The remaining categories of disputes were arranged in the following priority order: (1) Historic Claim Disputes; (2) Water Rights Management Disputes; (3) Water Rights Enforcement Disputes; and (4) Instream Flow Disputes. This priority order is reflected in the revised *Scoping Table* (dated April 24, 2003).

The group did not identify a specific priority number for the Federal and Indian Reserved Rights Disputes category. This was in part a result of Attorney General Gregoire's proposal that the Task Force tentatively suspend its efforts on this category while the Attorney General's Office works directly with the federal government to explore possible options to address this category. During the discussion, a Task Force member advocated for tribal involvement if the Task Force decides to explore new systems for addressing disputes involving Indian reserved water rights. Although the Task Force did not identify a specific priority number, the Federal and Indian Reserved Water Rights Disputes category immediately follows Historic Claims Disputes on the

revised *Scoping Table* as these categories have some similarities, including that both are frequently addressed using the same process, *i.e.*, the general adjudications process.

Additional discussions about the four prioritized categories included a discussion regarding whether to divide Water Rights Enforcement Disputes into two subcategories, those that involve a single water user and those that involve basin-wide enforcement. This concept is reflected in the Revised Table. This division is logical in that the current process for enforcement actions involving single water users is known (enforcement action may be appealed to PCHB/PCHB decision may be appealed to courts) and is the same process as that used for Water Rights Management Disputes. In contrast, in basins that have not been adjudicated (the large majority of basins), there is no current process for basin-wide enforcement in light of the *Sinking Creek* Supreme Court ruling.

There was also discussion regarding whether Instream Flow Disputes present more water policy issues as opposed to process issues. This discussion will be revisited when the Instream Flow Disputes category is considered.

### ***Existing Processes and Alternative Processes***

Next, the Task Force engaged in a limited review and discussion of the second table, *Working Document: Existing Processes and Possible Alternatives* (dated March 12, 2003). This table presents a description of the systems currently used to process the various categories of disputes described in the *Proposed Scoping Table*. To facilitate Task Force discussions, the table also begins to identify alternative processes. The two existing processes described on pages 1 and 2 of the *Working Document* deal with the large majority of water resources disputes. The third and fourth existing processes described on page 3 of the *Working Document* are used much less frequently.

Because Historic Claims Disputes was the group's first priority and because most historic claims disputes are addressed through general adjudications in superior court, the group's initial discussion primarily focused on page 2 of the *Working Document*. This page includes a listing of possible minor changes to the general adjudications system and possible major changes to this system. The group identified several additional suggested minor and major changes. These have been added to the revised *Working Document* (dated April 24, 2003).

Initial discussions regarding the *Working Document* were limited. Discussions regarding the document will continue. Task Force members are encouraged to identify alternative processes (both minor and major) that they would like to see captured on the *Working Document*.

### ***Plan for Upcoming Meetings***

Based on the priorities identified by the Task Force during its discussion, the AGO has developed a proposed schedule for the next three meetings. A detailed schedule is attached hereto. In summary, following the proposed schedule, the May meeting would be devoted to discussing Historic Claims Disputes and alternatives to the superior court general adjudications process. In advance of the May meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. At the May meeting, discussion would begin with the group identifying the strengths and weaknesses of the existing system in order for the group to be able to evaluate the potential for any alternative to incorporate the strengths and address the weaknesses. Thereafter, the May meeting would involve evaluation and ranking of the various alternatives. By the end of the May meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Historic Claims Disputes and alternatives to the superior court general adjudications system.

Following the proposed schedule, the July meeting would follow a similar framework but discussion would focus on the next two categories of disputes (Water Rights Management Disputes and Water Rights Enforcement Disputes) and the system that is currently used to process these categories of disputes (the PCHB/then to superior court model depicted on page 1 of the *Working Document*). Again, discussion would begin by identifying the strengths and weaknesses of the existing system and then turn to evaluating and ranking various alternatives.

Following the proposed schedule, the September meeting would follow a similar framework but discussion would focus on the remaining categories of disputes (Instream Flow Disputes and Federal and Indian Reserved Rights Disputes).

***Logistics for May 22, 2003 Meeting in Yakima***

At the March meeting, information was distributed regarding the location and directions to the May meeting in Yakima. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary May 22, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Member Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser participated by telephone.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, David Mears, Tammy Teeter; Mary Sue Wilson participated by phone.

*Legislative Staff:* John Charba, Caroleen Dineen, John Stuhlmiller, Karen Terwilliger, Sam Thompson, Gary Wilburn

*Department of Ecology Adjudications Staff:* Doug Clausing (referee), Becky Johnson, Elaine Peterson.

*Others:* Rachael Paschal Osborn

*The meeting was called to order at approximately 1:00 p.m.*

Participants and observers were introduced.

#### ***Introduce Plan for the Day***

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. This was the first Task Force meeting dedicated to the development of tentative recommendations. The topic for this meeting was Historic Claims Disputes/Superior Court General Adjudications.

The Attorney General emphasized the importance of the Task Force working to develop tentative recommendations on today's subject areas as time was running out and the Task Force's report is due to the Legislature this December. She also described her plan to have staff write up the results of the meeting's discussion into a document that identifies the recommendations made, including a description of each recommendation and reasons for each recommendation. This draft document will be circulated to members for review and comment. A final version of the document will ultimately become the first part of the Task Force's report to the Legislature.

***Review Worksheet # 1: Discuss Strengths and Weaknesses of Existing Process***

Senior Assistant Attorney General David Mears led the Task Force in its review of Worksheet #1: Historic Claims Disputes/Superior Court General Adjudications (dated May 22, 2003). Mr. Mears first provided an overview of the information in the first and second columns. He explained that historic claims disputes generally present issues concerning the validity, quantity, and/or priority of water rights that pre-date the water codes (1917 for surface water and 1945 for ground water). Because these water rights pre-date the codes, they have not been the subject of a permitting process. Rather, they are documented by the filing of a claim in the state claims registry. Until these rights are adjudicated (a process that determines their validity based on continuous beneficial use), their validity remains uncertain.

The existing Superior Court General Adjudications process established by the water code is the means through which historic claims are validated. This process generally involves 5 steps: (1) Ecology or a member of the public petitions for the commencement of an adjudication of a particular water body; (2) claimants are identified and provided notice of upcoming adjudication; (3) claimants are provided an opportunity to present evidence through an evidentiary hearing; (4) claimants can dispute preliminary findings through an exceptions process; and (5) a final report is issued by court confirming valid rights and establishing their priority dates.

Next, Mr. Mears led the Task Force through a discussion of the third and fourth columns on Worksheet # 1. The third column identifies strengths of Washington's existing superior court general adjudications system. The fourth column identifies weaknesses of the same system. As a result of the discussion, one "strength" was added to the third column (the ability to address federal reserved rights) and five weaknesses were added to the fourth column (surface water only; cost; no follow-up: adjudication provides only a snapshot; inexperience of claimants necessitates more "bites at apple"; and difficult to build historical knowledge/experience because same superior court does not hear all adjudications).

During the discussion of strengths and weaknesses, the following observations were made:

- While the topic for this meeting did not include federal and Indian reserved rights (that topic is scheduled for discussion in September), the Task Force should be mindful that, under the McCarran Amendment, these federal rights may not be subject to state court jurisdiction if a state adjudication is not sufficiently comprehensive.
- With respect to the identified weakness that a claimant may have too many opportunities to present evidence of his/her claim, Ms. Cottingham noted that claimants also frequently seek to amend their claims through the administrative process (Ecology decides, PCHB reviews), providing yet another opportunity to substantiate a claim.
- With respect to the time involved in the Yakima Basin adjudication (commenced in 1977, still underway), it was noted that the first ten years of that case were largely devoted to litigating questions involving the court's jurisdiction. Since those issues were decided in the Yakima adjudication, future adjudications will benefit from the guidance provided in Yakima and should not require a similar ten year "start up" process.
- In discussing the topic of ADR, one member asked what motivates people to participate in mediation. Possible motivations noted included: participants with sizeable claims such as irrigation districts may see the value of mediation and lead the way; preliminary decisions by the court may facilitate participation as claimants learn they may not realize the entirety of their claim through litigation.

- Senator Fraser made three observations:
  - An adjudication that covers surface water only does not appropriately account for hydraulic continuity;
  - Adjudications are very expensive. When the code was initially adopted, property owners paid for the entire adjudication; later this was changed to divide funding between property owners and the state; finally, it was changed to require the state to fund nearly the entire process; and
  - Follow-up documentation of the results of adjudications is lacking.
- The certainty provided by an adjudication does not last very long because there is no mechanism to address events that occur post-adjudication.
- The proceedings conducted by the referee are less formal than typical court proceedings. This facilitates participation by pro se parties. On the other hand, the adjudication process can be quite complex, making pro se participation more difficult.
- The current system whereby no centralized court handles multiple adjudications does not facilitate development of expertise over time, or if expertise is developed in a case such as the Yakima adjudication, once the adjudication is over, the court will no longer work on adjudications, putting to waste the expertise that has been developed.

Finally, the Task Force reviewed the items listed in the fifth column of the worksheet, “Criteria for Success.” These criteria were initially developed at the first meeting of the Task Force in June 2002. The Task Force modified one of these criteria and added three new criteria. Added criteria were: sufficient data to make process work; builds institutional memory/experience; and built-in system of prioritization.

While discussing criteria, the appropriate scope of the Task Force’s recommendations was discussed. Some members had suggested that there are concerns regarding what happens before and after adjudications. There is concern that the agency and/or courts may lack sufficient data to initiate and prosecute a successful adjudication. There is also concern that the agency and/or courts may lack sufficient resources to implement court decrees once issued. The Task Force decided its focus would be on the adjudications process, not the before and after. However, the final Task Force report should note the importance of other factors, such as funding, development of necessary technical data, and follow-up systems.

There was also discussion about the limitations of the adjudications process in the context of a prior appropriation system. The adjudications system simply identifies the scope and priority of valid legal rights, it does not determine whether there is sufficient water available to satisfy all valid rights. One member described the adjudications system as a system that addresses only the supply side of the equation and says nothing about the demand side. It was noted that the demand side (or whether water is available) involves the “management” of water resources, and that is not a function of the court. Members suggested the management role is more appropriately performed through the permitting process (done by Ecology) and through watershed planning efforts.

An updated version of Worksheet # 1, dated June 2003, has been modified to incorporate the discussion of the Task Force.

***Review Worksheet # 2: List of Alternatives***

Next, David Mears led the Task Force in reviewing and discussing Work Sheet # 2 (dated May 22, 2003). This work sheet presented nine alternatives to Washington's existing superior court general adjudications system. Each was assigned a letter, A – I. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative are expected to be further refined based on subsequent discussions and comments.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Key points from the discussion of each alternative were recorded in the "Comments" column of the worksheet. For several of the alternatives, most notably letters B (mediation), F (limited special adjudications), and G (adjudications to cover surface and ground water), the possibility of recommending discretionary authority rather than creating a statutory mandate applicable to all adjudications was discussed. For example, with respect to letter G, it was suggested that rather than mandating that all adjudications address both surface and ground water, the Task Force might want to recommend that courts be directed to consider, at the outset of every specific adjudication, the question of whether the case should include both surface and ground water.

With respect to letter H, modify watershed planning statute to expand responsibilities of the planning group to include facilitating basin-wide court enforceable water apportionment agreements, concerns were raised about how to protect those interested parties who did not participate in the watershed planning effort.

A number of concerns were raised with respect to letter I, create a specialized water court. Concerns included constitutional limitations, funding impacts, and political ramifications. It was agreed that additional analyses of legal and fiscal impacts would be necessary before making a final decision about this alternative. Staff will work to develop an analysis of constitutional concerns for use at the next meeting as water courts may be considered as an alternative to disputes involving water rights management and enforcement questions.

An updated version of Worksheet # 2, dated June 2003, has been modified to incorporate the discussion of the Task Force.

***Evaluate Alternatives Listed on Worksheet # 2***

Once members determined they had a general understanding of each alternative, Attorney General Gregoire asked each member to select his/her preferred alternatives by casting four votes a piece. As a result of this voting and subsequent discussion, the Task Force eliminated three of the nine from further consideration, combined alternative D with alternative A, and ranked the remaining 5 alternatives by order of preference. The updated version of Worksheet # 2 reflects these decisions. As a result, the recommendations that will be carried forward in the Task Force draft report are:

- (tied for 1st) (A) Comprehensive background information developed early in process, claimants present fully documented claims at outset, and Ecology makes tentative determinations on water rights. The ability to employ a "fact finding" process will be incorporated into this alternative (see alternative D).
- (tied for 1st) (F) Allow limited special adjudications.

- (2nd) (B) Expand the use of mediation.
- (3rd) (I) Create specialized water court or water judge positions.
- (4th) (C) Authorize pre-filed written testimony.

The three alternatives eliminated from further discussion were:

- (E) Independent of the adjudication process, create a new process for case-by-case validation of water right claims.
- (G) Mandate that all adjudications address both surface and ground water where appropriate.
- (H) Modify watershed planning statute to expand responsibilities of the planning group to include facilitating court-enforceable water apportionment agreements.

#### ***Upcoming efforts to document May 22<sup>nd</sup> decisions***

During the last half hour of the meeting, the Task Force continued discussions regarding the selected alternatives. Staff will prepare a draft summary of the selected alternatives. The summary will include a description of each alternative, together with a discussion of related issues (*e.g.*, funding needs, legal concerns). This draft will be circulated to members for review and comment. The Task Force agreed that legislative staff should work with AGO staff to further refine the water courts/water judges alternative.

#### ***Plan for Next Meeting (July 24, 2003)***

The July 24, 2003 meeting will follow the same format as used at the May meeting. The July meeting will focus on the next two categories of disputes (Water Rights Management Disputes and Water Rights Enforcement Disputes) and the system that is currently used to process these categories of disputes (the PCHB reviews Ecology decisions/appeals of PCHB decisions go to the superior and appellate courts for APA review). This model is depicted on page 1 of the *Working Document* distributed to the Task Force in April. In advance of the July meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. At the July meeting, discussion will begin with the group identifying the strengths and weaknesses of the existing system and thereafter be followed by an evaluation and ranking of the various alternatives. By the end of the July meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Water Rights Management Disputes and Water Rights Enforcement Disputes.

#### ***Logistics for July 24, 2003 Meeting***

The July 24<sup>th</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. Although the meeting is currently scheduled for 1:00 p.m. to 4:00 p.m., it may be rescheduled for 9:30 a.m. to 12:30 p.m. The time for the meeting will be confirmed in early July. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary July 24, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Representative Bruce Chandler, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser and Judge John Schultheis participated by telephone.

*Absent members:* Representative Bruce Chandler, Representative Kelli Linville, Judge Michael Cooper

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Tammy Teeter, Erik Cornellier

*Legislative Staff:* John Charba, Evan Sheffel, Caroleen Dineen, Ken Hirst, Bernie Ryan, John Stuhlmiller,

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Kathleen Collins, John Hollowed, Kris Kaufmann, Mike Schwisow, Dawn Vyvyan.

*The meeting was called to order at approximately 9:00 a.m.*

Participants and observers were introduced.

#### ***Introduce Plan for the Day***

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. This was the second Task Force meeting dedicated to the development of tentative recommendations. The topic for this meeting was Water Right Management and Enforcement Disputes/Alternatives to the PCHB-Courts via the APA Process.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting which included an agenda for the meeting, Worksheets Numbers 3 & 4 to guide Task Force discussion, a July 2003 discussion paper on Options for Specialized Water Courts with two attachments (the March 2003 PCHB Overview of Water Disputes and 1994 SB 6603), July 2003 PCHB Survey Results, a draft Summary of Task Force Recommendations from the May meeting, and a poem from Colorado Supreme Court Justice Hobbs. At the meeting, the following additional items were distributed: a summary of Department of Ecology water resources appealable decisions made in 2001-2002, a copy of RCW 90.58.170 (Shorelines hearings board membership), Water Resources Program Adjudications Strategic Plan (draft 5),

Article IV of Washington Constitution (the Judiciary), and Additional Superior Court Judge Costs.

Pollution Control Hearings Board Member Kaleen Cottingham described the results from a recent survey conducted by the Environmental Hearings Office (Survey Results distributed in July mailing). The survey was posed to both attorneys and unrepresented parties who had recently participated in a hearing or mediation before the Environmental Hearings Office (EHO). Survey respondents included parties who were appellants and parties who were respondents. The EHO hopes to make a number of improvements in response to survey results including enhancing the usability of its website and strengthening interactions with unrepresented parties to ensure they understand the process and are aware of the resources and assistance available to them. The office will modify its procedural assistance handbook (that is available on the office website) to specifically address motion practice and to better describe the entire appeal process.

### ***Review Worksheet # 3: Discuss Strengths and Weaknesses of Existing Process***

Assistant Attorney General Mary Sue Wilson led the Task Force in its review of Worksheet #3: Water Right Management & Enforcement Disputes/PCHB-Courts Via APA Process (dated July 24, 2003). Ms. Wilson first provided an overview of the information in the first and second columns. She explained that the first column describes this category of disputes as including Ecology decisions on applications for new water rights and changes to existing water rights, Ecology decisions canceling water right permits and relinquishing water right certificates, Ecology orders and penalties that address use of water in violation of a permit, certificate, or claim, water use not authorized by law and Ecology orders that address water shortages in adjudicated basins. This category also includes challenges to conditions included on permits and certificates, decisions on requests to amend water right claims under RCW 90.14.065, and orders aimed at waste of water.

The existing "PCHB-then to the courts via the APA process" is the means through which water rights management and enforcement disputes are currently addressed. The second column of Worksheet #3 describes this process. The PCHB conducts *de novo* hearings, meaning the Board conducts evidentiary hearings where all sides have the opportunity to provide evidence, regardless of whether the same evidence was presented to Ecology. The Board decides the factual and legal issues independently, generally providing no deference to Ecology's decision. When decisions of the PCHB are appealed to a superior court and higher courts, appeals are brought pursuant to the Administrative Procedure Act (APA). This generally means that the Board's findings are reviewed according to the substantial evidence standard and legal conclusions are determined *de novo*. If a case goes from the PCHB to a superior court for APA review and later goes to the Court of Appeals or Supreme Court, the appellate courts review the findings and conclusions of the PCHB and afford no deference to the superior court's decision.

In 2001, the total number of decisions made by Ecology's Water Resources Program that could have been appealed to the PCHB was 679. In 2002, the total was 1419. (The high number in 2002 appears to be related to Ecology issuing metering orders to hundreds of water users and Ecology increasing its production on water right change decisions after the 2001 Legislature increased staffing for that purpose). Comparing the number of decisions made by Ecology with the number of these decisions appealed to the PCHB, 72 PCHB appeals of water rights decisions were filed in 2001 and 67 were filed in 2002. This breaks down to a 10.5% appeal rate in 2001 and a 5% appeal rate in 2002. Approximately 10% (8 or 9 per year) of the PCHB's decisions in water right cases are appealed to the superior courts and higher, with less than half of those cases being appealed to the Court of Appeals or Supreme Court.

Next, Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet # 3. The third column identifies strengths of the existing system. The fourth column

identifies weaknesses of the same system. As a result of the discussion, one “strength” was added to the third column (the appointment process) and three weaknesses were added to the fourth column (potential conflicts of interest and equity issues related to the rendering of assistance by PCHB staff; the appointment process; and the potential for establishment of policy via adjudication by two administrative agencies before going to court or through a rulemaking process).

During the discussion of strengths and weaknesses, the following observations were made:

- Judge Hicks commented that the process did not look too bad. Judge Hicks focused his comments on the number of water right decisions Ecology makes each year (ranging between 679 and 1419 in 2001 and 2002), the number of PCHB appeals from these decisions (approximately 83 per year), and the number of subsequent APA court appeals (approximately 8-10 per year). This means between 5-10% of Ecology’s water right decisions are appealed to the PCHB. Approximately 10% of the PCHB’s decisions are appealed to the courts and less than half of those go to the Court of Appeals and/or the Supreme Court.
- A member commented that the cost of taking an appeal to the next level might be the reason for the low number of appeals to superior court and higher.
- PCHB member Cottingham commented that about 85% of the cases before the PCHB settle. She clarified that many settle without going through the PCHB’s formal mediation process. Questions were raised whether the mediation process was being utilized frequently enough. It was noted that the Board provides its mediation services free of charge.
- As a comparison to the PCHB’s typical resolution of many cases within six months of filing, Judge Hicks was asked to estimate the time it takes for a new case filed in Thurston County Superior Court to go to hearing. Absent continuances or other delays caused by the parties, Judge Hicks estimated that Thurston County civil cases involving the taking of evidence generally go to hearing within a year of filing.
- Judge Schultheis asked for more details regarding the PCHB providing mediation and procedural assistance to litigants. Board member Cottingham explained that Administrative Law Judges (ALJs) who are not assigned to work on the hearing in a particular case are available to mediate and provide procedural assistance to parties. Judge Hicks commented that no such assistance is available at superior courts. If a superior court litigant requests procedural assistance, superior court clerks tell the litigant that they may not provide any assistance.
- The PCHB Board Members were asked about the kinds of cases for which the Board travels for hearings. The Board Members explained that the Board tends to travel when there are a number of witnesses residing in a location distant from Olympia. Recently, to manage travel costs, the board has limited its travel to the larger cities in eastern Washington (*e.g.*, Yakima, Spokane, Tri-Cities). As a result of more drastic cuts to the Board’s travel budget for the new biennium (7/03-6/05), travel for hearings is highly unlikely during the next two years.
- The Task Force discussed the PCHB appointment process. The Governor appoints each of the three members to six year terms. The Senate confirms each appointment. Only one of the members is required to be an attorney, although in recent years all three members have been attorneys. Several outgoing board members who were not attorneys urged the Governor’s office to continue to appoint attorneys because the outgoing members thought the process was highly legalistic and members benefited from legal training. Other qualifications for appointment are familiarity with the subject matter and no more than two

members from the same political party serving on the Board at the same time. Some members viewed these appointment/qualification issues as strengths of the system while others viewed them as weaknesses.

- A staff member commented that people may view as a weakness of the PCHB process the fact that policy can be established on a case-by-case basis through the quasi-judicial process of Ecology making a decision and the PCHB deciding the case without the formal public notice and comment required by the APA for rulemaking. Although this method of establishing administrative policy is recognized in caselaw, some people may nonetheless view it as a weakness of the system.

An updated version of Worksheet # 3, dated August 2003, has been modified to incorporate the discussion of the Task Force.

#### ***Review Worksheet # 4: Alternatives to the PCHB-Courts Via APA Process***

Next, Ms. Wilson led the Task Force in reviewing and discussing Work Sheet # 4 (dated July 24, 2003). This work sheet presented eight alternatives to “the PCHB-Courts Via the APA Process.” Each was assigned a letter, A – H. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative were expected to be further refined based on subsequent discussions and comments.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Members also deleted one of the original alternatives (Alternative A) and added two new alternatives (Alternatives I and J). Key points from the discussion of each alternative were recorded on the worksheet.

The decision by the Task Force to eliminate Alternative A (Modify PCHB Process and Standards) followed the discussion of members that the system generally seems to be working well in terms of timely processing cases and weeding out a substantial number of cases as they move up through the appeals process. In addition, the Task Force made observations regarding the following factors:

- The PCHB currently uses a preponderance of the evidence standard. This standard is less deferential to Ecology than would be either the “clearly erroneous” or a “substantial evidence” standard.
- If the PCHB applies a more deferential standard to its review of Ecology decisions, review would likely be on the record created at Ecology rather than *de novo*. This would require Ecology to create records for hundreds if not thousands of cases each year, requiring a substantial increase of state resources.

The decision to add Alternative I (Retain the PCHB Process and Standards with some Minor “Tweaks,” including mandating mediation in certain kinds of cases) came after the following factors were discussed:

- There needs to be adequate funding of the PCHB to ensure it has the necessary tools to continue to assist unrepresented parties.
- Use of mediation services should be enhanced. Some members did not want to see participation in mediation made mandatory for every case but thought that the Board should have the authority to mandate mediation for particular types of cases. However, mediation

should not be mandated based on the status of the participant. In other words, members believed it would be inappropriate to mandate mediation for any case which included an unrepresented party. On the other hand, it might be appropriate to mandate mediation for certain types of cases such as all those involving a penalty.

The decision to add Alternative J (Deference to Superior Court decision by Appellate Court) came after the following situation was discussed:

- Under the current process, if a case goes from the PCHB to a superior court for APA review and later goes to the Court of Appeals or Supreme Court, the appellate courts review the findings and conclusions of the PCHB and afford no deference to the superior court's decision. Therefore, for cases that do not end at superior court, this means the superior court step is generally viewed as superfluous and a potential waste of time and resources.

An updated version of Worksheet # 4, dated August 2003, has been modified to incorporate the discussion of the Task Force.

### ***Evaluate Alternatives Listed on Worksheet # 2***

Once members determined they had a general understanding of each alternative, Attorney General Gregoire asked each member to select his/her preferred alternatives by casting three votes a piece. As a result of this voting and subsequent discussion, the Task Force eliminated five of the remaining nine from further consideration (the Task Force had already eliminated alternative A) and ranked the remaining 4 alternatives by order of preference. The updated version of Worksheet # 4 reflects these decisions. As a result, the recommendations that will be carried forward in the Task Force draft report are:

- (1st) (F) Create Specialized Water Court(s) to Hear Appeals From PCHB Water Decisions.
- (tied for 2nd) (I) Retain Current PCHB Process & Standards with some minor "tweeks," including mandatory mediation for certain types of cases.
- (tied for 2nd) (J) Deference to Superior Court Decision In Appellate Court Review.
- (3rd) (G) Create Specialized Water Court(s) the Hear Appeals from Ecology Decisions (Eliminate role of PCHB or make it optional).

The five alternatives eliminated from further discussion were:

- (B) Create a New Quasi-Judicial Administrative Body to Handle all Water Rights Management and Enforcement Appeals.
- (C) Modify Standard of Review Applicable to Superior Court Review of PCHB Decision.
- (D) Mandate or Authorize Automatic Direct Appellate Review of PCHB Decisions.
- (E) Appeals of Water Rights Management and Enforcement Decisions Go Directly to Superior Court (Eliminate role of PCHB or make it optional).
- (H) Provide Authority to Ecology to Address Priority of Uses in Areas That Have Not Been Adjudicated.

### *Discussion of Options for Specialized Water Courts*

Ms. Wilson introduced the final topic for the day, options for specialized water court(s). She introduced the discussion paper distributed in advance of the meeting that set forth an outline of the Structure Options, Selection of Judge Options, Values, Discussion and Questions prepared by staff for consideration by the Task Force. The Task Force proceeded to discuss whether it was seeking to develop an “ideal” recommendation or a recommendation that is less than ideal, but more easily implemented. Attorney General Gregoire suggested that the Task Force could do both, that is, the Task Force could develop an option that represented the optimum, or the best ideas, and then develop a fall-back option.

Discussion ensued and the Task Force reached consensus that an option should not be rejected simply because it would require a constitutional amendment. Judge Hicks stated that he was not opposed to a constitutional amendment, and that he believed an option should include regional representation on a court with some form of centralized authority.

Thereafter, the Task Force suggested a specialized water court model with the following attributes:

- Judges come from three or four regions to sit on a single court.
- Three regions would parallel the three divisions of the court of appeals.
- If court is divided into three divisions but comprised of four judges, the fourth judge would fill an “at large” position.
- Judges should have the power to appoint special masters to assist with cases.
- Each judge should have statewide jurisdiction.
- Each judge would be elected from the division he/she came from.
- The governor should appoint each of the judges to staggered terms.
- To ensure continuity and expertise, these judges would run in a retention election rather than an open election.
- Eligible candidates for appointment would meet mandatory minimum requirements.

The Task Force designated a subcommittee to work with staff to further refine a specialized water court model or models to bring back to the Task Force for endorsement. This subcommittee is comprised of: Judge Hicks, Judge Krese, Commissioner Ottem, Judge Schultheis, Senator Honeyford, and Senator Fraser. Staff will organize a series of conference calls of this subcommittee to refine the water court recommendations and bring them back to the full Task Force in September.

### *Follow-up from May 22<sup>nd</sup> decisions*

The Attorney General’s Office has circulated a staff write up of the results of the May 22, 2003 meeting. The draft document identifies the recommendations made, including a description of each recommendation and reasons for each recommendation. Members have been asked to **review and comment on this draft document by August 25, 2003**. A final version of the document will ultimately become the first part of the Task Force’s report to the Legislature.

***Follow-up from July 24<sup>th</sup> decisions***

In the next few weeks, the Attorney General's Office will circulate a staff write up of the results of the July 24<sup>th</sup> meeting. The draft document will identify the recommendations made, including a description of each recommendation and reasons for each recommendation. Once distributed, members will be given a deadline for review and comment on this draft. A final version of the document will ultimately become the second part of the Task Force's report to the Legislature.

***Plan for Next Meeting (September 30, 2003) \*\*\*\* note change of date\*\*\*\****

The September 30, 2003 meeting will follow the same format as used at the May and July meetings. The September meeting will focus on the last two categories of disputes (Instream Flow Disputes and Federal and Indian Reserved Water Rights Disputes) and the systems that are currently used to address these categories of disputes. In advance of the September meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. By the end of the September meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Instream Flow Disputes and Federal and Indian Reserved Water Rights Disputes.

Department of Ecology Task Force Member Keith Phillips will provide a summary to the Task Force in September of the Department's projections regarding future demands for general adjudications throughout the state. This should assist the Task Force as it projects the anticipated workload and costs associated with a specialized water court.

***Logistics for September 30, 2003 Meeting***

The September 30<sup>th</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. The meeting is scheduled for 1:00 p.m. to 4:00 p.m. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary September 30, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Richard Hicks, Judge Linda Krese, Judge Michael Cooper, Court Commissioner Sidney Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser and Senator Jim Honeyford participated by telephone.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Tammy Teeter.

*From the Department of Ecology:* Tom Laurie.

*Legislative Staff:* John Charba, Evan Sheffel, Caroleen Dineen, Karen Terwilliger, Gary Wilburn.

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Kathleen Collins, John Hollowed, Mike Schwisow, Paul Flemings, Kimberly Ordon, Jeff Dickison.

*The meeting was called to order at approximately 1:10 p.m..*

Participants and observers were introduced.

#### ***Introduce Plan for the Day***

Assistant Attorney General Mary Sue Wilson reviewed the agenda and topics to be covered at the meeting. This was the third Task Force meeting dedicated to the development of tentative recommendations. The primary topic for this meeting was Federal and Indian Reserved Water Rights. Before addressing this topic, the Task Force addressed some issues related to discussions and recommendations from prior meetings, including hearing Keith Phillips' report on Ecology's Evaluation of the Need for State-Wide Adjudications and a discussion of the Task Force Subcommittee's Recommendation regarding a Specialized Water Court.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting. These included an agenda for the meeting, two recommendations from the Task Force subcommittee, a list of questions to guide discussion of the subcommittee recommendations, and Worksheets Numbers 5 & 6 to guide Task Force discussion. At the meeting, a revised version of Worksheet Number 5 and three handouts from Keith Phillips were distributed.

***Ecology Report on Evaluation of Need for State-Wide Adjudications***

Keith Phillips from the Department of Ecology reported on Ecology's review of the need to conduct state-wide adjudications. Mr. Phillips distributed an 8 page document entitled *Water Rights Adjudications* and two maps. The first map is entitled *Number of Water Right Permits, Claims & Certificates by WRIA, with Petitioned Basins* (September 15, 2003). The second map is entitled *Number of Water Rights Pending by WRIA, with Current Tribal Reservations and Treaty Ceded Areas* (September 23, 2003).

Mr. Phillips walked the Task Force through the *Water Rights Adjudications* document, highlighting the reasons to conduct adjudications (page 2) and the geographic distribution of adjudications (completed, pending, and unadjudicated claims, page 3). With respect to geographic distribution of claims, more than half are in Western Washington. Mr. Phillips noted that the unadjudicated claims comprise 2/3 of the total number of water rights in the state, with the other 1/3 represented by permits and certificates. The maps illustrate the distribution of these water rights throughout the state.

Pages 4 and 5 of the *Water Rights Adjudications* document describes the steps in an adjudication, the factors that influence the workload, and the participants in an adjudication (judge, court commissioner, referee, staff that serve the judge, commissioner, and referee, Ecology staff and Attorney General staff). Page 6 depicts the costs of the Yakima adjudication by these categories. The total current cost is about \$3.6 million per biennium. Since 1977, historic costs have averaged about \$2 million per biennium.

Page 7 of the *Water Rights Adjudications* document sets forth factors that might be relevant in selecting the next basin or basins in which to begin adjudication(s). These factors include whether a petition has been filed, whether there is an apparent need (based on water availability issues, permit application backlogs, or desire to begin water marketing), whether there are conflicts, workload associated with preparing for and initiating an adjudication, and other local conditions.

Page 8 presents three possible scenarios for the future of adjudications in Washington State. The first scenario, captioned "the Default Future," anticipates support of adjudications with the same resources and funding as are currently used to support the Yakima adjudication. As the Yakima adjudication ramps down over the next two biennia, the department would ramp up other adjudications. If the state continues to fund adjudications at \$3.6 million per biennium, it is projected that the state could adjudicate two basins every 5 to 10 years, taking upwards of 200 years to complete adjudicating the entire state. The second scenario, captioned "An Alternative Future," assumes an investment of 4 specialized water judges, each of whom would adjudicate between 3 and 5 basins at a time taking between two and ten years to complete each basin. At this rate and at a projected funding level of \$12 million per biennium, it would take between 10 and 70 years to complete adjudicating the entire state. The third scenario, captioned "A More Modest Future," assumes that the state would prioritize 15 basins for adjudication (this is approximately one quarter of the 62 basins statewide). Adjudications in these basins would be completed by investing two water judges at \$ 6 million per biennium.

Task Force discussion followed Mr. Phillips' presentation. It was pointed out that the Yakima adjudication is unique and the Task Force should be careful not to draw too many statewide conclusions from the Yakima experience. It was also suggested that it might be possible to do some adjudication-type work administratively to make certain improvements to the system without needing to rely completely on comprehensive judicial adjudications. Some of the preliminary recommendations made by the Task Force in May 2003 address minor administrative improvements to the adjudications process that could serve this function.

***Discussion of Subcommittee Recommendations regarding A Specialized Water Court and an Office of Water Commissioners***

Having heard Ecology's report on the demand for statewide adjudications, the Task Force began discussing the Subcommittee's Recommendation regarding a Specialized Water Court. Assistant Attorney General Mary Sue Wilson summarized the general attributes of the Specialized Water Court described in the Subcommittee's recommendations and then suggested that the Task Force begin its discussion of this topic by talking generally about the concept of creating a Specialized Water Court to determine whether the entire Task Force would endorse the Subcommittee's recommendation. Ms. Wilson invited members of the Subcommittee to offer explanations for their support of the Subcommittee's recommendation.

Much of the discussion of the group focused on whether the Task Force was prepared to recommend to the Legislature, without any caveats, that a Water Court be created. Ms. Wilson explained that Attorney General Gregoire (who had not yet arrived) urged the Task Force to limit any caveat(s) to only those issues that were truly outside the expertise of the Task Force. Attorney General Gregoire asked that the Task Force keep in mind that it had been charged, as an "expert panel," with the task of identifying new or improved procedures.

At the end of this discussion, the Task Force confirmed its support for a recommendation to the Legislature for a Specialized Water Court. This recommendation will not include the broad caveat included in the September 22, 2003 Revised Draft Specialized Water Court Recommendation. Instead it will include a more specific caveat that indicates that the Task Force intends to defer to the Legislature on state-wide budget issues (*i.e.*, how the need for a water court is weighed against other state priorities). Within what the Task Force considers its area of expertise, the recommendation will endorse the Specialized Water Court as the best mechanism for getting the job done (completing adjudications statewide) in a meaningful timeframe. Discussion leading up to the Task Force's decision to recommend the creation of a Specialized Water Court included members noting that information contained in the presentation by Mr. Phillips could be cited as justifying the need for a state-wide adjudication.

Other points made during this discussion included a suggestion that the Task Force endorse a system involving water right property title recording as a means to confirm the validity of water rights outside a court process. Given that the Task Force was nearing the conclusion of its efforts when this suggestion was made, the Task Force decided its final report should recommend that the Legislature further evaluate this option.

Although the Task Force had already stated its general endorsement of a Specialized Water Court, Pollution Control Hearings Board Chair Bill Lynch asked that there be some discussion of question number 2 (whether the Task Force endorses the variation on alternative F & G from the July Task Force meeting; the variation would give parties who seek to appeal an Ecology water rights-related decision the option of pursuing their appeal at the PCHB or at the Specialized Water Court, with the Water Court given the discretion to return the case to the PCHB). Mr. Lynch offered his opinion that the concerns that had been raised about the PCHB included that the PCHB was not considered sufficiently in touch with local concerns and was also viewed by some as not "fair." Mr. Lynch suggested that allowing cases to go to a statewide water court would not address these concerns as the court would not be a "local" entity any more than is the PCHB. He also indicated that the way to address concerns regarding "fairness" at the PCHB is to replace Board members. He pointed out that, in the next year, two of the three members will be replaced.

After discussing these comments, the Task Force reached the conclusion that the final recommendation to the Legislature on this point would acknowledge that during Task Force

meetings concerns had been raised about the PCHB, that the Task Force had not determined whether these issues were real or perceived, and that if the Legislature determines they are real, the Task Force has created an option that might address these concerns. However, if the concerns were determined not to be real, then the current system (of all water rights-related appeals from Ecology decisions going first to the PCHB) should remain intact.

As noted above, during the course of the Task Force discussion, the Task Force considered several of the questions distributed in advance of the Task Force meeting, including questions 1, 2, and 6, although the Task Force reached consensus only on questions 1 and 2 as described above. Task Force members were asked to submit written comments on the remaining questions by October 14, 2003.

### ***Report on Discussions with Department of Interior and Department of Justice***

Deputy Attorney General Rob Costello reported on Attorney General Office discussions with representatives of the Departments of Interior and Justice on the topic of addressing issues involving federal and Indian Reserved Water Rights. In his general comments, Mr. Costello emphasized the importance of not generalizing about these issues as tribes are all different and individual disputes present unique factual scenarios. He explained that he was encouraged by the commitment of the federal agencies to work cooperatively with Washington State. The federal agencies expressed their willingness to put their human, creative, and (where available) financial resources behind finding resolutions to these difficult issues.

The Department of Interior had recently announced its “4 C’s” initiative. The “4 C’s” refer to “conservation through cooperation, consultation and communication.” Interior has not issued any specific guidance on resolving disputes involving federal and/or Indian reserved water rights by the use of the “4 C’s,” but did express a strong interest in working with Washington to develop a tool chest or library of specific options that could be drawn upon in any given dispute.

Interior is interested in working with Washington to develop both “macro” and “micro” options. “Micro” refers to addressing specific questions such as methods for quantifying reserved water rights. “Macro” refers to addressing system-wide issues such as Washington’s consideration of developing a compact commission and/or a specialized water court.

The State and Federal governments agreed to work together on pursuing mediation in the *Lummi* case which involves the Lummi Tribe’s claim to a federal reserved water right to groundwater. Now is a good time to attempt to pursue settlement for at least two reasons: (1) the federal district court recently ruled on summary judgment that a reserved groundwater right does exist; and (2) both the state and the federal experts appear to agree that there is more water in the groundwater aquifer than originally thought. The parties will seek to start negotiations this Winter. The State and Federal governments agreed to track options discussed during these negotiations (including those that are rejected) for the purpose of building a tool chest of options that might be useful elsewhere.

Representatives also described some recent successes in Montana, New Mexico, Idaho and Oregon, experiences from which Washington might draw upon as it looks to build a set of options for addressing these kinds of disputes. These approaches include the use of Section 6 of the ESA to develop federal/state cooperative agreements that address water management issues and the use of science panels to provide expertise on technical issues. Some of these options will be described in more detail in the draft report of the Task Force.

***Review Worksheet # 5: Discuss Strengths and Weaknesses of Existing Processes for Federal and Indian Reserved Water Rights***

Assistant Attorney General Mary Sue Wilson distributed a revised Worksheet #5 (Federal and Indian Reserved Water Rights, September 2003) and led the Task Force in its review of the information contained on this worksheet. Ms. Wilson first provided an overview of the information in the first and second columns. The first column describes the *Winters* doctrine: when the United States reserves land for a specific purpose, the federal government also reserves sufficient water to meet the purpose(s) of the reservation. This doctrine has been applied to find reserved water rights associated with Indian reservations and other federal reservations, e.g., U.S. Forest Service reservation of water for fire protection purposes. In addition to rights associated with reservations of land, with respect to tribal rights to water, when a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows to protect the fish in the streams.

The second column describes the current processes used to resolve issues involving federal and Indian water rights. In terms of direct processes, in the state system, these rights can be resolved in the context of a general adjudication. During general adjudications, parties (including federal and tribal) may voluntarily negotiate their water right claims. If the state does not initiate a general adjudication, the only formal way federal and Indian water rights can be resolved is through a federal court action. “Indirect processes” that may reduce the pressure to formally resolve these issues in state or federal court include: watershed planning; actions under federal authorities such as the Clean Water Act and ESA; and contracts or other agreements that address water management issues.

Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet # 5. The third column identifies strengths of the existing processes. The fourth column identifies weaknesses of these processes. No additions were made to the strengths or weaknesses columns.

***Review Worksheet # 6: Alternatives to the Current Processes Used to Resolve Federal and Indian Reserved Water Rights***

Next, Ms. Wilson led the Task Force in reviewing and discussing Work Sheet # 6 (Federal and Indian Reserved Water Rights: Alternative Processes, dated September 2003). This work sheet presented nine categories of alternatives to address disputes involving federal and Indian reserved water right issues. Each was assigned a letter, A – I. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative were expected to be further refined based on subsequent discussions and comments.

It was noted that Alternative A is actually a listing of the five alternatives endorsed by the Task Force in May when the Task Force focused on alternatives to the current general adjudication process (in the context of addressing historic water right claims, not federal and Indian water rights). Four of the alternatives involve modifying (with the goal of improving) the existing general adjudication process. The fifth alternative (create specialized water court) involves a system-wide change.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Alternative B was amended to add to the list of incentives a provision for the funding of mediation services. Task Force discussion about Alternative G emphasized the importance of making this alternative voluntary. As such, it could be described as one of the “tools in the tool box” that a particular watershed group could use if

there was consensus among all impacted groups. Representative Linville described efforts underway in Watershed Resource Inventory Area (WRIA) 1 (the Nooksak) that might come to a point where the parties could take advantage of this option. Alternative H was modified to eliminate the reference to consultation by the Governor's Office and instead refer more generally to "government to government" discussions. The final version of this alternative did not identify which branch of state government would "consult" with the other governments (federal and tribes).

After discussion of Alternative I, the Task Force agreed to eliminate it from consideration. This decision was based upon the following points: that the alternative appeared to describe a change to state policy rather than state processes (which is not within the Task Force's charge) and that, if the statement did represent a dramatic change in state policy, it could lead to more litigation and could upset the existing water rights priority system.

Before voting, several members suggested that the Task Force might want to agree that Alternative H (consulting with tribes and federal government to receive input on processes) should be an overarching recommendation that should be carried forward by consensus of the group. The idea was that the Task Force would endorse a suite of options, but include in its recommendation to the Legislature a statement that before the Legislature acts on the suite of options, the State should engage in government-to-government discussions to formally hear these other governments' perspectives on such options. There was no consensus for this approach so Alternative H (as revised) remained on the list for voting.

Voting results reduced the list of nine Alternatives to five. Alternative H received 14 votes, Alternative B received 12 votes, Alternative A received 10 votes, Alternative E received 6 votes, and Alternative D received 4 votes. Subsequent discussion resulted in the Task Force combining Alternatives D & E into a single alternative with a slightly modified description.

Therefore, as a result of voting and subsequent discussions at the meeting, the Task Force agreed to carry forward in its final report the following recommendations for addressing disputes involving federal and Indian water rights:

H. Initiate government to government discussions with tribes and the federal government to receive input from these governments on what processes they want the state to utilize to address their water right claims.

B. Create special incentives to encourage settlements of federal and Indian water rights (these might include: reduced fees for participants who resolve claims early; special funds for water conservation or delivery projects for claimants that settle; create special funding source for mediation services).

A. Endorse the same Alternatives Recommended by the Task Force at the May 2003 meeting on the general topic of Historic Claims Disputes and General Adjudications (this includes 4 recommendations to modify the existing adjudication system with an aim at improving it and 1 recommendation for a system overhaul, the creation of a specialized water court).

D/E. Create State Office like Montana's Compact Commission charged with the task of negotiating with other sovereigns. If an adjudication is underway, any settlement reached by the Commission would be filed in the state court adjudication. If an adjudication is not underway, any settlement reached by the Commission would be filed in federal court as a consent decree after providing sufficient opportunities for notice, comment, and objection by non-parties.

An updated version of Worksheet # 6, dated October 2003, has been modified to incorporate the discussion and decisions of the Task Force.

***Follow-up from July 24, September 30, and October 22 decisions***

In the next few weeks, the Attorney General's Office will circulate a draft report that includes results of the July 24, September 30, and October 22 meetings. The draft will identify the recommendations made, including a description of each recommendation and reasons for each recommendation. Once distributed, members will be given a deadline for review and comment. A final version of the document will ultimately become part of the Task Force's report to the Legislature.

***Plan for Next Meeting (Wednesday, October 22, 2003)***

The October 22, 2003 meeting will take place from 1:30 p.m. to 5:00 p.m. The first agenda item will be for the Task Force to address its final topic: Instream Flow Disputes. The format for discussing this topic will follow the same format as used at the prior decision meetings (May, July, and September meetings), with two worksheets describing the issues, the existing processes used to address these issues, and alternatives to the existing processes. After the Task Force arrives at tentative conclusions regarding alternatives to address Instream Flow Disputes, the remainder of the October 22<sup>nd</sup> meeting will be devoted to refining and clarifying earlier recommendations.

***Logistics for October 22, 2003 Meeting***

The October 22<sup>nd</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. The meeting is scheduled for 1:30 p.m. to 5:00 p.m. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

## ATTORNEY GENERAL OF WASHINGTON

### **Water Disputes Task Force Meeting Summary October 22, 2003 Task Force Meeting**

#### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Richard Hicks, Judge Linda Krese, Judge Michael Cooper, Court Commissioner Sidney Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Senator Jim Honeyford, Senator Karen Fraser, Representative Bruce Chandler, Representative Kelli Linville, Keith Phillips on behalf of the Department of Ecology.

#### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, David Mears, Mary Sue Wilson, Tammy Teeter.

*Legislative Staff:* John Charba, Caroleen Dineen, Evan Sheffel, John Stuhlmiller, Gary Wilburn.

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Adam Gravley, John Hollowed, Mike Schwisow, Dawn Vyvyan.

*The meeting was called to order at approximately 1:40 p.m..*

Participants and observers were introduced.

#### ***Introduce Plan for the Day***

Assistant Attorney General Mary Sue Wilson reviewed the agenda and topics to be covered at the meeting. This was the fourth Task Force meeting dedicated to the development of tentative recommendations. The primary topic for this meeting was Instream Flow Disputes.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting and handed out at the outset of the meeting. These included an agenda for the meeting, a meeting summary from the September 30, 2003 meeting, a revised Worksheet #6 reflecting discussion and decisions at the September 30, 2003 meeting, Worksheets #7 & #8 (revised) to guide the Task Force in considering the Instream Flow topic, and responses to questions posed in September by Senator Honeyford, Representative Chandler, and PCHB Member Cottingham. Later in the meeting, three additional documents were distributed: a Proposed Schedule for Review/Comment on the draft Task Force Report, a Summary of Preliminary Recommendations of the Task Force, and a list of Discussion Points for the October 22, 2003 meeting.

***Review Worksheet #7: Instream Flow Disputes: Background Document***

Assistant Attorney General Mary Sue Wilson led the Task Force in review of the information contained on Worksheet #7: Instream Flow Disputes. Ms. Wilson first provided an overview of the information in the first column. The first paragraph explains that disputes involving instream flows may relate to (1) establishing, (2) challenging, or (3) protecting flows from impairment by junior users. Ms. Wilson explained that the first category (*e.g.*, establishing instream flows) may not be the type of “process” dispute over which this Task Force has expertise because disputes surrounding the *establishment* of instream flows frequently concern scientific and policy disagreements rather than process issues. This issue was addressed by the Task Force later in the meeting.

The remainder of the first column identifies the ways in which instream flow requirements are established. The most common type of instream flow is one that is established by rule by the Department of Ecology. Once established, the instream flow rule is viewed as an appropriation of water with a priority date of the date of rule adoption. Once adopted, any water right junior to the instream flow appropriation will be subject to the instream flow, but rights that are senior to the instream flow rule will not be subject to it. Instream flow provisions may also be included in individual water right decisions as conditions on the exercise of an individual water right. Such conditions would govern the exercise of the particular water right but would not have any effect on other water rights. Instream flow “rights” may also be confirmed to exist when a tribal treaty to take fish from a particular water body is recognized as including a “right to a particular flow level” to support the fish.

Task Force comments resulted in the addition of the following ways in which instream flow requirements are established or recognized: (1) trust rights established for the benefit of instream flows; (2) flow conditions included in a Federal Clean Water Act, Section 401 certification; and (3) flow restrictions included in a Habitat Conservation Plan (HCP) under the Federal Endangered Species Act.

The second column describes the current processes used to resolve issues involving instream flow disputes. The column notes that different processes are used depending on how the flow was established or recognized in the first place.

The process used to resolve issues related to instream flows adopted by Ecology through rulemaking is an Administrative Procedures Act (APA) “rule challenge” action brought in superior court. Rules are reviewed on the record developed by Ecology through the rulemaking process and the court applies standards described in the APA. Instream flow rules can be set aside if the court finds: (1) the rule violates constitutional provisions, (2) the rule exceeds statutory authority, (3) the rule was adopted without compliance with statutory rule-making procedures, or (4) the rule is arbitrary and capricious. RCW 34.05.570(2)(c). When the court considers an “arbitrary and capricious” challenge, the court examines the rationale explained by the agency when it adopted the rule to determine if the record supports the conclusions of the agency. This does not involve the court making an independent judgment regarding the appropriateness of the rule.

The process used to resolve issues related to instream flow provisions included as conditions on the exercise of individual water rights is an appeal of the permit decision to the Pollution Control Hearings Board and then to superior courts. Similarly, to resolve issues related to flow conditions included in a Section 401 certification decision, the certification decision may be appealed to the PCHB. Later in the meeting, the Task Force agreed that it did not need to address issues related to instream flow conditions included in water right permit decisions or 401 certification decisions separately from how the Task Force had previously addressed general

Ecology water management and enforcement decisions that are currently subject to appeal to the PCHB.

In addition, because flow conditions included in a HCP are established under a federal process, the Task Force did not choose to separately address processes related to this category of instream flow condition.

The state process used to resolve issues related to tribal claims to instream flow rights is the commencement of a general adjudication. If the state does not initiate a general adjudication, the only formal way to address tribal claims to instream flow rights is through a federal court action. As part of either of these cases, parties may decide to negotiate, which may resolve issues without requiring formal disposition by the court. Later in the meeting, the Task Force agreed that it did not need to address issues based on tribal claims to instream flow rights separately from addressing general tribal water right issues, which were addressed at the September 2003 meeting. During this discussion, Senator Honeyford commented that he had heard that Montana's compact commission had not been particularly successful in resolving some contentious tribal water right issues.

Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet #5. The third column identifies strengths of the existing processes. The fourth column identifies weaknesses of these processes. During discussion of the listed strengths and weaknesses, Senator Fraser suggested that a failure to recognize tribal rights creates both legal and financial uncertainty in a watershed.

#### ***Review Worksheet #8: Instream Flow Disputes: Alternative Processes***

Next, the Task Force reviewed and discussed Work Sheet #8 (Instream Flow Disputes: Alternative Processes, revised version). Attorney General Gregoire explained why the worksheet had been revised to eliminate the suggested processes for the establishment of instream flows from the worksheet. She explained that she did not think that disputes involving the *establishment* of instream flows were the type of "process" disputes that come within the expertise of the Task Force as disputes surrounding the *establishment* of instream flows frequently concern scientific and policy disagreements rather than process issues. At Attorney General Gregoire's suggestion, the Task Force decided not to include this category.

The remainder of Work Sheet #8 presented six categories of alternatives to address disputes involving instream flows. Each category was assigned a letter, A – F.

Following discussion about Alternative A, the Task Force decided not to address issues related to tribal claims to instream flow rights separately from addressing general tribal water right issues, which were addressed at the September 2003 meeting. Nonetheless, the Task Force decided that the description contained in Alternative A (which was an attempt to summarize decisions made at the September meeting) required revision. The Task Force agreed that its decision from the September meeting should be described as follows:

The Task Force recommends "government to government" consultation with tribes and the federal government to obtain input from these governments regarding processes that might be used by the state to resolve federal and tribal water right issues. During the consultation process, the state will put forward the three options that received support at the September meeting: (1) retain the existing structure but create incentives to facilitate settlements; (2) institute measures to improve and streamline adjudications, including creating a specialized water court; and (3) create an entity like Montana's compact commission.

Before leaving this topic, the Task Force discussed several questions about the value of a Specialized Water Court: (1) in the event that statewide general adjudications are not commenced; or (2) in the event that adjudication does not include adjudicating federal and tribal water rights. The Task Force did not resolve these questions.

Next, the Task Force discussed Alternatives B, C, and D, which present several different ways for challenging instream flow rules. Alternative B would modify the process for challenging an instream flow rule by empowering a court which was hearing an instream flow rule challenge to take evidence outside the agency's rulemaking record (beyond what is currently authorized under the APA) and to make an independent decision regarding the substance of the rule. Alternative C would modify the process in the same way as modified under Alternative B, but the case would be filed in the Specialized Water Court rather than the general superior court. Alternative D would retain the status quo for instream flow rulemaking challenges (they would continue to be subject to existing APA standards governing the taking of evidence and the decision of the court). Alternative D would be applied by the general superior court or the Specialized Water Court, if one is created.

In discussing the topic of instream flow rule challenges, some Task Force members suggested: (1) the possibility of defining who has standing to bring such challenges in a manner different from how the APA currently approaches standing; (2) whether to change statutes of limitations applicable to instream flow rule challenges (currently there is a two year statute of limitations on procedural challenges to rules but there is no statute of limitation applicable to substantive rule challenges); and (3) whether to change upfront processes applicable to instream flow rulemaking, *e.g.*, by requiring more notice upfront (before a rule is proposed) or limiting the types of permissible changes between the proposed and adopted rule. The Task Force did not resolve these questions.

Next, the Task Force discussed Alternatives E and F, which present two different ways to protect senior instream flows from impairment by junior rights. Keith Phillips offered his opinion that, where flows are established by rule, any subsequent water right decision made by the Department of Ecology will be made subject to (or junior to) the flow rule. The department probably has the authority to enforce such conditions even after the *Rettkowski* ("*Sinking Creek*") case (122 Wn.2d 219 (1993)). Therefore, questions of protecting senior instream flows from impairment by junior rights will probably come up only in the context of a water right that has been transferred into trust for the benefit of an instream flow. In such case, the creation of the trust is intended to ensure that the quantity of water represented by the right be kept in the stream and not be removed by a junior user. Where the right exists in an adjudicated basin, the department may regulate the junior user to protect the senior trust right. However, where the right exists in an unadjudicated basin, the department lacks the authority to so regulate. Alternative E would authorize an administrative action by Ecology to protect a senior trust right in an unadjudicated basin. Alternative F would authorize Ecology to petition a superior court (or the Specialized Water Court if one is created) for an order protecting a senior trust right in an unadjudicated basin.

Each member received two votes and Attorney General Gregoire asked that each member cast one of their votes between Alternatives B, C, and D, and their second vote between Alternatives E and F. Voting results led to Task Force support of Alternatives D (9 votes) and F (8 votes). Alternative B received 1 vote, Alternative C received 2 votes, and Alternative E received 4 votes.

As a result of voting and subsequent discussions at the meeting, the Task Force agreed to include the following recommendations for addressing instream flow disputes:

D. The existing structure governing challenges to instream flows adopted by agency rule should be retained (challenge brought in court, pursuant to APA standards). If a Specialized Water Court is created, the instream flow rule challenge should be filed in that court. Subsequent discussion of the Task Force led to a decision to include a footnote in the Task Force report suggesting that the Legislature consider whether to authorize the court to take additional new evidence beyond what is currently allowed under RCW 34.05.562 in an instream flow rule challenge case.

F. Ecology should be authorized to petition the superior court (or the Specialized Water Court if one is created) for an order protecting an instream flow right that is based on a senior trust right in an unadjudicated basin.

An updated version of Worksheet #8, dated October 2003, second revision, has been modified to incorporate the discussion and decisions of the Task Force.

#### ***Follow-up from May 22, July 24, September 30, and October 22 decisions***

A Summary of Preliminary Recommendations of the Task Force as of October 22, 2003 was distributed to all members. Members were asked to provide comments to Assistant Attorney General Mary Sue Wilson by October 30, 2003. On October 23, Ms. Wilson distributed an updated version of this document by e-mail. This updated version includes the results of Task Force deliberations on October 22, 2003.

#### ***Plan for Review and Comment on Draft Task Force Report (Report to be distributed to members by November 5, 2003, comments due back by December 5, 2003)***

Attorney General's Office staff is preparing a draft report of the Task Force. The draft report will follow the structure and substance of the Summary of Preliminary Recommendations referenced above. This draft report will be distributed to Task Force members on or about November 5, 2003. Comments on this draft report should be submitted to the AGO by December 5, 2003. Because the Task Force has already agreed to its preliminary recommendations, comments on the draft report should focus on: (1) presentation/focus/structure of the report; (2) consistency with decisions made by the Task Force at its meetings (for reference see draft documents and meeting summaries); and (3) whether supporting detail/rationale for Task Force decisions is sufficient.

The draft report will be a public document and will be provided to members of the public who ask for a copy. If members of the public want to submit comments for Task Force consideration, the AGO will ask that they send their comments to the AGO by November 25, 2003. Copies of any comments received by that date will thereafter be distributed to all members of the Task Force.

#### ***Thank yous and good-byes***

Attorney General Gregoire thanked the members of the Task Force for the time and energy they dedicated to the work of the Task Force. She also thanked staff that provided support to the Task Force. All Task Force members joined in a special recognition of Tammy Teeter for her administrative and refreshment support throughout the tenure of the Task Force.

#### ***Discussion Points***

The final agenda item of the day required the Task Force to review a document entitled *Discussion Points*, October 22, 2003. Task Force members agreed with the approaches suggested in items 1-4 of the Discussion Points.

The Task Force devoted some time to discussing the issue presented by Discussion Point #5, whether Senate confirmation should be required for judges appointed by the Governor to the Specialized Water Court. During this discussion, the issue of whether these judges should run for election in a retention election or a contested election was revisited. The Task Force was reminded that members had already decided to recommend retention election (*see* July 24, 2003 Task Force Meeting Summary at page 6). At the conclusion of the discussion, it was decided by the Task Force that the Recommendations include a footnote indicating that a minority of Task Force members supported a provision for Senate confirmation of Specialized Water Court judges. The footnote will explain the reasons that Senate confirmation was urged.

Next, the Task Force discussed item #6 of the Discussion Points. Item #6 focuses on the Task Force's plan to recommend that the Legislature examine the feasibility of an administrative title system that would aim to validate water rights short of an adjudication and keep them up to date after an adjudication. The Task Force agreed that this recommendation should be stated as generally as possible since the Task Force has not studied this topic to a degree that allows endorsement of any particular option. Therefore, the report will recommend that the Legislature further study and examine the feasibility of an administrative title system that would aim to validate water rights before a basin is adjudicated and that would keep water rights up to date after an adjudication. Ideas that the Task Force urges the Legislature to consider include, but are not limited to: (1) a process aimed at validating water rights; (2) a process aimed at enhanced agency record-keeping; and (3) a "title insurance"-type system. The Task Force report should suggest that the Legislature be educated about the *Torrens Act* (a state law for real property) before making any final decisions on this topic as experience under that act may provide information regarding how similar legislation has or has not worked in the real property context.

*The meeting adjourned at approximately 4:30 p.m.*

# *Appendix*

## *C*

# *Proposed Scoping Table*

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p><b>#1</b> Historic Claim Disputes</p>	<p>Disputes involving a water right claimant who does not hold a permit or certificate because the claim pre-dates adoption of the water code. The claim is filed in the state claims registry.</p> <ul style="list-style-type: none"> <li>A tentative determination of the validity of these rights occurs if the right holder seeks to change the right. The tentative determination is subject to challenge in a PCHB appeal.</li> <li>A final determination of the validity of these rights occurs in a superior court general adjudication.</li> <li>An Ecology regulatory action issued to a water right claimant for invalid water use is subject to challenge in a PCHB appeal.</li> </ul>	<ul style="list-style-type: none"> <li>Annual average number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement categories.</li> <li>Only 1 general adjudication (Yakima basin) is currently underway. Many of the rights at issue in this adjudication are reflected by historic claims.</li> <li>Statewide, there are an estimated 169,000 historic claims, the large majority of which are unadjudicated. [note: unadjudicated does not necessarily = "in dispute."]</li> <li>These 169,000 historic claims represent a huge volume of water.</li> <li>_____.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>May 22nd</p>
<p>Federal &amp; Indian Reserved Rights Disputes</p> <p><i>Task Force deferring consideration pending AGO discussion with federal government.</i></p>	<p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <ul style="list-style-type: none"> <li>These disputes may be addressed in a federal court action or in a state court general adjudication that satisfies the McCarran Amendment.</li> </ul>	<ul style="list-style-type: none"> <li>Total number of cases not large, but workload and costs associated with cases addressing these cases is high. Expect more cases/disputes in the future.</li> <li>Impact of these rights is significant: in a given watershed, these rights are frequently the most senior; if not resolved, the junior right holders and water managers lack certainty regarding availability of water for others; if resolved, result may be to limit exercise of junior rights.</li> <li>Legislature has considered this topic in recent sessions; appears ripe.</li> <li>Options that state can develop are limited by McCarran Amendment requirements.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>Sept 18th</p>

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p><b>#2</b></p> <p>Water Rights Management Disputes</p>	<p>Disputes involving Ecology decisions to approve or deny applications for new water rights or applications to change or amend existing water rights; disputes involving relinquishment orders; disputes involving decisions to cancel permits.</p> <ul style="list-style-type: none"> <li>Ecology permit decisions, and relinquishment and cancellation decisions are subject to challenge at the PCHB.</li> </ul> <p>Disputes involving priority of water rights across single watershed.</p> <ul style="list-style-type: none"> <li>A final determination of the validity and priority of water rights occurs in a superior court general adjudication.</li> </ul>	<ul style="list-style-type: none"> <li>Annual number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement.</li> <li>PCHB viewed favorably by some as specialized expert; viewed by others as not adequately sensitive to local concerns. [2003 SSB 5086 presents this debate]</li> <li>Only 1 general adjudication (Yakima basin) is currently underway.</li> </ul> <p>Adjudication viewed as large, slow and costly. Issue of whether there are alternatives to general adjudication appears ripe. [see AGO/Ecy Report on Streamlining Adjudications]</p>	<p>Yes</p> <p>July 24th</p>
<p><b>#3</b></p> <p>Water Rights Enforcement Disputes</p> <p><i>Task Force may divide into two subcategories:</i></p> <p>a) single water users enforcement; and</p> <p>b) Basin-wide enforcement.</p>	<p>In all watersheds, these disputes involve enforcement of the terms of permits or certificates and illegal water use (water use not covered by permit or permit exemption); in watersheds that have been adjudicated, these disputes also involve enforcing the terms of the court's final decree.</p> <ul style="list-style-type: none"> <li>Ecology enforcement decisions are subject to challenge at the PCHB.</li> <li>While adjudication is pending, superior court has jurisdiction over enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>Annual number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement.</li> <li>PCHB viewed favorably by some as specialized expert; viewed by others as not adequately sensitive to local concerns. [2003 SSB 5086 presents this debate]</li> <li>_____.</li> <li>_____.</li> <li>_____.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>July 24th</p>

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p><b>#4</b> Instream Flow Disputes</p>	<p>Disputes involving the setting of an instream flow and disputes involving whether a particular water right is subject to an instream flow.</p> <ul style="list-style-type: none"> <li>• Instream flows applicable basin-wide are established by rule. Instream flow rules are subject to challenge in superior court pursuant to the APA.</li> <li>• Instream flow conditions may be included in individual permit decisions. Such conditions are subject to challenge in a permit appeal to the PCHB.</li> <li>• Ecology may bring a regulatory action to restrict water use based on a flow condition included in a water right. These actions may be appealed to the PCHB.</li> </ul>	<ul style="list-style-type: none"> <li>• In recent years, Ecology has adopted only a few new instream (ISF) flow rules. In recent years, no superior court APA ISF rule challenges have been filed.</li> <li>• Watershed planning efforts that will address instream flows are underway in 33 watersheds. These efforts are projected to result in the adoption of new ISF rules in 23 watersheds by 2010. Each new rule could be the subject of a superior court APA challenge. Watershed planning aims to involve all local interests in developing ISFs. If these efforts are successful, we may see only a few legal challenges.</li> <li>• Permits containing stream flow conditions are occasionally subject to challenge. These numbers are not separately tracked by the PCHB.</li> <li>• ISF issues are closely related to tribal water/fisheries claims; if tribal water rights are considered by Task Force, ISF issues should probably also be considered.</li> <li>• This may be a unique category because flow issues involve questions of science.</li> <li>• _____.</li> </ul>	<p>Yes</p> <p><b>September 18th</b></p>
<p>Two-Party Disputes (or private small-scale disputes)</p>	<p>Disputes between individuals concerning the validity or seniority of their rights; including disputes where one right holder alleges impairment from another right holder's use of water.</p> <ul style="list-style-type: none"> <li>• In <i>Rettkowski v. Ecology</i> ("Sinking Creek"), 122 Wn.2d 219 (1993) the Supreme Court determined that Ecology lacked authority to issue orders addressing priorities among competing water rights; under the water code, priorities are addressed only in a general adjudication.</li> <li>• As between two parties, a quiet-title or DJA may be brought to resolve disputes. In these actions, the state is not a party.</li> </ul>	<ul style="list-style-type: none"> <li>• Uncertain re number of cases; Ecy/AGO learn about 1-2 cases per year; these cases could become more common in future as water becomes more scarce.</li> <li>• Ecy/AGO's perception is that need for new system is relatively low.</li> <li>• Do we want/need state involvement beyond court system in disputes that are essentially private disputes? Is our answer different for disputes that are truly 2 party disputes and those that are small scale, multi-party disputes?</li> <li>• _____.</li> <li>• _____.</li> </ul>	<p>No</p>

Revised PROPOSED SCOPING TABLE

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p>Interstate or International Disputes</p>	<p>These disputes involve water bodies shared between two states or two nations. Washington shares water bodies with Oregon, Idaho, and Canada.</p> <ul style="list-style-type: none"> <li>• Congressional authorization required to negotiate international agreement. Congressional approval required to approve Treaty.</li> <li>• Officially, congressional authorization required for formal interstate compacting. In practice, states frequently negotiate informal compacts.</li> </ul>	<p>A January 2003 Ecology draft report executive summary describes existing agreements between Washington and Oregon, Idaho, and Canada. The report concludes that no additional agreements are required at this time. The Spokane-Rathdrum Aquifer is the shared water body receiving the most attention recently. Washington and Idaho are working together to obtain funding for a comprehensive study of the aquifer.</p> <ul style="list-style-type: none"> <li>• Unique character of these disputes.</li> <li>• Systems already exist to address these disputes; state is limited in its capacity to create new interstate or international system.</li> <li>• Facts (recent study) do not show immediate need.</li> <li>• _____.</li> </ul>	<p>No</p>

*Working Document: Existing Processes  
and Possible Alternatives*

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>1</sup>	ALTERNATIVE PROCESSES (major changes)
<p><b>ECOLOGY/PCHB ACTIONS</b></p> <p>Ecology makes decision, decision may be appealed to PCHB. PCHB conducts <i>de novo</i> hearing. PCHB decision may be appealed to superior court and higher.</p> <ul style="list-style-type: none"> <li>• Some historic claim disputes</li> <li>• Some instream flow disputes</li> <li>• Some water rights management disputes</li> <li>• Some water rights enforcement disputes</li> </ul> <p><b>To be discussed at July 24<sup>th</sup> meeting</b></p>	<p>Disputes involving Ecology decisions: to approve or deny applications for new water rights or applications to change or amend existing water rights; disputes involving relinquishment orders; disputes involving decisions to cancel permits; enforcement of the terms of permits or certificates and illegal water use (water use not covered by permit or permit exemption); if watershed has been adjudicated, these disputes also involve enforcing the terms of the court's final decree.</p> <p>Average number of PCHB water right cases per year = 83</p>	<p>(1) <i>Modify the process associated with how Ecology makes any of these decisions.</i></p> <p>(2) <i>Modify PCHB process or standards; e.g., change standard of review, change hearing process.</i></p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) <i>Agency other than Ecology makes initial decision for any of these categories.</i></p> <p>(2) <i>Appeals of WR decision (whether made by Ecology or new agency) go directly to superior court or court of appeals, i.e., eliminate role of PCHB.</i></p> <p>(3) _____.</p> <p>(4) _____.</p>
<p><b>SUPERIOR COURT APPEALS OF PCHB DECISIONS</b></p> <p>Continuation of above process. Review is conducted according to APA standards.</p> <p><b>To be discussed at July 24<sup>th</sup> meeting</b></p>	<p>Covers same disputes as described above.</p> <p>Estimated total number:</p> <p>Superior Court appeals from PCHB WR decisions: 8-9 per year over past 11 years.</p> <p>Court of Appeals: approximately 5 per year.</p> <p>Supreme Court: approximately 1 per year.</p>	<p>(1) <i>Modify standard of review applicable to superior court review of PCHB decision.</i></p> <p>(2) _____.</p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) <i>Create specialized water judge positions among superior court judges. Jurisdiction might include jurisdiction to make decisions (i.e., serve role currently served by Ecology) or jurisdiction to review decisions (i.e., serve role currently played by PCHB) or jurisdiction to hear review from PCHB decision (i.e., serve same function as superior court currently serves).</i></p> <p>(2) <i>Create statewide water court. Jurisdiction choices same as in number (1).</i></p> <p>(3) _____.</p> <p>(4) _____.</p>

<sup>1</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>2</sup>	ALTERNATIVE PROCESSES (major changes)
<p><b>GENERAL ADJUDICATIONS IN SUPERIOR COURT</b></p> <ul style="list-style-type: none"> <li>• Some historic claim disputes</li> <li>• Some federal and Indian reserved rights disputes</li> <li>• Some water rights management disputes</li> <li>• Enforcement disputes while adjudication is pending</li> </ul> <p><b>To be discussed at May 22<sup>nd</sup> meeting</b></p>	<p>Disputes involving priority of water rights across single watershed. A final determination of the validity and priority of water rights may occur only in a superior court general adjudication.</p> <p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <p>Only 1 adjudication in process, it was filed in 1977.</p>	<p>(1) <i>Within the adjudication process, have Ecology make the tentative determinations on water rights and have claimants present fully documented claims at the outset.</i></p> <p>(2) <i>Independent of the adjudication process, create a new process for Ecology to validate registered water right claims.</i></p> <p>(3) <i>Allow limited special adjudications.</i></p> <p>(4) <i>Have Ecology provide comprehensive background information early in the adjudication proceedings.</i></p> <p>(5) <i>Authorize pre-filed written testimony.</i></p> <p>(6) <i>Utilize information technology more effectively.</i></p> <p>(7) <i>Develop aerial photograph interpretation expertise.</i></p> <p>(8) <i>Expand the use of mediation.</i></p> <p>(9) <i>Develop guidance on how to maintain and document a water right.</i></p> <p>(10) <i>More aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address watershed-wide water right priorities.</i></p> <p>(11) <i>More aggressive prioritizing/funding: establish priorities for conducting general stream adjudications in priority basins.</i></p> <p>(12) <i>Post adjudication tracking of water rights.</i></p> <p>(13) _____.</p>	<p>(1) <i>Create specialized water judge positions among superior court judges. Jurisdiction might include conducting basin-wide or focused adjudications according to legislatively established priorities.</i></p> <p>(2) <i>Create Water Court: Jurisdiction might include conducting statewide adjudication or focused adjudications.</i></p> <p>(3) <i>Create Entity like Montana's Compact Commission to negotiate with federal agencies and tribes.</i></p> <p>(4) <i>Two water courts (East &amp; West) to adjudicate claims/basins.</i></p> <p>(5) <i>Adjudication of rights "one at a time."</i></p> <p>(6) <i>Employ "fact finding" process.</i></p> <p>(7) <i>Adjudicate both ground water and surface water.</i></p>

<sup>2</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>3</sup>	ALTERNATIVE PROCESSES (major changes)
<p><b>ORIGINAL SUPERIOR COURT ACTIONS</b></p> <ul style="list-style-type: none"> <li>• Two-party disputes (some involve state as party; some do not)</li> <li>• Some instream flow disputes</li> </ul>	<ul style="list-style-type: none"> <li>• Two party, private water rights disputes (state is not a party). Numbers not tracked. Estimated 1-5 per year.</li> <li>• Declaratory judgment action where state is a party. Roughly one case filed per year.</li> <li>• APA rule challenge to instream flow rule adopted by Ecology. Less than one case per year of this sort is filed. May see increase in future.</li> </ul>	<p>(1) See recommendation # 3 from Streamlining Adjudications Report (Allow limited special adjudications).</p> <p>(2) Create new role for PCHB or another agency to assist or expedite two party disputes.</p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) WR rule challenges heard by PCHB instead of superior court.</p> <p>(2) _____.</p> <p>(3) _____.</p>
<p><b>ORIGINAL FEDERAL COURT ACTIONS</b></p> <ul style="list-style-type: none"> <li>• Federal and Indian reserved rights disputes</li> <li>• Interstate disputes</li> </ul>	<p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <p>Less than one case filed per year. Case involves significant resources.</p>	<p>(1) Ad hoc mixing of litigation and negotiations as cases arise, with federal court action continuing to provide the legal overlay.</p> <p>(2) More aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address federal and tribal water right claims.</p> <p>(3) More aggressive prioritizing/funding: establish priorities for resolution of federal and tribal water right issues, obtain funding to pursue general stream adjudications in priority basins. Within these adjudications, prioritize negotiations with federal agencies and tribes.</p> <p>(4) _____.</p> <p>(5) _____.</p>	<p>(1) Establish water court, set in motion adjudications across state.</p> <p>(2) Establish compact commission type agency to negotiate federal and tribal water rights (may need adjudication to be successful).</p> <p>(3) Even more aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address federal and tribal water right claims AND other claims within the basin and to include a process to enter consent decree documenting comprehensive agreement.</p> <p>(4) _____.</p> <p>(5) _____.</p>

<sup>3</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

*Historic Claims Disputes/Superior  
Court General Adjudications  
Work Sheet #1*

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, Revised: June, 2003 Work Sheet #1

Historic Claims Disputes	Superior Court General Adjudications	Strengths of Superior Court General Adjudication System (supplemented by discussion at May 2003 meeting)	Weaknesses of Superior Court General Adjudications System (supplemented by discussion at May 2003 meeting)	Criteria for Success (identified by Task Force 6/02 meeting; supplemented by discussion at May 2003 meeting)
<p>Historic claims are those claims to surface water rights that pre-date the Surface Water Code (1917) and those claims to groundwater that pre-date the Ground Water Code (1945). Water uses pre-dating the codes do not require a permit, but in 1967 the Legislature required that claimants to these pre-code rights file administrative statements of claim to preserve these pre-code rights. There have been four open periods for filing claims in the claims registry: 1969-1974; 1979; 1985; and 1997-1998. If a statement of claim was required and a claim was not filed, the right is considered relinquished. Under Washington water law, to maintain a water right it must be put to continuous beneficial use unless a period of non-use is excused by an exception to this use requirement. See, e.g., RCW 90.14.020(3); 90.14.160; 90.14.170; 90.14.180. There are an estimated 170,000 registered water right claims in Washington, most have not been adjudicated, i.e., confirmed to represent valid rights, with defined quantity limits and priority dates.</p>	<p>A general adjudication of water rights in Washington is conducted according to procedures provided in the Water Code. RCW 90.03.105 through 90.03.245 and 90.44.220. In a general adjudication, the court determines the validity, extent, and relative priorities of existing water rights for a specific basin, surface water body, or ground water body. For more details, see <i>2002 Report to the Legislature: Streamlining the Water Rights General Adjudications Procedures</i>; December 2002, Ecology Publication No. 02-11-019 at pages 5-7 (Report with blue cover). Issues regarding whether a historic claim represents a valid right, and, if so, what the quantity and priority of that right is are decided in a superior court general adjudication. Given the requirement of continuous beneficial use, determining the validity of a water right involves examining the entire history of the claimed right. Thus, a court conducting an adjudication in 2003 charged with determining whether a claim asserting a surface water right dating back to 1910 represents a valid water right will examine the entire history of the use of that water right, beginning in 1910 and continuing to 2003.</p>	<ul style="list-style-type: none"> <li>• End result provides complete legal certainty among water users. This certainty facilitates future water management and enforcement. [certainty lasts only for a period of time, as there is no provision for ongoing updates]</li> <li>• The decree also provides reliable documentation as to the extent of water rights appurtenant to property, and can facilitate sales of land and development of markets for transfers of water rights.</li> <li>• Because the local superior court serves as the forum, there is relatively easy access to local citizens.</li> <li>• Involves agency, including its expertise and resources (e.g., providing reports to the court and providing referee to conduct some hearings) in the process.</li> <li>• Allows for voluntary participation in ADR processes.</li> <li>• Provides for interim regulation of water rights by the superior court during the pendency of the adjudication.</li> <li>• Ability to address federal reserved water rights</li> </ul>	<ul style="list-style-type: none"> <li>• The larger the water body, the longer and more complex the adjudication. (Costly/time-consuming).</li> <li>• Existing structure may allow claimants too many opportunities to provide evidence supporting their claims (e.g., exceptions process).</li> <li>• Entire water body or basin is adjudicated at one time, makes for lengthy processes; may be more comprehensive than necessary if actual disputes involve only part of water body.</li> <li>• Does not mandate mediation or other ADR.</li> <li>• Process is too complex for small claimants, including those that represent themselves without legal counsel. [although this has been accommodated to some extent in ongoing Yakima case]</li> <li>• Surface Water Only</li> <li>• Cost</li> <li>• No follow-up: adjudication provides only a snapshot</li> <li>• Inexperience of claimants necessitates more “bites at apple”</li> <li>• Difficult to build historical knowledge/experience because same court does not hear all adjudications (i.e., Yakima County Superior Court is hearing current adjudication, but its expertise will not be used if next adjudication is filed in WallaWalla county).</li> </ul>	<ul style="list-style-type: none"> <li>• Cost: for both participants and the public.</li> <li>• Unified system (which is able to cover all types of water, e.g., ground water, surface water, rain water).</li> <li>• Sufficient data to make process work (finite character of water resources)</li> <li>• Recognizes limitations of interests and authorities of other jurisdictions (e.g., other states, tribes, federal government claims).</li> <li>• Appropriately comprehensive.</li> <li>• Builds institutional memory/experience.</li> <li>• Provides access to all, especially pro se parties.</li> <li>• Built-in system of prioritization.</li> <li>• Timely &amp; efficient.</li> <li>• Just &amp; balanced.</li> <li>• Certainty about its scope (e.g., does it cover interstate issues or not?).</li> </ul>

*Historic Claims Disputes/Superior  
Court General Adjudications  
Work Sheet #2*

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, **Revised June 2003**, Work Sheet #2

Alternatives	Description	Comments (from 5/22/03 discussion)	Ranking
<p>(A) <b>Comprehensive background information developed early in process, claimants present fully documented claims at outset, and Ecology makes tentative determinations on water rights.</b></p> <p style="text-align: center;"><b>11 votes</b> <b>tied for 1st</b></p>	<p>This alternative combines <i>Streamlining</i> Recommendations #1 &amp; #4. The basic structure of the existing general adjudication system is retained, but the alternative employs measures aimed at reducing court time associated with adjudicating claims.</p> <ul style="list-style-type: none"> <li>• Would require funding for these activities; court time and money savings may be shifted to Ecology.</li> </ul>	<p>(1) Background Information (2) Tentative Determination(s)/Recommendation (?)</p> <p><b>additional notes:</b></p> <ul style="list-style-type: none"> <li>• Deference to agency? (no)</li> <li>• Fact Collection</li> <li>• Screening – disputed &amp; non-disputed                             <ul style="list-style-type: none"> <li>• Disputed sent on with issues identified</li> <li>• Non-disputed: ratified by court</li> </ul> </li> </ul> <p>Voluntary or Mandatory? Provide referee with mediation or settlement authority? Mandatory only in sense that judge can order it? Create incentives to mediate (earlier resolution)? Occurs within context of court proceeding?</p>	<p><b>#1</b></p> <p><b>(tied with F)</b></p>
<p>(B) <b>Expand the use of mediation.</b> (As a concept)</p> <p style="text-align: center;"><b>9 votes</b> <b>2<sup>nd</sup> place</b></p>	<p>This alternative, by itself, also retains the existing structure. Increased use of mediation is expected to expedite decision-making and reduce court time.</p> <ul style="list-style-type: none"> <li>• Would require funding.</li> </ul>	<p>Voluntary or Mandatory? Provide referee with mediation or settlement authority? Mandatory only in sense that judge can order it? Create incentives to mediate (earlier resolution)? Occurs within context of court proceeding?</p>	<p><b>#2</b></p>
<p>(C) <b>Authorize pre-filed written testimony within the adjudication.</b></p> <p style="text-align: center;"><b>5 votes</b> <b>4<sup>th</sup> place</b></p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #5. This alternative also aims to expedite judicial decision-making within the existing structure.</p>	<p><b>Rebuttal opportunity</b></p> <p><b>Variations:</b> Direct done by pre-filed; cross-exam/redirect done live</p>	<p><b>#4</b></p>

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, **Revised June 2003**, Work Sheet #2

Alternatives	Description	Comments (from 5/22/03 discussion)	Ranking
<p>(D) Employ “fact finding” process. Short hearing – “offer of proof” type hearing.</p>	<p>This alternative was suggested during March 2003 meeting. Proponent may elaborate on concept. Appears to leave existing structure intact.</p>	<p>Purpose of early fact finding would be to establish something like “reasonable cause” early in process to justify moving potentially valid claims forward and weeding out baseless claims.</p> <p><b>Task Force decided to make this concept part of Alternative A.</b></p>	<p><b>received no votes</b></p>
<p>(E) Independent of the adjudication process, create a new process for Ecology to validate registered water right claims. Does not involve prioritizing claims.</p> <p style="text-align: center;"><b>2 votes</b> <b>5<sup>th</sup> Place</b> <b>(decision to strike from recommendations)</b></p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #2. It would exist independent of the general adjudication process. It could be employed whether or not other changes are made to the existing system.</p> <p>Ecology would determine the validity of an historic claim upon request. Ecology’s determination would be appealable to the PCHB. Ecology’s validation would be final, not tentative so questions of the validity of a particular claim would not have to await a full adjudication.</p>	<p>Does not have to be Ecology that performs validation; could be other agency or a court.</p> <p>Focus is on one right at a time.</p> <p>Concern about persons who might have an interest but who would not be a party or receive notice of the validation proceeding.</p>	<p><b>#5</b></p>
<p>(F) Allow limited special adjudications. (geographically limited)</p> <p style="text-align: center;"><b>11 votes</b> <b>tied for 1<sup>st</sup></b></p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #3. It would authorize adjudication of rights among a limited number of claimants or for <b>stream reaches</b> or <b>limited groundwater areas</b>, rather than entire basins.</p>	<p>Issues regarding federal rights (McCarran Amendment won’t allow inclusion of federal rights in proceeding not sufficiently comprehensive)</p> <p>Clearly identify the parties involved</p> <p>Need to clarify authority in water code</p>	<p><b>#1 (tied with A)</b></p>

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, **Revised June 2003**, Work Sheet #2

Alternatives	Description	Comments <b>(from 5/22/03 discussion)</b>	Ranking
<p><b>(G) Mandate that all adjudications address both surface and ground water where appropriate.</b></p> <p style="text-align: center;"><b>1 vote</b></p> <p style="text-align: center;"><b>6<sup>th</sup> place</b></p> <p><b>(decision to strike from recommendations)</b></p> <p><b>(H) Modify watershed planning statute (90.82) to expand the responsibilities of the planning group to include facilitating basin-wide water apportionment agreements.</b></p> <p><b>(decision to strike from recommendations)</b></p>	<p>This alternative was suggested during the March 2003 meeting.</p> <p>This alternative would charge planning groups with facilitating water apportionment agreements. A final apportionment agreement would be entered as consent decree in court and be final and binding as is a final decree from an adjudication court.</p>	<p>Discussed possible rewrite of this to require court to make determination at outset whether adjudication should encompass both surface and ground water. If such a requirement was adopted by statute, Legislature might identify criteria to be considered by court in making determination.</p> <p>Discussed whether court's decision would be subject to interlocutory review.</p> <p>May not work if all persons impacted don't agree.</p>	<p><b>#6</b></p> <p><b>received no votes</b></p>
<p><b>(I) Create specialized water court, or water judge positions, designed and funded to process water right disputes.</b></p> <p><b>Jurisdiction of court(s)/judges would need to be determined:</b></p> <p><b>Basin-wide or focused adjudications? Appeals from PCHB water resources cases?</b></p> <p style="text-align: center;"><b>7 votes</b></p> <p style="text-align: center;"><b>3<sup>rd</sup> place</b></p>	<p>This alternative could involve:</p> <ul style="list-style-type: none"> <li>- single water court with statewide jurisdiction</li> <li>- two water courts, one with jurisdiction in eastern Washington, one with jurisdiction in western Washington; or</li> <li>- specialized water judge positions throughout the state (<i>e.g.</i>, one water judge serves every 6 counties)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Funding</b></li> <li>• <b>Separate body (Admin or Judicial)</b></li> <li>• <b>consider McCarran Amendment impacts</b></li> <li>• <b>2 new water courts</b></li> <li>• <b>Possible constitutional restrictions</b></li> <li>• <b>Possible political ramifications (<i>e.g.</i>, judge elected in one county but serves multiple counties; loss of local access)</b></li> <li>• <b>Resource impacts</b></li> </ul>	<p><b>#3</b></p>

***Water Right Management & Enforcement  
Disputes/PCHB-Courts via APA Process  
Work Sheet #3***

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, Revised August 2003 Work Sheet #3

Page 1 of 1

Water Rights Management and Enforcement Disputes	Description of the PCHB-Courts via APA Process	Strengths of PCHB-Courts via APA Process (supplemented by discussion at July 2003 meeting)	Weaknesses of PCHB-Courts via APA Process (supplemented by discussion at July 2003 meeting)
<p>Ecology decisions: approving or denying applications for (1) new water rights and applications for (2) changes to existing water rights. Challenges to these decisions may include a challenge to conditions included in Ecology decision.</p> <p>Ecology decisions: (3) canceling water right permits that have not been developed using due diligence or according to permit terms; and (4) relinquishing water rights based on non-use.</p> <p>Ecology (5) orders and penalties (<i>i.e.</i>, enforcement actions) that address use of water in violation of the terms of a permit, certificate, or claim or that address illegal water use (use not authorized by a permit, certificate, claim, or statutory permit exemption). Ecology orders that address (6) water shortages in adjudicated basins (these orders reduce diversions by junior water right holders to ensure availability of water for senior right holders). Ecology lacks authority to issue similar orders in basins that have not been adjudicated. <i>Rettkowski v. Ecology</i> (“<i>Sinking Creek</i>”), 122 Wn.2d 219, 858 P.2d 232 (1993).</p>	<p>Under current law, all of these Ecology “water right management and enforcement” decisions are subject to appeal to the Pollution Control Hearings Board (PCHB). A party who is not satisfied with the decision of the PCHB may appeal the PCHB decision to the superior court and/or appellate courts pursuant to the Administrative Procedures Act (APA), RCW ch. 34.05.</p> <p>The PCHB process is <i>de novo</i>. This means that the PCHB conducts a full evidentiary hearing with each party given an opportunity to present testimony and evidence supporting his/her case. The PCHB makes factual and legal conclusions without giving any deference to Ecology’s decision. Ecology has the burden of proof in penalty and regulatory order cases. Appellant has the burden of proof in other cases.</p> <p>Superior court APA review of the PCHB decision involves review of the PCHB record and generally does not involve taking new evidence. The superior court (and higher courts) review questions of law, including constitutional questions, on a <i>de novo</i> basis.</p> <p>On average, 83 water right cases are filed at the PCHB each year. Approximately 10% (~8-9) are appealed to superior court, with less than half of those going on to the appellate courts.</p>	<ul style="list-style-type: none"> <li>• As a single forum, the PCHB develops <b>expertise</b> in a specialized area and applies this expertise to nearly all water cases (other than adjudications) that are brought in Washington, thereby facilitating <b>consistency</b> in case decisions.</li> <li>• Decisions of the PCHB are indexed and most are available electronically. This is helpful to attorneys and parties with access to the internet.</li> <li>• No filing fee is required to initiate a PCHB appeal.</li> <li>• Mediation services are provided free of charge.</li> <li>• Procedural assistance, especially beneficial to pro se parties, is available free of charge.</li> <li>• In order to assist unrepresented parties, the PCHB has the ability to waive procedural requirements except those related to jurisdiction.</li> <li>• Budget permitting, the PCHB travels to the locality of a dispute to conduct the hearing on the merits; the PCHB conducts many preliminary conferences and hearings over the phone.</li> <li>• The PCHB has a goal to resolve cases within 6 months of filing. Evidence indicates that this goal is met in a majority of cases and that this is much quicker than <i>de novo</i> resolution by a court would be.</li> <li>• The APA review process minimizes the amount of time general superior court judges devote to becoming familiar with the specialized area of water law. This probably expedites judicial resolution.</li> <li>• <b>Appointment process</b></li> </ul>	<ul style="list-style-type: none"> <li>• PCHB proceedings are quasi-judicial. This formal, court-like setting (<i>e.g.</i>, with deadlines and motion practice) can be <b>intimidating</b> for unrepresented appellants. Many unrepresented parties expect the hearing to be similar to city council hearings and are surprised to find they must present evidence and cross-examine witnesses.</li> <li>• As a single forum located in Olympia, the PCHB may be viewed as not sufficiently responsive to, or in touch with, local concerns and/or <b>too removed from the locality of the dispute</b>. Especially given budget constraints, this may become more of an issue as travel for hearings is restricted.</li> <li>• As an agency of the state, parties may be discouraged from bringing appeals because they anticipate the PCHB will rubber stamp Ecology decisions or because they don’t view the PCHB as an entity separate and independent from Ecology.</li> <li>• APA review standards mean that the superior court does not conduct a <i>de novo</i> review of factual issues and instead reviews the PCHB record. (Although there are some limited exceptions allowing the court to take new evidence). Litigants may desire an evidentiary hearing in front of their local superior court. Of course, this would add time and expense.</li> <li>• <b>Potential conflict(s) of interest, equity issues-related to the rendering of assistance by PCHB staff.</b></li> <li>• <b>Appointment process</b></li> <li>• <b>Potential establishment of policy via adjudication by 2 administrative agencies before going to court.</b></li> </ul>

***Water Right Management & Enforcement  
Disputes/Alternatives to PCHB-Courts  
via APA Process  
Work Sheet #4***

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, **Revised August 2003** Work Sheet #4

Alternatives	Description	Comments	Ranking
		<b>This option eliminated before Task Force voting on July 24, 2003.</b>	<b>None</b>
<b>B. Create a New Quasi-Judicial Administrative Body to Handle all WR Management and Enforcement Appeals</b>  <b>0 VOTES</b>	This alternative removes from the PCHB jurisdiction over appeals from Ecology WR decisions. A new quasi-judicial entity is created and given jurisdiction over appeals from Ecology WR decisions. This new entity might look like the Shorelines Hearings Board (SHB), which is charged with jurisdiction over only one subject matter, shoreline decisions. The makeup of this new "WR appeals board" could be similar to the makeup of the SHB, including members of the PCHB and representatives of local interests. For administrative convenience, this new agency could be made part of the Environmental Hearings Office.	<b>This option eliminated when it did not receive any votes.</b>	<b>None</b>
<b>C. Modify Standard of Review Applicable to Superior Court Review of PCHB Decision</b>  <b>0 VOTES</b>	Currently APA standards of review apply to superior court (and appellate court) review of PCHB decisions. PCHB factual determinations are reviewed based on the PCHB record but the superior court conducts a <i>de novo</i> review of all legal, including constitutional, questions. Any of these standards could be changed or modified to provide more or less deference to the factual and/or legal conclusions of the PCHB. For example, the entire superior court appeal could be made <i>de novo</i> , so that the superior court conducts a new evidentiary hearing and enters new findings of fact and conclusions of law.	<b>Second half of this option eliminated before Task Force voting on July 24, 2003.</b>	<b>None</b>
Alternatives	Description	Comments	Ranking
<b>D. Mandate or Authorize Automatic Direct Appellate Court Review of PCHB Decisions</b>	When a PCHB decision is reviewed by an appellate court after having been reviewed by a superior court, the superior court's decision is superfluous as the appellate court directly reviews the PCHB decision. Currently, persons seeking review of a PCHB decision may ask for direct review by the court of appeals or the supreme court (thereby skipping over the superior court level). It is then up to the appellate court to decide whether to accept direct review.	<b>This option not carried forward as a recommendation because it received only one vote.</b>	<b>None</b>

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, **Revised August 2003** Work Sheet #4

<b>1 VOTE</b>	This option would either mandate direct appellate review or make direct appellate review automatic if an appellant so elected. This would eliminate the superior court step. As noted, less than 10 PCHB WR cases are appealed to superior courts and higher e ach year.		
<p>E. Appeals of WR Management and Enforcement Decisions Go Directly to Superior Court (Eliminate Role of PCHB)</p> <p style="text-align: center;"><b>2 VOTES</b></p>	<p>This alternative specifies that Ecology WR decisions are no longer appealable to the PCHB and instead are appealable directly to superior courts. If this alternative is proposed, the Task Force would need to identify the type of hearing (record review or full evidentiary hearing), and the standard of review (any deference to Ecology’s factual and/or legal conclusions).</p> <p><b>As a result of Task Force discussion, this option modified to give appellant choice/option to go either to PCHB or superior court for de novo hearing.</b></p>	<p><b>This option not carried forward as a recommendation because it received only two vote.</b></p> <p style="text-align: right;"><b>None</b></p>	
<p>F. Create Specialized Water Court(s) to Hear Appeals From PCHB Decisions</p> <p style="text-align: center;"><b>7 VOTES</b></p>	<p>This alternative directs that appeals of PCHB WR decisions be filed at the specialized water court(s). This could be the same court(s) charged with jurisdiction over general adjudications (per May recommendation).</p> <p><b>This option could involve a change in deference (as with option J)</b></p>	<p><b>This option will be carried forward as a Task Force recommendation. A subcommittee will work on refining this option.</b></p> <p style="text-align: right;"><b>#1</b></p>	
<b>Alternatives</b>	<b>Description</b>	<b>Comments</b>	<b>Ranking</b>
<p>G. Create Specialized Water Court(s) to Hear Appeals From Ecology Decisions (PCHB Role Eliminated)</p>	<p>This alternative is similar to alternative E, but rather than send appeals of Ecology WR decisions to any superior court, this alternative directs such appeals to specialized water court(s). This could be the same court(s) charged with jurisdiction over general adjudications (per May recommendation).</p>	<p><b>This option will be carried forward as a Task Force recommendation. A subcommittee will work on refining this option.</b></p> <p style="text-align: right;"><b>#3</b></p>	

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, **Revised August 2003** Work Sheet #4

<b>4 VOTES</b>		
<p>H. Provide authority to Ecology to address priority of uses in areas that have not been adjudicated.</p> <p>(“Sinking Creek” fix)</p> <p style="text-align: center;"><b>1 VOTE</b></p>	<p>This alternative would authorize Ecology to address water shortages and disputes between water right holders in basins that have not been adjudicated. Ecology currently lacks this authority per <i>Rettkowski v. Ecology</i> (“Sinking Creek”), 122 Wn.2d 219, 858 P.2d 232 (1993).</p> <p>Granting authority to Ecology to <b>make tentative determinations regarding</b> water priority disputes might eliminate the need for general adjudications in some basins.</p>	<p><b>This option not carried forward as a recommendation because it received only one vote.</b></p> <p style="text-align: right;"><b>None</b></p>
<p>I. Process &amp; Standards keep as current with some minor “tweaks,” including mandatory mediation</p> <p style="text-align: center;"><b>6 VOTES</b></p>	<p><b>This alternative leaves intact the basic structure of the PCHB – courts via APA process; the Task Force will recommend some minor changes, including giving authority to PCHB to mandate participation in mediation for certain types of cases.</b></p>	<p><b>This option will be carried forward as a Task Force recommendation.</b></p> <p style="text-align: right;"><b>#2</b> <b>(tied with J)</b></p>
<p>J. Deference to superior court decision when appellate court reviews</p> <p style="text-align: center;"><b>6 VOTES</b></p>	<p><b>This alternative leaves intact the basic structure of the PCHB – courts via APA process. However, in an appeal to the Court of Appeals or Supreme Court in a case that had been subject to APA review in Superior Court, the appellate courts would be required to give some degree of deference to the Superior Court’s conclusions.</b></p>	<p><b>This option will be carried forward as a Task Force recommendation.</b></p> <p style="text-align: right;"><b>#2</b> <b>(tied with I)</b></p>

# *Federal and Indian Reserved Water Rights*

## *Work Sheet #5*

## FEDERAL AND INDIAN RESERVED WATER RIGHTS

Water Rights Disputes Task Force, Revised September 2003, Work Sheet #5

Disputes Involving Federal and Indian Reserved Water Rights	Existing Processes: Superior Court General Adjudications, Federal Court Actions, Ad Hoc Negotiations and Indirect Processes	Strengths of the Existing Processes	Weaknesses of Existing Processes
<p>Federal and Indian reserved water rights are rights based on the legal principle first recognized in <i>Winters v. U.S.</i>, 207 U.S. 564 (1908), that when the United States acquires or sets aside land through reservation for some specific purpose, the federal government also reserves sufficient water to meet the purposes of the reservation. This doctrine applies both to Indian reservations and other federal reservations.</p> <p>The federal government asserts rights to water based on reservation principles in many contexts. <i>E.g.</i>, in the Yakima adjudication, reserved water right claims were filed by the U.S. Forest Service, the Department of Defense, and the U.S. Fish and Wildlife Service for many purposes, including domestic supply, stock-water, irrigation, power generation, dust abatement, fire protection, and wildlife habitat maintenance.</p> <p>When a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows based on the principle that the right to take fish carries with it the right to have fish habitat protected from human caused degradation, including water diversions.</p>	<p>General adjudications of water rights in Washington are conducted according to procedures provided in the Water Code. In a general adjudication, the court determines the validity, extent, and relative priorities of existing water rights for a specific basin, surface water body, or ground water body. Under the federal McCarran amendment, the United States and Tribes may be named as defendants in a state court general adjudication. <i>See</i> AGO Federal and Indian Reserved Water Rights, October 2002, Report to the Legislature, particularly at 15 (chart depicting differences between state-based water rights and federal reserved water rights).</p> <p>In the context of state general adjudications, any party may voluntarily enter into negotiations regarding his/her claims.</p> <p>If the state does not initiate a general adjudication in state court, an action may be initiated in federal court to address issues involving federal and/or Indian reserved water rights.</p> <p>“Indirect processes” may resolve related issues in a way that reduces the need/pressure to formally resolve federal and/or Indian reserved water rights. These include: watershed planning efforts; actions under federal authorities such as the Clean Water Act or the ESA.</p>	<ul style="list-style-type: none"> <li>• For general strengths related to the general adjudication process, see Worksheet # 1, Revised June 2003 (certainty, local forum, draws on agency expertise).</li> <li>• With respect to federal and Indian water right disputes in particular:             <ul style="list-style-type: none"> <li>• A state court general adjudication provides a state forum capable of addressing federal reserved water rights claims; other state systems may run afoul of the McCarran Amendment;</li> <li>• Across the west, voluntary “ad hoc” negotiations in the context of a state court general adjudication frequently prove successful, particularly where parties are willing to negotiate and resources (water and/or funding) make compromise possible;</li> <li>• Federal court actions provide quicker resolution involving fewer parties;</li> <li>• “Indirect processes” are less formal, but may relieve pressure/need to formally resolve direct issues.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• For general weaknesses related to the general adjudication process, see Worksheet # 1, Revised June 2003 (costly/time-consuming, claimants may have too many opportunities to prove their case, all claims in entire basin must be addressed, no mandatory mediation, process can be too complex for unsophisticated claimants, does not facilitate the building, and the transfer to other cases, of expertise).</li> <li>• With respect to federal and Indian water rights disputes in particular:             <ul style="list-style-type: none"> <li>• To formally resolve issues in state system, a state court general adjudication, which can be a very large process (basin-wide), is required even if the parties only want to address federal and/or tribal rights;</li> <li>• For a smaller case, you need to go to federal court, but a federal court action does not automatically involve private water users;</li> <li>• “Indirect processes” are not predictable, are not proven, do not directly resolve issues, and may lack finality.</li> </ul> </li> </ul>

*Federal and Indian Reserved Water Rights:  
Alternative Processes  
Work Sheet #6*

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
<p><b>(A) Endorse the same Alternatives Recommended by the Task Force at the May meeting on the general topic of Historic Claims Disputes and General Adjudications:</b></p> <ol style="list-style-type: none"> <li>1. Ecology Develops Comprehensive Background Info Early; Submits Early Report to Court</li> <li>2. Authorize Limited Special Adjudications</li> <li>3. Expand use of Mediation</li> <li>4. Create Specialized Water Court</li> <li>5. Authorize Pre -filed Written Testimony</li> </ol>		<p>Use of limited special adjudications may prevent jurisdiction over U.S. &amp; tribes because of McCarran Amendment.</p> <p style="text-align: center;"><b>10 VOTES</b></p>	<b>#3</b>
<p><b>(B) Retain existing structure (general superior court adjudications) but create special incentives to encourage settlements of federal and Indian water rights</b></p>	<p>Incentives might include:</p> <ul style="list-style-type: none"> <li>• Reduced fees for participants who resolve claims early;</li> <li>• Special funds available for water conservation or delivery projects for participants who participate in settlements and/or resolve claims early;</li> <li>• Funding for mediation services.</li> </ul>	<b>12 VOTES</b>	<b>#2</b>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
(C) Retain existing structure (general superior court adjudications) but mandate settlement/mediation efforts for any federal or Indian water right claims		<b>0 VOTES</b>	<b>NO RANKING</b>
(D) Create State Office like Montana's Compact Commission charged with task of negotiating with other sovereigns (United States & Tribes); negotiations may occur outside of any general adjudication	<p>Need to decide how any settlement will be "formalized"; options:</p> <ul style="list-style-type: none"> <li>• after settlement reached, legislative authorities (Federal, Tribal, and State as appropriate) take action to formalize agreement</li> <li>• settlement filed in federal court as consent decree; would need to address opportunities for notice, comment, objection by non-parties</li> </ul>	<b>4 VOTES</b>	<b>#5</b>
(E) Create State Office like Montana's Compact Commission charged with task of negotiating with other sovereigns (United States & Tribes); negotiations may only occur in conjunction with a general adjudication		<p style="text-align: center;"><b>6 VOTES</b></p> <p><b>After voting, the Task Force decided to combine D &amp; E to allow the use of the compact commission in both scenarios (whenever adjudication is underway and when an adjudication is not underway)</b></p>	<b>#4</b>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
<p><b>(F) Create new process designed to facilitate resolution of federal and tribal water right claims</b></p>	<p>Define scope of negotiations:</p> <ul style="list-style-type: none"> <li>• final confirmation (quantification) of reserved rights; or</li> <li>• final determination of tribal claim to instream flow; or</li> <li>• interim determination of reserved rights or instream flow claim; or</li> <li>• specify terms for managing water resources in basin subject to both federal and/or tribal AND state-based claims; or</li> <li>• parties determine scope of negotiations at outset</li> </ul>	<p><b>0 VOTES</b></p>	<p><b>NO RANKING</b></p>
<p><b>(G) Authorize (but don't mandate) watershed planning groups to take actions that address federal and/or Indian water right claims</b></p>	<p>Decide whether authority would be:</p> <ul style="list-style-type: none"> <li>• to facilitate development or implementation of water management plans, contracts, or compacts designed to satisfy federal and Indian claims but which do not directly settle them; or</li> <li>• to facilitate development of interim measures designed to satisfy federal and/or Indian water needs; or</li> <li>• to facilitate formal settlement.</li> </ul>	<p><b>RCW 90.82 (Watershed Planning Act) currently does not define tribal interests as including off-reservation, usual and accustomed (U&amp;A) rights.</b></p> <p style="text-align: center;"><b>0 VOTES</b></p>	<p><b>NO RANKING</b></p>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
<b>(H) Initiate government to government discussions with tribes and federal government to receive input from tribes and federal government on what process(es) they want the state to utilize to address their water rights claim.</b>	This postpones making a decision on a specific process but acknowledges that a decision on new process(es) should not be made until the tribes and federal government are formally consulted with.	<b>14 VOTES</b>	<b>#1</b>
		<b>Eliminated by Task Force before voting on 9/30/03.</b>	<b>N/A</b>

***Instream Flow Disputes***  
***Work Sheet #7***

## INSTREAM FLOW DISPUTES

Water Rights Disputes Task Force, October 2003, Work Sheet #7

Instream Flow Disputes	Existing Processes: Watershed Planning; Superior Court APA Rule Challenges; PCHB challenges to individual Ecology water right decision; for tribal stream flow claims: General Adjudication or Federal Court Action	Strengths of the Existing Processes	Weaknesses of Existing Processes
<p>These disputes <b>may</b> involve issues surrounding (a) establishing instream flows; (b) challenging instream flows once they are established; and (c) protecting instream flows from impairment by junior rights.</p> <p>Pursuant to several water statutes, Ecology is charged with establishing instream flows by regulation. <i>See</i> RCW 90.22; 90.54. Watershed planning groups may recommend instream flows, which are submitted to Ecology to go through the rulemaking process. RCW 90.82.080.</p> <p>Once established by rule, an instream flow is an “appropriation” of water with a priority date of the date of rule adoption. Any new water rights granted after the rule is adopted are junior to the instream flow rule.</p> <p>Instream flow conditions may also be included in an individual water right decision, <i>e.g.</i>, as a condition of a water right permit or change decision.</p> <p>When a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows based on the principle that the right to take fish carries with it the right to have fish habitat protected from human caused degradation, including water diversions. Where such a right is confirmed to exist, it is likely to have “senior” priority.</p>	<p>A person may challenge an instream flow adopted by rule by filing an APA rule challenge in superior court. Rules are reviewed on the agency’s record, RCW 34.05.558, and are overturned if the court finds: the rule violates constitutional provisions, the rule exceeds statutory authority, the rule was adopted without compliance with statutory rule-making procedures, or the rule is arbitrary and capricious. 34.05.570 (2)(c). Instream flows are set to protect instream values, including: wildlife, fish, scenic, aesthetic, water quality, other environmental values, and navigational values.</p> <p>An instream flow rule adopted by Ecology based on a recommendation from a watershed planning group is subject to APA challenge as would any other flow rule, but one would expect fewer challenges if all affected interests have participated in the recommendation.</p> <p>Decisions establishing a permit-specific flow condition can be challenged in an appeal to the Pollution Control Hearings Board.</p> <p>In order to formally resolve issues involving a tribe’s claimed right to a minimum stream flow for the protection of fish, the state must either initiate a general adjudication or one of the parties must bring an action in federal court.</p> <p>Under <i>Rettkowski</i> (“Sinking Creek”), 122 Wn.2d 219 (1993) the state may lack authority to prevent impairment of instream flow rights from junior rights in unadjudicated basins in certain circumstances.</p>	<p><b>Strengths of the Existing Processes</b></p> <ul style="list-style-type: none"> <li>• For strengths related to the general adjudication process, see Worksheet # 1, Revised June 2003 (certainty, local forum, draws on agency expertise).</li> <li>• For strengths related to the Ecology/PCHB process, <i>see</i> Worksheet # 3, Revised August 2003 (<i>e.g.</i>, expertise, statewide consistency, procedural and mediation services)</li> <li>• Of the instream flow rules that have been adopted recently, very few have been challenged in court.</li> <li>• APA rulemaking challenges are filed in superior court (which provides a local, court forum) and subject to record review (allowing some deference to agency and relatively prompt decisions).</li> <li>• Watershed planning is underway, with flow recommendations for 18 basins due to Ecology between now and the end of 2005. Should this relatively new process be given an opportunity to succeed before it is changed?</li> <li>• Confirming a tribal right to a particular stream flow is likely to confirm a relatively “senior” right – allowing better protection of the instream flow.</li> </ul> <p>Options recommended at September meeting for addressing federal and tribal water rights might provide some relief here, <i>i.e.</i>, those new options combined with existing processes may address instream flow disputes.</p>	<p><b>Weaknesses of Existing Processes</b></p> <ul style="list-style-type: none"> <li>• For weaknesses related to the general adjudication process, see Worksheet # 1, Revised June 2003 (costly/time-consuming, claimants may have too many opportunities to prove their case, all claims in entire basin must be addressed, no mandatory mediation, process can be too complex for unsophisticated claimants, does not facilitate the building or the transfer of expertise to other cases).</li> <li>• For weaknesses related to Ecology/PCHB process, see Worksheet # 3, Revised August 2003 (<i>e.g.</i>, PCHB not local, court review limited)</li> <li>• APA rulemaking challenges generally do not allow the taking of new evidence and do not contemplate live testimony. Superior courts may be viewed as lacking sufficient expertise to address instream flow issues.</li> <li>• Confirming a tribal right to a particular stream flow is likely to confirm a relatively “senior” right, but the process for confirming such a right is contentious and may be time consuming. If the right is confirmed through a new method that does not involve a general adjudication, the issue of protecting the right (<i>Sinking Creek</i>) remains.</li> </ul>

***Instream Flow Disputes:  
Alternative Processes  
Work Sheet #8***

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

<p><i>For establishing instream flows, designate a new entity to establish the instream flow or designate a new entity to make instream flow recommendation to Ecology.</i></p>	<p><i>The entity could be:</i></p> <ul style="list-style-type: none"> <li>• <i>Washington State Department of Fish &amp; Wildlife; or</i></li> <li>• <i>Legislatively-created or governor-appointed science panel; or</i></li> <li>• <i>Legislatively-designated or governor-appointed representatives of impacted interests (e.g., tribes, federal government, local governments, etc.)</i></li> <li>• <i>Other?</i></li> </ul>	<p>Task Force agreed not to address issues related to establishing instream flows as part of its recommendations.</p>
<p style="text-align: center;"><b>Alternatives</b></p> <p>(A) To confirm tribal right to instream flow, endorse one or more of the options selected at the September meeting.</p>	<p style="text-align: center;"><b>Description</b></p> <p>Options selected in September:</p> <p>After consultation with tribes and federal government:</p> <ul style="list-style-type: none"> <li>• improve adjudications; create Specialized Water Court;</li> <li>• retain existing structure but create incentives that facilitate settlements;</li> <li>• use entity like compact commission.</li> </ul>	<p style="text-align: center;"><b>Comments</b></p> <p>Task Force revised summary of September decisions and then agreed not to address tribal issues related to instream flows separately from general tribal water issues.</p>
<p>(B) For challenging instream flow rules (once established), modify process for challenge – challenge still occurs in superior court but review could involve taking of new evidence and/or court substituting its judgment for that of the agency.</p>	<p>This would mean court would make decision independent from Ecology’s decision.</p>	<p style="text-align: center;"><b>1 VOTE</b></p>

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

Alternatives	Description	Comments	Ranking
<p><b>(C) For challenging instream flows (once established), modify process for challenge – challenge is brought in Specialized Water Court.</b></p>	<p><b>This alternative was modified before voting to be identical to Option B, but action heard by Specialized Water Court.</b></p>		<p><b>2 VOTES</b></p>
<p><b>(D) For challenging instream flows, maintain status quo – rule is subject to challenge pursuant to APA in Superior Court (or Specialized Water Court if one is created).</b></p>	<p><b>APA Standards retained.</b></p>		<p><b>9 VOTES</b></p>
<p><b>(E) To protect instream flows from impairment by junior rights, authorize administrative action by Ecology.</b></p>	<p><b>This option applies only to flows based on senior trust rights located in unadjudicated basins.</b></p>		<p><b>4 VOTES</b></p>

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

Alternatives	Description	Comments	Ranking
<b>(F) To protect instream flows from impairment by junior rights, authorize Ecology to petition the superior court (or the Specialized Water Court).</b>	<b>This option applies only to flows based on senior trust rights in unadjudicated basins.</b>		<b>8 VOTES</b>
<b>(G)</b>			

# *Appendix*

## *D*

# Water Resources Program – Adjudications Strategic Plan

## Draft 5 (May, 2003)

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# Water Resources Program – Adjudications Strategic Plan

## Draft 5 (May, 2003)

### Section 1: Introduction

Water is a limited resource with increasing and changing demands on it. The need for reliable information on the extent, validity and relative priorities of existing water rights is essential for water resource management and planning. Currently, general adjudications are the only way to determine this information comprehensively and with certainty. The Water Disputes Task Force has been charged with recommending one or more methods to resolve water dispute resolutions. Based on the outcome of the work from the Water Disputes Task Force, the future may hold alternative options outside of the current adjudication process. However, this plan is created based upon the existing statutory structure and existing opportunities.

### Section 2: Relationship to Program Mission and Vision

#### Program Mission

The program mission is to manage water resources to meet the current and future needs of the natural environment and Washington's citizens with principles affirming both people *and* fish by advancing the following two principles together, in increments, over time:

1. Meet the needs of a growing state population and to support a healthy economy statewide
2. Meet the needs of fish and healthy watersheds statewide

#### Water Resources Vision

The Water Resources Vision outlines a long-term preferred future for water resource management in Washington State. The critical importance of adjudications is affirmed in the Vision in that general adjudications of water rights are an essential part of water resource management in Washington State. Adjudications are currently the only definitive way to determine the extent and validity of existing water rights from a particular source or sources within a geographic area - information that is at the foundation of all water resource planning and management.

### Section 3: Background

A general adjudication of water rights under RCW 90.03.105 - .245 is a special form of quiet title action that determines all existing rights to the use of water from a specific body of water. A general adjudication may not be used to lessen, enlarge, or modify existing water rights. (Washington State Supreme Court Acquavella III)

*A general water rights adjudication* determines the validity and extent of existing water rights in a given area. Adjudication is a legal process, conducted through the superior court in the county in which the water is located. It involves surface and/or ground water. Adjudication does not create new rights, it only confirms existing rights.

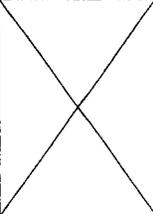
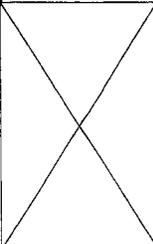
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Under current law, Ecology may initiate a water right adjudication either in response to a petition filed by a citizen or planning unit, or, if after investigation, Ecology determines the interest of the public will be subserved by such an adjudication..

Adjudication benefits water users because it clarifies existing water rights. This provides greater certainty on the availability of water. Adjudication helps the Department of Ecology (Ecology) to better regulate during times of shortage and controversy. It also provides Ecology information to use when considering the impact of granting new rights and proposed changes to existing rights.

### **Section 4: 2003 – 2005 and 2005 – 2007 Biennia (and Beyond): The Yakima Adjudication**

#### **Projected Adjudication Unit Workload and Staffing Requirements 2003 – 2005 Biennium**

<b>Workload &amp; Staffing Projections for 2003 – 2005 Biennium (FY 04 &amp; FY 05)</b>				
<b>Adjudication Unit Activity</b>	<b>Number of Actions</b>	<b>Staffing in FTEs</b>		
		<b>FY 04</b>	<b>FY 05</b>	<b>Total</b>
<b>Acquavella – Major Claimant Activities:</b> Conditional Final Orders (CFO's) Entered CFO's Mapped Draft Adjudication Certificates Prepared	15 0 31	0.79	1.32	2.11
<b>Acquavella – Subbasin Activities:</b> CFO's Entered CFO's Mapped Draft Adjudication Certificates Prepared (Subbasins)	6 0 21	3.02	2.34	5.36
<b>Acquavella – Closing Activities:</b> Appeals of Significant Legal Issues Order of Default Preparation Final Decree Preparation Supercede or Cancel Existing Water Right Documents Archiving Acquavella Records		0.22	0.12	0.34
<b>Adjudications – Other Activities:</b> AS/400 Database Maintenance Responding to Public & Internal Requests Court Documents Imaging Historic Adjudication Records Planning for Next Adjudication Management & Supervision		1.05	1.23	2.28

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<b>Workload &amp; Staffing Projections for 2003 – 2005 Biennium (FY 04 &amp; FY 05)</b>				
<b>Adjudication Unit Activity</b>	<b>Number of Actions</b>	<b>Staffing in FTEs</b>		
		<b>FY 04</b>	<b>FY 05</b>	<b>Total</b>
<b>Adjudication Unit – Non-Adjudication Activities:</b> Budget & Planning Contract Management GIS Activities Internal Policy Team Maintain RCW 90.14 Claim Records Metering Power License Fees Web Coordination (Back-up) Unscheduled or Unforeseen Activities		0.92	0.99	1.91
<b>Subtotal – Adjudication Activities</b>		<b>5.08</b>	<b>5.01</b>	<b>10.09</b>
<b>Subtotal – Non-Adjudication Activities</b>		<b>0.92</b>	<b>0.99</b>	<b>1.91</b>
<b>Total – Adjudication Unit Activities</b>		<b>6.00</b>	<b>6.00</b>	<b>12.00</b>

**Projected Adjudication Unit Workload and Staffing Requirements 2005 – 2007 Biennium**

<b>Workload &amp; Staffing Projections for 2005 – 2007 Biennium (FY 06 &amp; FY 07)</b>				
<b>Adjudication Unit Activity</b>	<b>Number of Actions</b>	<b>Staffing in FTEs</b>		
		<b>FY 06</b>	<b>FY 07</b>	<b>Total</b>
<b>Acquavella – Major Claimant Activities:</b> Conditional Final Orders (CFO's) Entered CFO's Mapped Draft Adjudication Certificates Prepared	6 39 7	0.18	0.81	0.99
<b>Acquavella – Subbasin Activities:</b> CFO's Entered CFO's Mapped Draft Adjudication Certificates Prepared (Subbasins)	3 31 8	1.90	1.04	2.94
<b>Acquavella – Closing Activities:</b> Appeals of Significant Legal Issues Order of Default Preparation Final Decree Preparation Supercede or Cancel Existing Water Right Documents Archiving Acquavella Records		1.35	1.42	2.77

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<b>Workload &amp; Staffing Projections for 2005 – 2007 Biennium (FY 06 &amp; FY 07)</b>				
<b>Adjudication Unit Activity</b>	<b>Number of Actions</b>	<b>Staffing in FTEs</b>		
		<b>FY 06</b>	<b>FY 07</b>	<b>Total</b>
<b>Adjudications – Other Activities:</b> AS/400 Database Maintenance Responding to Public & Internal Requests Court Documents Imaging Historic Adjudication Records Planning for Next Adjudication Management & Supervision	X	1.71	2.14	3.85
<b>Adjudication Unit – Non-Adjudication Activities:</b> Budget & Planning Contract Management GIS Activities Internal Policy Team Maintain RCW 90.14 Claim Records Metering Power License Fees Web Coordination (Back-up) Unscheduled or Unforeseen Activities	X	1.08	1.13	2.21
<b>Subtotal – Adjudication Activities</b>	X	<b>5.14</b>	<b>5.41</b>	<b>10.55</b>
<b>Subtotal – Non-Adjudication Activities</b>	X	<b>1.08</b>	<b>1.13</b>	<b>2.21</b>
<b>Total – Adjudication Unit Activities</b>	X	<b>6.22</b>	<b>6.54</b>	<b>12.76</b>

The above tables summarize projected Adjudication Unit activities and staffing requirements including those dedicated to working towards closing out the Acquavella (Yakima) Adjudication. Those activities dedicated to closing out Acquavella are discussed in more detail as follows:

**Completing Yakima Adjudication Acquavella**

On March 3, 1989, Judge Stauffacher signed Pre-trial Order Number 8, which established procedures for evaluation of Statements of Claim filed with the Court. The Court found the Acquavella Adjudication to involve an unusually large number of claims that are based upon either state or federal laws and which can be divided into discrete, manageable groups or pathways. The Court determined that dividing claims evaluation into Pathways would expedite claim evaluation and resolution. The following is a brief summary of the claim evaluation status by Pathway and estimated evaluation activities and staffing resources necessary during the next four (4) years (FY 2003 – FY 2007).

# **Water Resources Program – Adjudications Strategic Plan Draft 5 (May, 2003)**

## **Federal Reserved Rights for Indian Claims (Federal Reserved – Indian Pathway)**

This Pathway has reached Conditional Final Order (CFO) status. Adjudication Unit activities beyond CFO status are discussed in this document following the Pathway information.

The claims of the Yakama Nation were addressed in the Report of the Court (Volume 25) and in the Supplemental Report of the Court (Volume 25 A). The claims of the Yakima Reservation Irrigation District were addressed in the Report of the Court Volume 36.

## **Federal Reserved Rights for Non-Indian Claims (Federal Reserved – Non-Indian Pathway)**

This Pathway has reached Conditional Final Order (CFO) status. Adjudication Unit activities beyond CFO status are discussed in this document following the Pathway information.

The claims of the United States Forest Service and the United States Fish and Wildlife Service have been addressed in Report of the Court Volume 5, which has reached CFO status.

## **State Based Rights for Major Claimants (Major Claimant Pathway)**

There are 36 major claimants. CFO status has been reached for 19 of the major claimants. It is projected that CFO's will be entered for the remaining major claimants by the end of Fiscal Year 2006. The projected Fiscal Year for reaching Conditional Final Order for the remaining Major Claimants and the estimated Adjudication Unit staffing requirements are as follows:

Conditional Final Orders entered by the end of FY – 04:

- Ellensburg, City of
- Benton Irrigation District
- Grandview, City of
- Grandview Irrigation District
- Konewock Ditch Company
- Piety-Flat Ditch Company
- Prosser, City of
- Sunnyside, City of
- Sunnyside Valley Irrigation District

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Zillah, City of

Zillah, Irrigation District

Conditional Final Orders entered by the end of FY – 05:

Cascade Irrigation District

Cle Elum, City of

Columbia Irrigation District

West Side Irrigating Company

Conditional Final Orders entered by the end of FY – 06:

Ahtanum Irrigation District

John Cox Ditch Company

United States Bureau of Reclamation

Conditional Final Orders entered by the end of FY – 07:

United States Department of the Army for the Yakima Firing Center, etc.

### **State Based Rights for Other Claimants, by Subbasin (Subbasin Pathway)**

The Yakima River Basin was divided into thirty-one (31) subbasins. CFO status has been reached for 22 Subbasins. It is projected that CFO's will be entered for the remaining subbasins by the end of Fiscal Year 2007. The projected Fiscal Year for reaching Conditional Final Order for the remaining subbasin and the estimated Adjudication Unit staffing requirements are as follows:

Conditional Final Orders entered by the end of FY – 04:

Subbasin No. 8 (Thorp)

Subbasin No. 18 (Cowiche Creek)

Conditional Final Orders entered by the end of FY – 05:

Subbasin No. 9 (Wilson-Naneum)

Subbasin No. 10 (Kittitas)

Subbasin No. 27 (Satus Creek)

Subbasin No. 28 (Sunnyside)

Conditional Final Orders entered by the end of FY – 06:

Subbasin No. 23 (Ahtanum Creek)

# Water Resources Program – Adjudications Strategic Plan

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Subbasin No. 25 (Toppenish)

Subbasin No. 29 (Mabton-Prosser)

After Conditional Final Orders have been entered for all the Pathways work can commence on closing out the Acquavella adjudication. Closing activities include preparation of the Order of Default and the Court's Final Order (Decree); Geographic Information System (GIS) mapping of all confirmed rights; preparing and responding to any appeals; issuance of Certificates of Adjudicated Water Right; supersedure of existing water right documents; archiving Acquavella records; and dealing with any unforeseen activities that may arise. These activities are briefly discussed below.

### Conditional Final Order (CFO) Mapping

Planning is underway for mapping the places of use and points of diversion of all confirmed water rights, by subbasin and major claimant, including Federal Reserved rights. These maps are being released in "Draft" format to the Ecology's Central Regional Office. They are in GIS format and when completed will indicate the Adjudicated Certificate number, place of use and point of diversion. Much work remains to rectify overlapping property descriptions and errors found in legal descriptions. Currently, Ecology attempts to rectify mapping errors when making exceptions to Reports of Referee and Reports of the Court. Work still remains in those subbasins that went to CFO prior to Ecology's implementation of this practice. A tracking sheet and files have been prepared that identify unresolved mapping errors for each subbasin. As the Central Regional Office authorizes changes to confirmed rights under Chapter 90.03.380 RCW and Pre-trial Order No. 12, those changes will be tracked to ensure they are incorporated in the final maps. Ecology, will need to work with the Acquavella Referee's Office, the Office of the Attorney General and the Court to create a Pre-trial Order authorizing a process to amend Conditional Final Orders prior to issuance of the Final Decree.

This Pre-trial Order should include all the anticipated solutions for issuance of the Final Decree, Adjudicated Certificates, partition of rights and could include the process for Order of Default.

Although mapping will not be completed until fiscal year 2007, considerable progress will occur in fiscal years 2004, 2005 and 2006. Currently, Adjudication Unit staff are mapping subbasin recommendation as Reports of Referee and Reports of the Court are issued by the Acquavella Court. Mapping is subsequently updated based upon modified and new recommendations contained Supplemental Reports and Conditional Final Orders. Mapping is not completed until discrepancies and Chapter 90.03.380 RCW authorized changes to confirmed rights are incorporated, which won't happen until the Acquavella Final Order is ready for entry by the Court.

# Water Resources Program – Adjudications Strategic Plan

## Draft 5 (May, 2003)

### **Order of Default Link to Court Rule CR – 55 (Default and Judgment)**

Order of Default requirements for Acquavella have changed since the case was filed in 1977. The Order of Default process requires notification of all parties that were named defendants and were served summons but did not appear either by filing a Notice of Appearance or Statement of Claim with the Court. When this process is started a meeting with an Assistant Attorney General is necessary to determine to what extent service of the Order of Default must be made upon the defaulting parties.

Ecology has an old archived list of original defendants and their last know address (contact Kevin Barbee for the DIS Archival location) this list is on an old system that may not be retrievable. The requirement of Service could open a whole new process in this case. When this process begins original service documents may need to be produced. Ecology has a couple of copies of the old system (hard copy printouts), which show how original service was ascertained. All of the Affidavits and documentation have been filed with the Clerk. Ecology still has, in it's records each water right document, with an attached sheet of who was named as defendant for that document.

Completing preparation of the Order of Default could also result in a significant workload. We will need to identify all defaulting parties, which will be relatively simple. The difficult part will be locating the defaulting parties and serving them with the Order of Default.

### **Final Order (Decree)**

The Final Order is an integration of all Acquavella Court confirmed rights by their priority dates. The final decree in this case will be produced by the AS400 report writing system. The system is prepared to produce this document but testing has not been done to insure it will pull the right fields for production of this report. Lacking in the AS400 system, are the schedule of rights for Major Claimants, and any changes made to rights through the administrative procedures of chapter 90.03.380 RCW. As "Draft Certificates" are produced most of the errors in the system will be rectified. This document will have to be mailed to all parties in this case with a substantial printing and mailing cost. Considerable work will be required to insure all confirmed rights have been entered into the AS400.

### **Appeals (Significant Legal Issues)**

Appeals of significant legal issues have been filed through out this case, producing case law that will be used in water management statewide. There are many issues left that could be taken to the Court of Appeals, Supreme Court or even Federal District Court or beyond. By negotiation, Ecology has resolved many of the Major issues in Acquavella. Major legal issues that are still unresolved include the Warren Act Order, where the Court ruled a state water right document was not necessary to preserve the

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rights of parties who have a valid Warren Act Contract with the United States. As a consequence of the case law of Acquavella III, the Acquavella Court may need to revisit its Warren Act Contract Order. If Ecology determines the Warren Act Contract issue is still viable it may need to appeal. The return flow issue is still pending for the Cascade Irrigation District and numerous Subbasin 28 claimants. Issues dealing with integration of confirmed rights into the Decree for reservation lands and those areas bordering the reservation could end up in Court of Appeals. When issues are taken to appeal it can result in a significant workload increase for the Attorney General's Office as well as technical staff who must provide support. For each level of appeal, the process can take up to two-plus years and extend the case until issues are resolved.

### **Supersedure of Existing Water Right Documents**

In each Report of Referee and Report of the Court there is a list of existing Certificates which will require production of a Superseding Document. Such superseded Certificates will have to be filed in the County Auditors office, entered in our WRTS tracking system, and filed with Ecology's water right documents. Production of these superseding documents will have to adhere to the requirements of the County and filing fees will have to be paid by Ecology. No notification back to the original owner will be necessary, as the Court has already given notice.

Ecology will also need to make the proper notation to all RCW 90.14 claim documents entered as exhibits in the case. The court did not list these document numbers therefore all of the exhibits entered by Ecology will have to be researched to insure all RCW 90.14 claim numbers are properly noted. The notification on RCW 90.14 claims is simply that this case has been completed and those RCW 90.14 claims have been either superseded by confirmed rights or cancelled by the final Decree. There will be no way to associate Adjudicated Certificates and RCW 90.14 Claims in this case. For future adjudications tracking these associations upfront, including notation in the record of the proper replacement document (if one should exist).

### **Issuance of Certificates (Title Research)**

As previously mentioned "draft" certificates are being prepared. Some time ago it was decided rather than continuously going back to the County to research title records, for those parties we have lost contact with, we would do necessary title research just prior to issuance of Certificates of Adjudicated Water Rights. At that time the current property owner will be notified that their Certificate of Adjudicated Water Right can be issued upon their payment of the Certificate filing fees. The process of splitting confirmed water rights resulting from changing property ownerships should be discussed with an Assistant Attorney General. Forms similar to Ecology's assignment form may have to be developed by Ecology and signed and notarized by appropriate claimants. In this case claimants are responsible for keeping the Court informed of property sales or division transactions, see Pre-trial Order No. 3. Ecology may want to rely on Pre-trial Order

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No. 3 and not research title records. It is highly recommended Ecology potential procedures with an Assistant Attorney General.

### **Archiving Acquavella Records:**

Most official Acquavella adjudication records are located in the Yakima County Superior Court Clerk's office. Many of these records are exhibits and are referenced in decisions made by the Court, some have even been incorporated by reference into specific confirmed water rights. Because many courts dispose of exhibits once a case is completed, it is imperative that these important Acquavella documents be retained, therefore preserving the integrity of the adjudication. A plan will be developed in the near future to address archiving (imaging) pertinent records from the Acquavella Referee's office, the Adjudication Unit, the Attorney General's Office, and Yakima County Superior Court. The proposed plan will be sent to the legislature along with a proposal for funding to begin this process.

### **Additional Provisions to Consider (Staffing Changes, Budget, Appeals, Etc.):**

Ecology should consider asking the United States and the Yakama Nation to jointly file a Motion prior to issuance of the final decree regarding additional provisions which should be added to each Adjudicated Certificate. Provisions to consider would be fish screening criteria; metering and reporting criteria, if they weren't already covered by previous orders; and any other criteria which may be passed by legislation prior to issuance of Certificates. Other matters to consider may be a time limit on payment of Certificate fees. As noted above Ecology could choose to rely on the Pretrial Order No. 3 and issue Certificates to the last known party, then ask the Court to put a time limit for payment of fees and automatically default those parties who don't pay fees after a year. If that happens Ecology should consider regulation on those rights in a timely manner as well as those Acquavella claimants whose claimed rights were denied by the Court.

### **Closing Note:**

Put Ecology's funding where the law is and enforce all prior adjudicated areas before initiating a new adjudication. If enforcement funding is not available existing Acquavella FTE's and funding could be used to enforce the 83 adjudications as Acquavella winds down.

## **Section 5: 2003 - 2005 Biennium: Looking Forward**

Significant Yakima Adjudication (Acquavella) workload will likely continue through the 2005 – 2007 biennium. It is difficult to predict precisely when Acquavella will be completed, however, it is anticipated that Acquavella workload will reduce significantly towards the end of the 2005 – 2007 biennium.

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The focus for the Adjudications Unit during the 2003 – 2005 biennium will be to participate in completing most of this adjudication at the pace set by the Court. In conjunction with this Acquavella work, the Adjudications Unit and the Water Resources Program should plan for initiation of a new adjudication(s) towards the end of the 2005 - 2007 biennium. The following is a discussion of preliminary considerations for that planning effort.

### **Work that should be accomplished prior to commencing the next adjudication:**

Ecology should conduct most of the research early in the adjudication process. This positions Ecology to be able to provide comprehensive background information prior to the commencement of evidentiary hearings, which can occur a significant period of time after filing for an adjudication case. Ecology could share this information with claimants early in the adjudication. Based on this information and documentation, the agency could complete an initial evaluation and share it with interested parties. Although, there would be a greater cost in the initial preparation, there should be a savings in time to the state, the court, and the claimants later in the adjudication process. In addition, local, state, or federal agencies would be less impacted if the number of inquiries (often duplicative requests for public records) were reduced.

Public outreach will be very important prior to initiation of a new adjudication. Ecology should prepare a public notification strategy prior to initiation of a new adjudication. Focus sheet, news releases, letter and possible public meetings should be used to inform water right holders, legislators, and local elected officials and law enforcement agencies prior to filing an adjudication.

Prior to the filing adjudication Ecology is required to prepare a statement of facts, together with a plan or map of the locality under investigation. The boundaries and characteristics of geographic area to be adjudicated must be defined, including ground water aquifers boundaries, if ground water is included (which is highly recommended), and the surface water drainage basin. It is recommended that other maps and aerial photographs be prepared and compiled prior to filing the adjudication. Ecology should prepare maps depicting the states water right certificate and RCW 90.14 claim records. Ecology should also compile USGS Quadrangle maps, county assessor parcel maps, and historic aerial photographs. Historic aerial photographs should include the earliest coverage available, 1933 coverage, and most current coverage. It would also be extremely useful if the aerial photography coverage could be integrated as Geographic Information System (GIS) layers. These maps and aerial photography would be entered as formal exhibit later in the process and would be used through out the adjudication as analytical and research tools.

Flow data information is useful in determining water duties, conveyance losses in diversion ditches, and seasonal fluctuations in stream flows. With considerations regarding access to private property it may not be possible to conduct this activity prior to filing an adjudication. A claimant diversion measurement effort should be initiated, but will not be successful without claimant cooperation.

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Digitally link mapped water rights to county tax parcel and ownership information. For most counties, this will provide better access to property ownership information and depict the relationship of property to the place of water use and other relevant information. By using tax parcel information to identify land ownership, certified notices may be mailed once an adjudication is initiated, possibly reducing the need and cost for personal notification (service of summons). This takes either statutory change or special authorization from the Court. This calls for serving the property owner, taxpayer, and in some cases, the financial institution.

Obtain and use digital aerial photography and satellite imagery. These images are useful in analyzing the extent of past and current water use and in estimating the age of existing development.

To the extent authority exists to do so, require that existing water withdrawals and diversions be measured. Expand the metering requirements to all water users in the basins so data can be used in future adjudications. If the authority does not exist, petition the court to require this. Because most areas which would be considered for adjudications are most likely on the critical basin lists, expand the metering requirements to all water users in these basins so data can be used in future adjudications.

Coordinate scoping of the area with any existing watershed planning group through the watershed planning lead or with other interested parties.

Plan an appropriate information technology system for case management as the adjudication progresses. Timing is critical to insure that this system is in place before the adjudication begins so that it can support the adjudication process.

#### **Things to do during the next adjudication**

When it is determined that an adjudication should be initiated, a Statement of Facts and petition is filed by Ecology (the Plaintiff) with the appropriate Superior Court to initiate the case. The Statement of Facts must contain the names of all known persons claiming water rights from the water source(s) to be adjudicated, and a brief statement of the facts and maps regarding the water source and the necessity for a determination of the relative rights associated with the water source.

Based upon experience gained through previous adjudications, there will be less confusion regarding the scope of a case and it will assist the court and potential participants if the Statement of Facts provides more information than the minimum required by statute. Therefore, the Statement of Facts should contain at least the following additional information as is appropriate for the area being adjudicated:

1. Maps and accompanying data that depicts present ownership of property, the places of use of existing water right claims and certificates, known water sources and the boundaries of the area to be adjudicated, and established streamflow measuring points,

## **Water Resources Program – Adjudications Strategic Plan** **Draft 5 (May, 2003)**

and other information that may be relevant in determining and resolving the issues related to the adjudication.

2. Copies of all RCW 90.03 water right certificates, RCW 90.14 registered water right claim, and well logs (if ground water is included) for the area to be adjudicated.
3. Information that may be useful to potential participants regarding the purpose and benefits of conducting the adjudication as well as Ecology contact that could assist claimants regarding research of existing water right records that haven't already been provided by Ecology.
4. A proposed plan for the conducting of the adjudication, including, case management, and proposed stipulations or Pre-Trial Orders that Ecology asks be considered by the court in initial proceedings.
5. A proposed Statement of Claim form to be completed by claimants asserting water rights in the adjudication.
6. A recommendation for a Referee to be appointed upon remand of the case to Ecology.

Upon initiation of the case and resolution of preliminary matters, Service of Summons, the acceptance of Statements of Claim, and other procedures are conducted in accordance with the rules adopted by the court. Statements of Claim should be filed at the early stages of the adjudication to identify participants and provide a preliminary assessment of the water rights to be resolved and the issues to be heard by the court. Based upon Ecology's Acquavella experiences, claimants should be required to update/revise their Statements of Claim prior to the time of their scheduled evidentiary hearing when the adjudication will take more than a few years to complete. The updated/revise Statement of Claim will be the final identification of parties and their claimed water rights. Claimants should also explain variances between the initial and updated/revise Statements of Claim. This should occur immediately prior to the evidentiary hearings.

If a Referee is appointed, that person should have good organizational skills and have expertise in court procedures, water law, and water use as it relates to water rights. The Referee is a fact finder, and writes a report to the court that includes findings and recommendations for the confirmation of water rights. It is not necessary for the Referee be a legal expert. The objective of retaining a Referee is to supplement the skills and knowledge of the court. The Referee should be given a broad authority by the court to find facts. The adjudication plan proposed to the court should propose that the Referee not be bound by strict court rules during evidentiary hearings, but should be allowed greater ability to ask probing and leading questions. The Referee should also be allowed become familiar with the area being adjudicated. Liberal rules for Referee evidentiary hearings will result in a more complete set of facts, will assist claimants appearing without legal council, and will assist claimant attorneys if important factual points would otherwise be missed. The Referee's Office should be considered a neutral

## **Water Resources Program – Adjudications Strategic Plan Draft 5 (May, 2003)**

participant in the adjudication and should include the function of assisting claimants in understanding adjudication procedures and the role of the Referee. Authority to mediate significant factual issues might also be delegated to the Referee.

Ecology as plaintiff has a multipurpose function during an adjudication. Ecology provides public assistance to interest parties, assists the court in matters of case management, participates in hearings before the court and the Referee, investigates Statements of Claim, and presents testimony, factual information, and exhibits to the Referee and the court. Ecology's focus is on development of factual records upon which the Referee can base confirmation recommendations and may take positions on issues of compelling public interest. Ecology should participate with other parties to ensure that state water law is accurately and consistently interpreted by the court. Ecology remains neutral on the confirmation of specific water rights if they are supported by the evidence and are consistent with water law.

### **Staffing and Resource Needs for a Future Adjudication:**

An adjudication unit within Ecology consisting of staff to conduct research and investigations including hydrology, manage the case, maintain information technology system(s) (databases, GIS mapping, etc.), and provide technical expertise on specific issues unique to the adjudication including interpretation of water law. Supervisory and management staff would also be required. There would also be an impact on Ecology Executive Management, if the next adjudication involved a significant mediation effort of when formulating policy positions dealing with significant legal or factual issue. Staff with appropriate expertise may testify or otherwise provide information regarding hydraulics, farming practices, crop water requirements, and other issues of general public interest or concern. Expertise required will vary depending upon the issues that arise within a specific adjudication.

A Referee that serves as the water right and water use expert for the court of jurisdiction.

Staff of the Office of the Attorney General that serve as the lawyers on behalf of each interested state agencies and most significantly for Ecology as plaintiff.

Regional office field staff, either under the supervision of the adjudications staff or the regional office. Regional staff must be able to work face-to face with claimants, their attorneys, the court, and others on an as needed basis. Use of regional office staff enhances the adjudication process and they have already become familiar with the area being adjudicated.

### **Maximizing the Benefits of the Adjudication.**

Entry of the Decree by the Adjudication Court does not complete the adjudication process. The Decree (Final Order) establishes a schedule of rights specifying the extent and relative priority of all confirmed water rights. The certainty provided by an adjudication is useful in watershed and resource planning, water marketing, and for evaluation of applications for change and transfer of existing water rights. The results of an adjudication provide necessary

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information to regulate water uses to ensure that senior water rights are satisfied according to their priority to the extent water is available. The determinations of the court are maintained and may be updated through relinquishment activity.

Post adjudication activities include:

1. Regulation of existing water rights, including compliance and enforcement activities. This may include the establishment of Stream Patrolmen and/or Water Masters. A commitment to regulate adjudicated water right is essential to maintaining the property interests of water right holders. Stream patrolman are located in the adjudicated area and are delegated authority to regulate the adjudicated water rights. Regulated water right holders pay for the services of a stream Patrolman through county assessments. Water Masters are Ecology employees with general authority to implement the state's water laws and to regulate water rights.
2. Over time property ownerships change and confirmed water rights can be changed or transferred. To track such changes and to assist compliance activities, Ecology must maintain GIS maps of confirmed water rights, property ownership, stream gages, and other information within the adjudicated area. This information is very useful for watershed management and water right regulation and permitting. The general public will also find this information useful for property ownership transactions and real estate development. The established historical record will allow water right holders and other interested parties to know with relative certainty the water supply associated with the adjudicated water rights.
3. Stream gages. Stream flow gages are important for identifying critical times to regulate. An adjudication court will not generally dictate the location of gages. An extensive knowledge of the water source may be required prior to establishing gages for regulatory purposes. Additionally, gages will provide an indication of the extent to which water is available for the satisfaction of junior rights as the flow record is established. Stream flow information is essential to support water markets and water right change and transfer decisions.

### **The Next Adjudication?**

During the 2003 – 2005 biennium Ecology should plan for initiating the next adjudication as Acquavella activities wind down during the 2005 – 2007 biennium. Over the years Ecology or its predecessor agencies have received numerous petitions to initiate adjudications. There may also be requests or adjudication petitions that result from current watershed planning initiatives. In it's planning efforts Ecology should consider the following before selecting the geographic area to adjudicate next.

# **Water Resources Program – Adjudications Strategic Plan**

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### **Selection Considerations:**

Ecology should consider historic and future petitions filed by private parties. Ecology should also give consideration to petitions that may be filed by watershed planning units in the future.

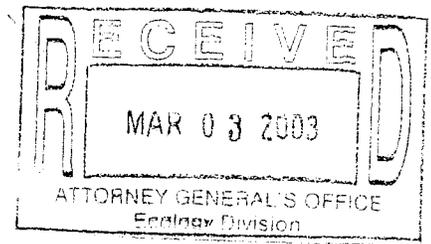
Consideration will also need to be given to Water Resources Program workload and staffing needs, the history of water right regulation and enforcement activities and needs, water availability, water right permitting, water marketing (water right changes and transfers), and other water resource initiatives that further Ecology's vision and the Governor's water strategy.

Other consideration should include Endangered Species Act listings, instream flows and lake levels, and fish critical issues; Tribal and federal reserved water right issues and conflicts with state based water rights, local and legislative support; the ability of the local economy to be maintained during the uncertainty associated with an ongoing adjudication; the impact of a new significant adjudication on the courts; and growth management and the growing communities.

The next adjudication should include all claims to historic existing surface and ground water rights, including exempt ground water withdrawals.

# *Appendix*

## *E*



**Overview of Water Disputes Heard by  
The Pollution Control Hearings Board  
Prepared by  
Kaleen Cottingham and Robyn Bryant  
March 2003**

As part of its charge to study judicial and administrative alternatives for resolving water disputes, the members of the Water Dispute Task Force seek to better understand the functions and budget of the Pollution Control Hearings Board, specifically its role in resolving water right disputes. Since the Pollution Control Hearings Board is just one part of the Environmental Hearings Office, in order to extract the costs associated with water disputes, it is important to understand the entirety of the role and budget of the Environmental Hearings Office.

The Environmental Hearings Office houses four quasi-judicial tribunals: 1) the Pollution Control Hearings Board, 2) the Shorelines Hearings Board, 3) the Forest Practices Appeals Board, and 4) the Hydraulic Appeals Board. Each board is independent of the agencies whose decisions are reviewed on appeal. The purpose of these boards is to provide an easily accessible forum for independent, expeditious, and efficient review of various state agency and local government environmental decisions. Additionally, the boards foster a statewide consistent interpretation of Washington's environmental laws in agency decision-making and give aggrieved parties meaningful and enhanced access to justice. Some of the differences (and benefits) of utilizing these boards, as compared to the superior courts, is that appellants do not have to pay a filing fee to challenge the agency decision, cases are resolved in a much shorter period of time, procedural assistance is provided free-of-charge to all parties, and is especially utilized by pro se litigants. Finally, the boards have a respected mediation program whereby mediators are available free-of-charge to help the parties settle or otherwise resolve their disputes.

The decisions of the board are variously indexed and available for use by individuals, attorneys, and others by way of commercial legal research purveyors Westlaw and Lexis, as well as by accessing hard-copy decisions in the Board's office. All decisions since 1998 are available directly from the Environmental Hearings Office's web page. Summaries and Digests of decisions are also available in hard copy and, in some cases, electronically.

The Environmental Hearings Office consists of 9 employees (FTE's). This includes the three full-time members of the Pollution Control Hearings Board, three Administrative Appeals judges, and three administrative staff. The 9 part-time members of the three other boards, and in some cases designated alternates, receive per diem and travel expenses only, unless such expenses are covered by their agency.

The biennial budget for the Environmental Hearings Office for 2001-2003 is \$1,690,707.00, plus approximately \$206,000.00 in pass-through funding from the Department of Ecology to cover one Administrative Judge authorized as a result of the passage of ESHB 1832. This budgetary amount reflects reductions made by OFM as part

of current cost cutting measures. The majority of the expenditures of the Environmental Hearings Office (75%) are associated with salaries and benefits for the 9 FTES. The remainder of the budget covers the cost of travel to remote hearing locations, maintaining the computer system, compensating for attorney general time, along with all other expenses associated with a small state agency (rent, phones, liability premiums, etc.).

The Environmental Hearings Office keeps data on a wide variety of aspects of the cases filed with it. See Appendix 1 for the December 2002 Report, which shows the number of cases filed in December, total numbers filed in 2002, and a running tally of cases filed since 1994. The data is broken down by Board, by type of case, and for a wide variety of actions, such as mediation, settlement, motions, and length of hearing. The Environmental Hearings Office's electronic Case Management System generates this data.

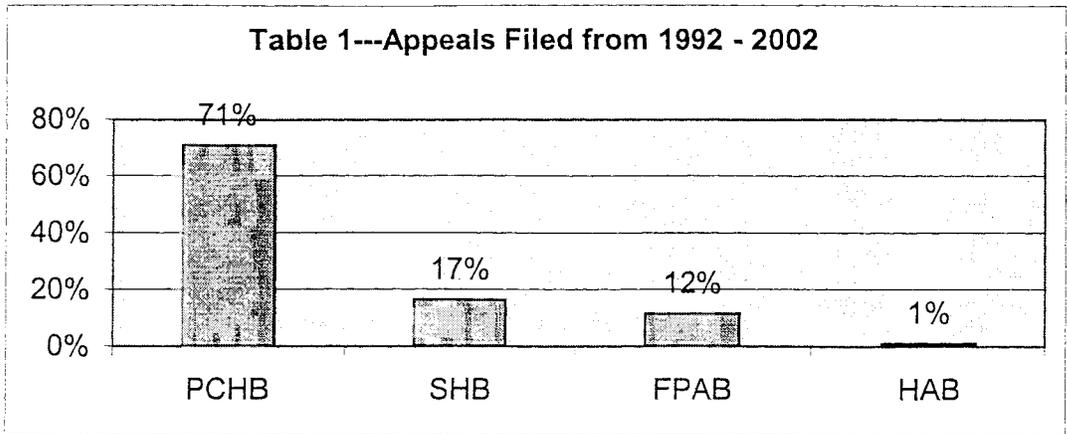
On average, 363 cases are filed with the Environmental Hearings Office each year (records kept on a calendar year basis). Since 1980, the number of cases has been as low as 246 (1995) and as high as 500 (1993). Of those cases, on average, 80 to 85% settle prior to going to hearing. These statistics do not, however, show the complexity of the cases. Later in this document, cases will be broken down by length of hearing, which is the only method the office currently tracks that provides some indication of the complexity of a case.

In order to determine what percentage of the Environmental Hearings Office budget is affiliated with resolving water right disputes, it is important to isolate the amount of work done by the Pollution Control Hearings Board and then subdivide that work by subject areas. This analysis comes from the decade worth of data kept by the Environmental Hearings Office on the various cases filed with the office. Appendix 2 contains the eleven-years of data.

### **Pollution Control Hearings Board**

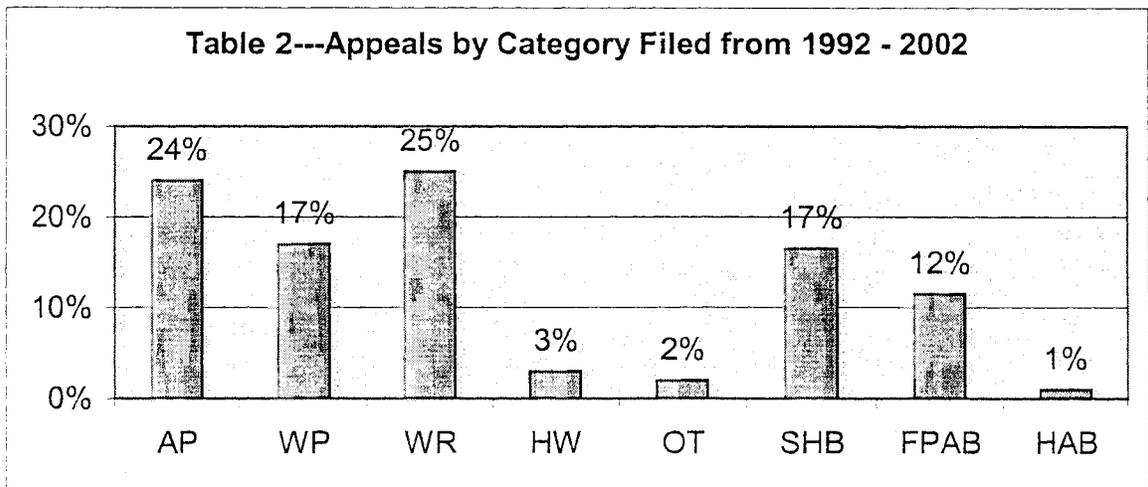
The Pollution Control Hearings Board is comprised of three members appointed by the Governor and confirmed by the Senate. The Pollution Control Hearings Board reviews the decisions of the Department of Ecology. Additionally, this board reviews certain decisions of local conservation districts, air pollution agencies, local health departments, and the Department of Natural Resources.

The Pollution Control Hearings Board receives the majority of cases filed with the Environmental Hearings Office. Table 1 shows the number of cases filed during the eleven-year period from 1992 to 2002, broken down between the four boards. During that time, 3,628 appeals were filed with the Environmental Hearings Office. The Pollution Control Hearings Board accounts for 71%.



PCHB= Pollution Control Hearings Board    FPAB= Forest Practices Appeals Board  
 SHB= Shorelines Hearings Board            HAB= Hydraulics Appeals Board

Over the course of the past eleven years, water right cases have comprised 35% of the cases filed with the Pollution Control Hearings Board and 25% of the cases filed with the Environmental Hearings Office. During the period 1992-2002, 909 water right cases were filed. Over eleven years, this averages to 83 water resources cases filed each year.



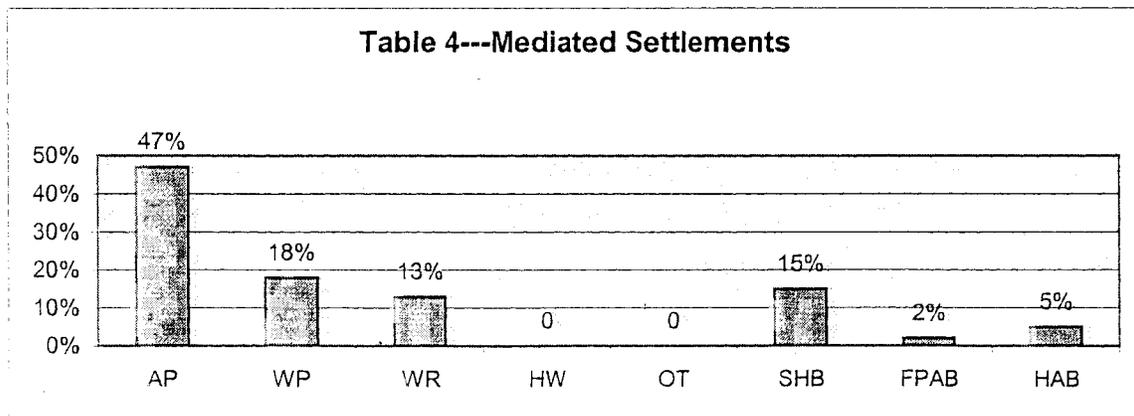
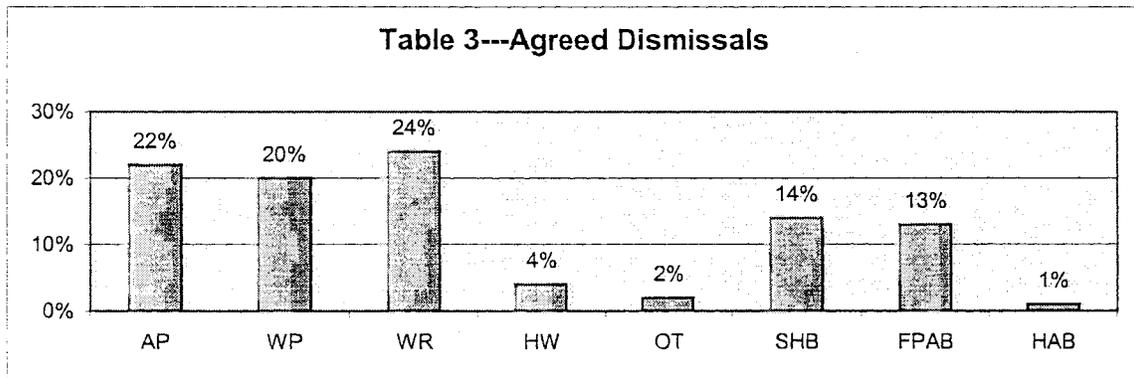
AP= Air Pollution                                    HW= Hazardous Waste                    FPAB= Forest Practice  
 WP= Water Pollution                            OT= Other                                    HAB= Hydraulic Appeal  
 WR= Water Right                                SHB= Shorelines Board

In the above table (table 2), it is important to note that all challenges to Ecology issued §401 certifications are tracked as Water Pollution (WP) cases. In nearly every challenge to a §401 certification in recent years, water right questions have been a major portion of the appeal. Thus, the actual percentage of water right disputes may be higher than 25%.

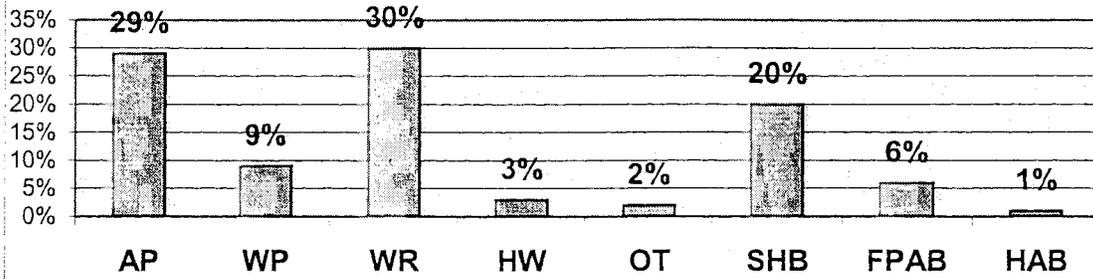
For purposes of determining an approximate cost of water right cases before the Pollution Control Board, this 25% number will be used as an estimate of expenditures associated with water disputes. This is only an approximation, as none of the Board members or staff track actual hours spent on particular cases.

Using the adjusted 2001-2003 biennial budget for the Environmental Hearings Office as an estimate of expenditures, approximately \$474,177.00 is associated with water disputes (over that two year period). This equates to \$237,088.00 for one year.

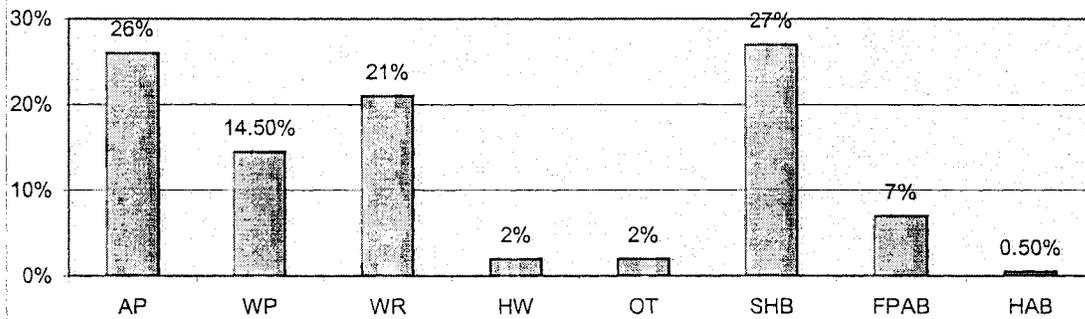
Determining the complexity of a case, or the amount of time to resolve a case, depends to a great degree on whether the case goes to hearing (rather than being settled or otherwise dismissed). Other factors include whether dispositive motions are filed or whether the parties request the assignment of a mediator to assist in resolving a dispute. The following charts can help determine the amount of time spent on the various types of cases. You can see that a water dispute is more likely to be resolved on summary judgment motion than other disputes (see table 7). Water disputes take more time for hearings (see table 12). Water right decisions, water pollution decisions, and shoreline decisions are more likely to be appealed to superior court than other decisions (see table 14). And finally, parties to a water dispute are less likely to request the assistance of a mediator (see table 13). All the following charts are based on the same eleven years of data (1992-2002).



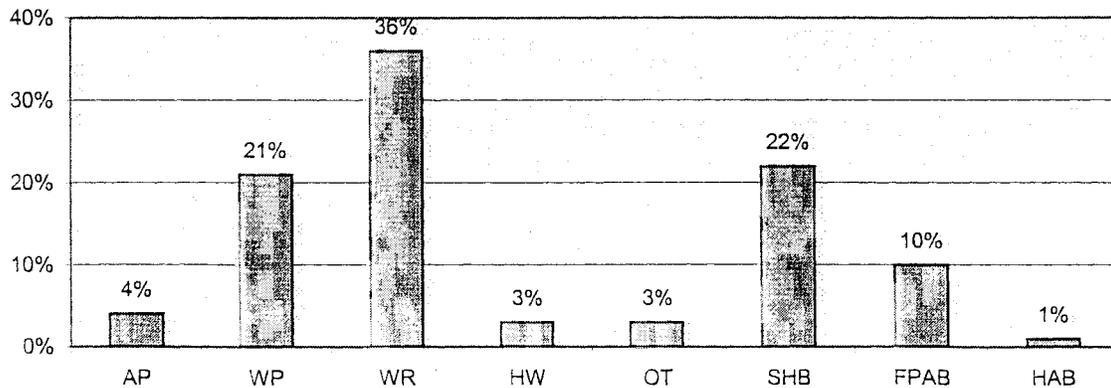
**Table 5---Contested Dismissals**



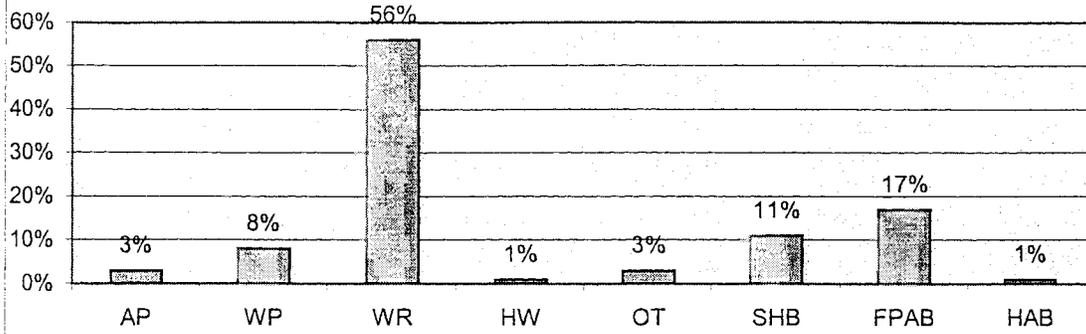
**Table 6---Decisions on the Merits**



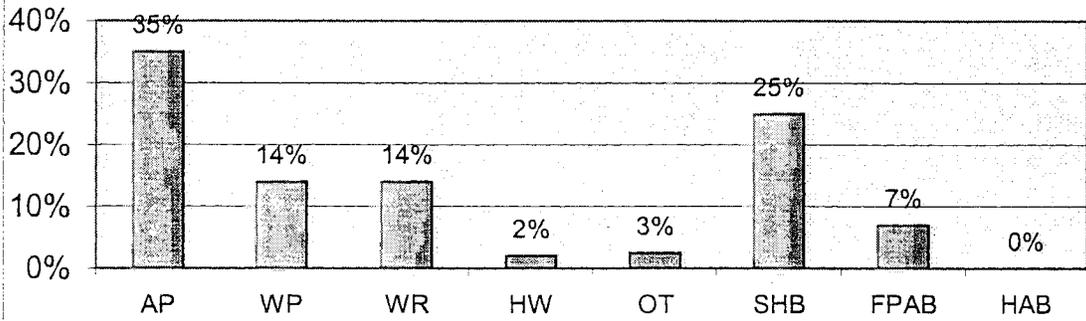
**Table 7---Cases Resolved on Summary Judgment**



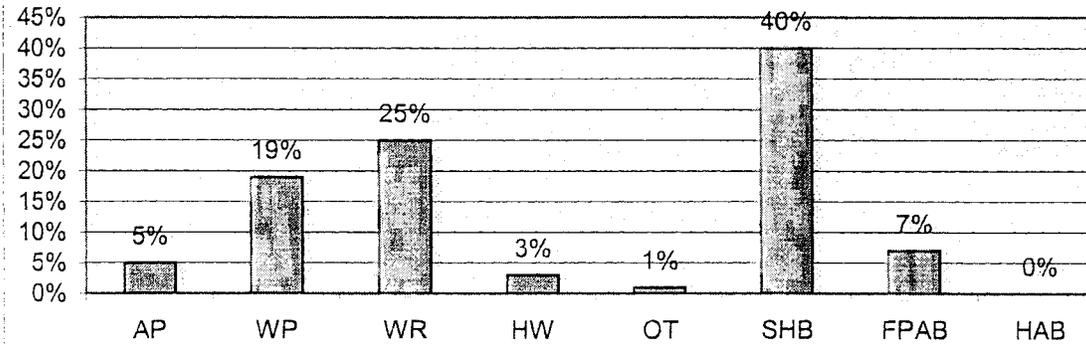
**Table 8---Motion Hearings**



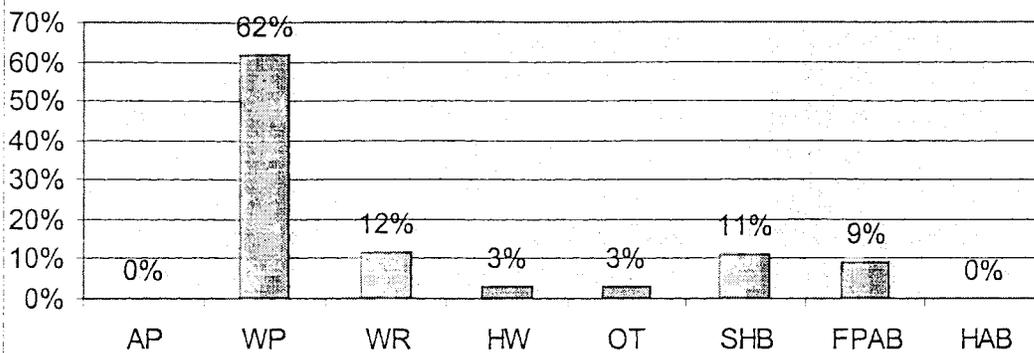
**Table 9---1 Day Hearings**



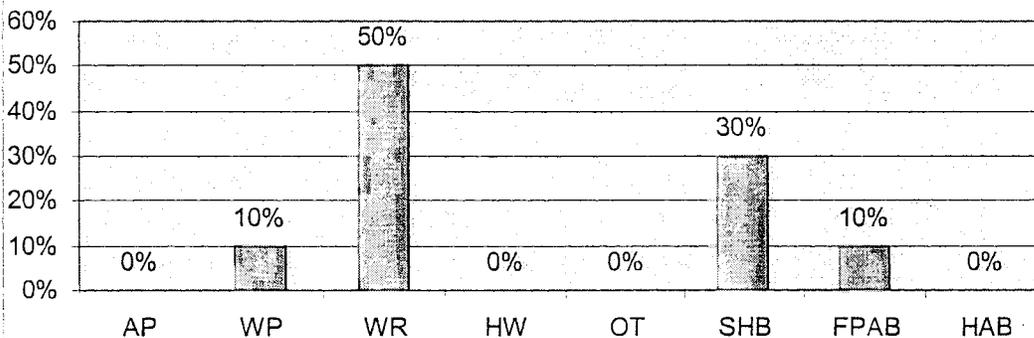
**Table 10---2 - 3 Day Hearings**



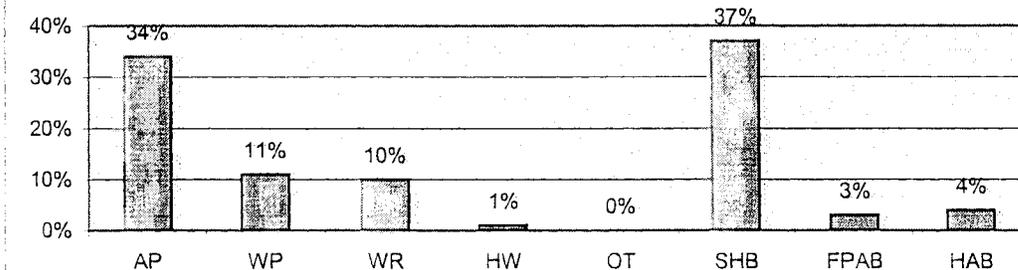
**Table 11---4 - 5 Day Hearings**

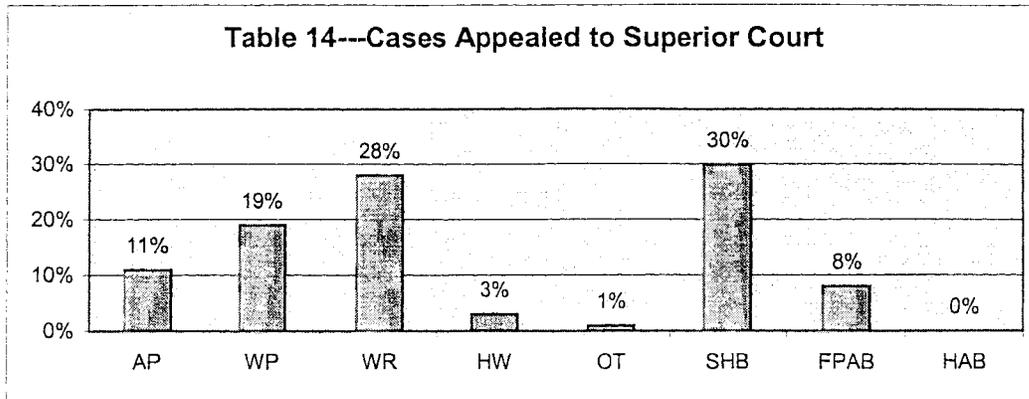


**Table 12---6 - 10 Day Hearings**



**Table 13---Mediations**





Relating to water rights, the PCHB has jurisdiction to hear the following types of cases:

- i. **Surface Water Permits and Certificates** (RCW 90.03.250-.290 and Chapters 90.14, 90.22 and 90.54 RCW and Chapters 173-500, -522, -530, -531, -532, -548, -549, -555, -559, -590, and -596 WAC): Any person seeking to divert surface water for most purposes needs a permit. This includes agricultural irrigation, municipal and industrial uses.
- ii. **Ground Water Permits and Certificates** (RCW 90.44.050-.070 and Chapters 90.14, 90.22, and 90.54 RCW and Chapters 173-124, 128, 132, 134, and 136 WAC): Required for all groundwater withdrawals exceeding 5,000 gallons/day.
- iii. **Metering of withdrawals and diversions** (RCW 90.03.360 and 90.44.450): Ecology is given specific authority to impose metering requirements.
- iv. **Amendments to the Claims Registry** (RCW 90.14.065): Any amendment to a claim on file in the state claims registry must be approved by Ecology.
- v. **Family Farm Water Act** (chapter 90.66 RCW): water rights held under this chapter generally follow the Surface Water Code and Ground Water Code, but are subject to some specific provisions of this chapter.
- vi. **Emergency Withdrawals** (RCW 43.83B.400-410): The Department of Ecology may authorize emergency withdrawals of public surface or groundwaters, on a temporary basis, under drought conditions.
- vii. **Reservoir Permits** (RCW 90.03.370): Required in addition to surface water permit when more than ten acre-feet of water is stored.

- viii. **Approval of Dam Plans** (RCW 90.03.350): Plans for all dams designed to store more than ten acre-feet of water must be approved by the Department of Ecology.
- ix. **Change in Place of Use, Purpose of Use or Point of Diversion** (RCW 90.03.380): Any of these changes in a surface water right must be approved by Ecology. More limited changes in water rights are authorized by RCW 90.44.100.
- x. **Cancellation of Permits** (RCW 90.03.320): If a water right is not perfected in accordance with a schedule in the permit, it may be cancelled after notice.
- xi. **Relinquishment of Water Rights** (RCW 90.14.130): The Department of Ecology may issue orders of relinquishment when a water right has been abandoned or not been used for five years without good cause.
- xii. **Administrative Orders** (RCW 43.27A.190-200): The Department of Ecology issues orders for alleged violations of the surface water code, ground water code, and the flood control act.
- xiii. **Civil Penalties** (RCW 90.03.600): \$100 a day for each violation.
- xiv. **Establishment of Minimum Water Flows or Levels** (RCW 90.22 and Chapter 173-30 WAC): The Department of Ecology may unilaterally, or at the request of the Departments of Fish and Wildlife, establish minimum flows or levels for streams, lakes or other public waters, to protect wildlife, recreational values, or water quality. When minimum flows are established by administrative regulation, they may be challenged in superior court pursuant to the APA. When included as conditions of permit decisions, they are subject to review by the PCHB.
- xv. **Declaration of Artificially Stored Ground Waters** (RCW 90.44.130 and Chapter 173-136 WAC): The Department of Ecology may designate ground water areas or sub-areas for the administration of withdrawals to limit them to a safe-sustaining yield from the ground water body. Any person may, within 90 days after such designation, file with Ecology a certified declaration it is the owner of artificially stored ground water within such area or sub-area. The Department shall either accept or reject these.
- xiv. **Well Drillers Licensing**
  - A. **General** (RCW 18.104 RCW and Chapters 173-160 and 162 WAC): All Department of Ecology orders under this chapter may be

appealed to the PCHB. These include cease and desist orders and license revocations.

- B. Penalties** (RCW 18.104.155): For water well construction violations: \$100-\$500 for minor violations, \$500-\$5,000 for serious violations, and \$5,000-\$10,000 for major violations.

2002 Appeals Filed											Running Totals								
2002	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total	2002	2001	2000	1999	1998	1997	1996	1995	1994
January	12	4	1	0	0	17	2	2	0	21	21	8	17	16	21	24	53	16	32
February	6	5	4	1	0	16	2	1	0	19	40	20	32	33	36	44	164	35	51
March	5	0	10	1	0	16	3	3	0	22	62	48	52	52	60	63	203	56	82
April	1	4	6	1	0	12	2	1	0	15	77	67	70	68	91	88	229	80	113
May	4	6	6	0	0	16	2	2	0	20	97	100	94	103	116	114	249	96	143
June	4	11	1	0	0	16	3	1	1	21	118	126	120	132	151	140	273	116	179
July	7	6	14	0	0	27	0	1	0	28	146	155	147	159	190	171	292	141	232
August	11	6	6	1	0	24	3	5	0	32	178	177	190	182	282	184	314	162	283
September	13	7	5	0	0	25	2	2	1	30	208	209	214	209	313	208	331	191	330
October	13	10	6	1	0	30	4	3	0	37	245	236	229	233	348	236	359	209	365
November	7	3	4	1	0	15	3	4	0	22	267	250	241	255	367	260	379	232	375
December	7	1	4	1	1	14	5	2	0	21	288	261	262	273	381	282	398	246	402
TOTAL	90	63	67	7	1	226	31	27	2	288									

December										
MEDIATION	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Active Mediation	19	3	0	1	0	23	2	2	0	27
ACTIVE CASES	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Appeal 11/30/02	44	43	70	1	0	158	21	16	1	196
Appeals Filed	7	1	4	1	1	14	5	2	0	21
Appeals Closed	0	9	10	0	0	19	6	2	0	27
Appeal 12/31/02	51	35	64	2	1	153	20	16	1	190
CUMULATIVE TOTAL	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Cases Filed	3525	1311	1960	235	463	7494	1734	520	40	9763
Cases Closed	3474	1276	1896	233	462	7341	1714	504	39	9598
DISPOSITIVE ORDERS ISSUED										
DISPOSITIVE	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Agreed Dismissals	0	5	9	0	0	14	4	2	0	20
Mediated Settlements	0	0	0	0	0	0	0	0	0	0
Contested Dismissals	0	0	0	0	0	0	0	0	0	0
Decisions on Merits	0	1	0	0	0	1	0	0	0	1
Summary Jgmt.	0	3	1	0	0	4	2	0	0	6
TOTALS	0	9	10	0	0	19	6	2	0	27
NON-DISPOSITIVE ORDERS ISSUED										
NON-DISPOSITIVE	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Pre-Hearing	1	1	10	1	0	13	2	1	0	16
Consolidation/Join	33	0	0	0	0	33	2	0	0	35
Intervention	0	0	0	0	0	0	2	0	1	3
Stay Motion/Orders	0	2	0	0	0	2	0	0	0	2
Misc. Orders	2	1	0	0	0	3	1	1	0	5
TOTALS	36	4	10	1	0	51	7	2	1	61
Orders Issued in Dec.										88
TOTAL ORDERS ISSUED TO DATE IN 2002:										925

ACTIVITIES	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total
Hearings:										
1 Day			2	1		3				3
2-3 Days						0				0
4-5 Days						0				0
6-10 Days						0				0
Motion Hearings						0		2		2
Conferences	1	3	9			13	2	3		18
Mediation						0				0
*Procedural Assistance		1	1			2	1	1		4
Site Visits						0				0
Superior Court Appeals						0				0

HISTORICAL Total Cases Filed					
YEAR	PCHB	SHB	FPAB	HAB	Total
1970	42				42
1971	36	5			41
1972	173	44			217
1973	243	72			315
1974	278	61			339
1975	185	29	3		217
1976	175	39			214
1977	189	41			230
1978	269	51	2		322
1979	222	57	7		286
1980	235	49	1		285
1981	210	51	2		263
1982	212	54			266
1983	219	54			273
1984	343	64	1		408
1985	267	41	5		313
1986	233	62	2		297
1987	240	53	7		300
1988	194	61	7		262
1989	168	76	22	1	267
1990	239	93	27	3	362
1991	271	82	21	2	376
1992	241	58	32	4	335
1993	320	87	89	4	500
1994	283	76	41	2	402
1995	146	66	34	0	246
1996	295	58	43	2	398
1997	198	49	33	2	282
1998	278	66	37	0	381
1999	205	39	22	7	273
2000	189	37	29	7	262
2001	195	33	29	4	261
2002	228	31	27	2	288

Backlog based on last year's average production:	8 3/4 Mo.
Percent of cases disposed of without going to hearing:	36%
Average time in PCHB appeals disposed of by Board hearing:	5 Mo. (Based on number of cases closed)
Average time in SHB appeals disposed of by Board hearings:	3.5 Mo. in last three months

\*Total time spent on procedural assistance: 2.3 hours

ENVIRONMENTAL HEARINGS OFFICE  
1992-2002

Appendix 2

Appeals Filed by All Boards

YEARS	PCHB					SHB	FPAB	HAB	TOTALS
	AP	WP	WR	HW	OT				
1992	87	50	67	23	14	58	32	4	335
1993	138	39	122	13	8	87	89	4	500
1994	94	77	102	7	3	76	41	2	402
1995	66	45	30	2	3	66	34	0	246
1996	58	44	175	3	15	58	43	2	398
1997	68	64	51	11	4	49	33	2	282
1998	65	56	138	10	9	66	37	0	381
1999	81	74	30	11	9	39	22	7	273
2000	69	52	55	11	2	37	29	7	262
2001	60	54	72	9	0	33	29	4	261
2002	90	63	67	7	1	31	27	2	288
<b>TOTALS</b>	<b>876</b>	<b>618</b>	<b>909</b>	<b>107</b>	<b>68</b>	<b>600</b>	<b>416</b>	<b>34</b>	<b>3628</b>
<b>%</b>	<b>24%</b>	<b>17%</b>	<b>25%</b>	<b>3%</b>	<b>2%</b>	<b>16.50%</b>	<b>11.50%</b>	<b>1%</b>	<b>100%</b>

# *Appendix*

## *F*



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

4224 - 6th Avenue SE, Bldg. 2, Rowe Six  
P.O. Box 40903, Lacey, WA 98504-0903

To: Water Disputes Task Force  
From: Kaleen Cottingham *Kaleen*  
Subject: Recent Survey of parties  
Date: July 15, 2003

The Environmental Hearings Office recently contracted for a survey of parties appearing before the various boards that comprise the Environmental Hearings Office. In the Water Disputes Task Force's efforts to improve the water adjudications process, I thought you'd like to see a summary of the survey's results. We were pleased to find the high response rate and the positive contributions from the wide variety of interviewees. The primary weakness apparent from the survey is how pro se appellants feel about quasi-judicial processes. This type of feedback can help the Task Force as it evaluates improving or modifying provisions for water adjudications and other water related matters.

Our interest in a customer survey stemmed from the recent Governor's Executive Order on Service Delivery, as well as our goal to continually improve our processes. We have tried in the past to obtain feedback through a survey on our web page, but have received virtually no responses. We are also limited in what we can ask parties by a prohibition on ex parte contact between the judges and the participants. Finally, we believed that many of the attorneys that practice before us regularly might not be forthcoming unless confidentiality was assured. All these reasons caused us to look for an outside entity to conduct our survey. We sought competitive bids from pre-authorized contractors, and selected Hebert Research as our survey contractor. We worked closely with Hebert Research in the scope of the potential interviewees and in the nature of the survey questions. We relied on our extensive data system to provide all the information about the parties and attorneys for use in the survey process. We used all cases that had been closed from April 2002 to April 2003.

I have attached verbatim pages from the report. Included are the objectives and methodology of the survey, the questionnaire, and the key findings.

We are currently revising our biennial strategic plan and will be incorporating changes resulting from this survey into our process improvement efforts. We intend to focus on improving the ability of the pro se appellants to participate in the adjudicatory process, improving our web page, and improving the written materials that are sent to parties. We will also be making other improvements as appropriate.

If you have any questions, please feel free to contact the Environmental Hearings Office.

## *Objectives*

### **Research Objectives:**

The following objectives were addressed in conducting research for the EHO:

1. Assess the promptness and accuracy of answers received and instances where improvements are needed;
2. Determine the acceptability of the amount of time between filing the appeal and the hearing;
3. Examine the value of the pre-hearing conference and how it may be improved;
4. Evaluate the clarity with which procedures were explained by the presiding officer;
5. Assess the degree to which rulings made in the course of the hearing were clearly explained;
6. Determine if participants felt they received a fair opportunity to present their case and, if not, why they felt the opportunity was not fair.
7. Assess the degree to which participants felt board members were knowledgeable regarding their case;
8. Examine the degree to which participants felt board members were open-minded and listened to all sides;
9. Determine the perceived level of courteousness of board members;
10. Assess the perception of fairness of board members;
11. Evaluate the clarity of the board's written decision;
12. Determine the aspects of the proceedings respondents held in highest regard;
13. Determine how the process may be improved;
14. Examine satisfaction with mediated resolutions and how the mediation process may be improved; and
15. Assess awareness of information available on the EHO website, the utility of information currently available, and how the Website may better serve the needs of attorneys and pro se parties.

## *Methodology*

A total of 87 surveys were completed for the EHO. The EHO provided lists of participants in their hearings and mediation processes, broken down into attorneys, mediation, and Pro ses. A comprehensive list of participants was developed, with each person being entered only once. Participants could qualify for two different aspects of the survey, both for the hearings process and for mediation. For ease of interviewing and managing the sample, these two aspects were combined into a master questionnaire. The questionnaire had initial questions up front that all interviewees answered, and then had a section for the hearing participants, and for mediation participants. Within the hearings or mediation section, there may have been questions which only applied to attorneys or only applied to Pro se participants. The response rate, which represents the proportion of the population who agreed to participate in the research, was 97.6 percent. The overall incidence rate, which represents the proportion of the population qualified to participate in the survey, was 71.3 percent. Some people who failed to qualify said that although they were listed on the case, they did not take part in the process; others said their case was settled before it went through the mediation or hearings process. In the case of Pro se interviewees and mediation interviewees, all potential interviews were exhausted. This means that the interviewees in the survey constitute a census of participants, and there is no margin of error. A total of 18 out of 67 Appellant Hearing Attorneys were interviewed. Because of the small sample size, the margin for error is +/-10.5 percent. Likewise, 23 out of 72 Respondent Hearing Attorneys were interviewed. The margin for error here is +/-8.6 percent.

In total, the breakdown of interviewees is as follows:

**Appellant Hearings Attorneys (AHA):** 18 interviews

**Respondent Hearings Attorneys (RHA):** 23 interviews

**Pro ses:** 28 interviews

**Mediation Appellants (attorneys & independents):** 18 interviews

**Mediation Respondents (attorneys & independents):** 17 interviews

The initial goal was to complete 30 interviews among hearings attorneys, both appellant and respondent (15 each); 30 Pro se interviews (out of a possible 42 names originally given) and 30 mediation interviews, both appellant and respondent (10 appellant attorneys, 10 appellants, and 10 respondents, both attorney and non-attorney). A letter announcing the survey was sent out to all potential participants with the dates of the survey. Interviewees were generally highly willing to participate in the survey and to offer their opinions. Of the 206 potential participants, only two refused and one terminated the interview part way through. Completes were tracked by each interviewer for each group of respondents, and sample and completes both were reviewed on a daily basis by the project analyst. Participants were called up to 10 times each to try to secure their cooperation for this research.

## *Key Findings*

### *Administrative Staff*

- Administrative staff was rated well overall, particularly by Respondent Attorneys, but even Pro ses gave some of their highest ratings for the administrative staff. However, nearly every group did not consider the contribution of the administrative staff to be of primary importance relative to their overall satisfaction with the process. The administrative staff should be commended for doing a good job of facilitating the process and maintaining its high level of service. The one recommendation for improvement is simply the turn-around time: the suggestion made most often was that response time could be shorter.

### *Website*

- Pro ses rarely use the website, but the reasons why are unclear. It may be they are not aware of the website; they may not be aware of the value of information or how to use the information on the website.
- Attorneys for both Appellants and Respondents are frequent users of the website.
- Users of the website considered the case histories to be the most important part of the website. However, they wanted to be able to search by type of case or type of law being ruled on, rather than by year. The year, as a search category, is not a strong search criteria. As well, having the full history of cases would be highly beneficial to users.
- While website users find it fairly easy to navigate, improvement is needed. Consider using drop-down menus on the navigation bar, so users know what is under each main section. This improves their efficiency and reduces frustration with not finding the appropriate topic in an area.
- The Website provides needed information regarding the hearing process, but is much less complete in providing needed information regarding mediation. Develop a separate section for mediation containing additional process information and listing example case histories and the compromises achieved.

### *Hearings Process*

- The prevalent feeling among all interviewees is that the speed in which a case is brought to resolution needs to be improved. Pro ses, in particular, find the hearings process to take too long.
- The message to Pro ses that help with hearings procedures is available to them needs to be made more forcefully by the presiding officer.

- The survey clearly indicates Pro ses are poorly informed and feel disconnected to the process. Both written and verbal information should be made available to Pro ses informing them that help in understanding procedures is available. This step would hopefully mean Pro ses would seek assistance more often and feel more in command of their appeal.
- The presiding officer is doing a fine job of informing parties that mediation is available, however, all individuals new to the process (i.e., Appellant Attorneys and Pro ses) are not receiving the message. The presiding officer should communicate verbally and in writing that mediation is available and secure feedback from participants indicating they fully understand the mediation alternative.
- By and large, attorneys did not feel the need for procedural assistance. Pro ses, however, often felt that they had no real understanding of what was coming. Attorneys seconded this idea by saying that even with Pro ses being given leeway, they still needed a much stronger education program if the Pro se is to participate effectively in proceedings.
- The two primary concerns among attorneys about the motions practice were: 1) make decisions in a more timely fashion, and 2) improve the Board's understanding of the law or have more experienced judicial people on it. Several attorneys mentioned situations where they felt the Board did not understand the issues as well as they should have or else that the procedure to be followed was not well defined.
- In two out of three Pro ses hearings, motions are filed and, in half of those cases, Pro ses did not know how to respond. Those who knew how to respond either asked for assistance or had been through the process before. Clearly, the procedural assistance provided by EHO to those who requested it was helpful. Provide information in writing that clearly indicates the responsibilities and actions open to Pro ses when motions are filed. When the presiding officer makes Pro ses aware that procedural assistance is available, each area of opportunity for a response, such as when a motion is filed, should be highlighted so Pro ses recognize it as an important area of concern for the case.
- The majority of Pro ses are not fully cognizant of the fact that deadlines can be extended before the hearing. The communication to Pro ses that deadlines can be extended needs to be made more forcefully and through a variety of communication channels.
- The hearings process is moderately satisfying to participants as a whole. Pro ses have low satisfaction with the hearings process. The hearings process needs improvement for all parties and substantial improvement for Pro ses. Parties who won their case showed higher satisfaction with the hearings process than those who lost.

- Appellant Pro ses who do not settle their case have a one in six chance of winning. Appellants represented by an attorney have a two in five chance of winning their case, more than double the Pro se's chances. In contrast, respondents who are represented by an attorney have a 70% chance of winning their case. These percentages indicate that Pro ses are at a clear disadvantage and emphasize the Pro se's need for substantial education and support from EHO.

#### *Mediation*

- Mediation is perceived as a desirable alternative to the hearing process. Mediation saves both time and money and holds out the promise of resolutions which are more constructive than the win/lose outcome of a hearing.

#### *Derived Importance Findings*

##### **Mediation – Pro Ses**

- It is clear that of all groups, Pro ses demonstrate the greatest needs for both mediation and the hearings process.
- Nearly all areas tested are regarded by Pro ses as important elements of overall satisfaction with the mediation process. Pro ses who went through mediation considered the strengths of EHO to be the courteous and respectful attitude expressed by staff and the impartiality of the mediator. In all other dimensions of performance tested, improvement is needed to raise Pro se satisfaction with the mediation process.
- Pro ses strongly question the fairness of the proceedings. Ratings of fairness appear to be nearly synonymous with their level of satisfaction. Pro ses need more help from staff. Providing prompt and accurate information remains highly important. The actions of the mediator also strongly affect Pro se satisfaction. To further improve Pro se satisfaction, mediators must take additional steps to assure Pro se interests are fully made known and assure Pro ses that the opposition respects the Pro se and is not dominating the mediation.

##### **Hearing – Pro Ses**

- The ability to clearly understand the Board's decision is nearly synonymous with overall satisfaction and substantiates the key importance of presenting a written decision that will be easily comprehended by Pro ses. Pro ses need to be shown that their case was fully understood by the Board.
- The quality of the scheduling letter has less influence on satisfaction than the information shared at the pre-hearing conference. This information should be improved in terms of clarity and completeness so Pro ses have a full understanding of how subsequent events will unfold and the procedures involved.

- Improving the attentiveness of the Board Members, finding ways the Board can communicate its fair treatment and expanding the help provided by staff will contribute to raising the satisfaction of Pro ses with the hearings process.
- Pro ses are very aware of being treated courteously and respectfully by the staff. However, this treatment bears little relationship to overall satisfaction.

#### **Mediation – Appellants (Attorneys and Appellant Pro ses Combined)**

- Mediation Appellants reported no relative strengths that were highly related to overall satisfaction.
- Mediation Appellants were quite similar to Pro ses in the categories of needs they expressed relative to mediation.
- Four areas loomed very close to determining overall satisfaction: the essential contribution of the mediator, feeling the agreement was fair, the impartiality of the mediator and assuring the opposition did not dominate the mediation. Improvement in these areas is key to improving overall satisfaction.
- Other areas to improve include helping Mediation Appellants understand they are respected by the opposition, fully and completely making the appellant’s position known and providing them with more accurate information from staff.

#### **Hearing – Appellant Attorneys**

- Appellant Attorneys found the relative strengths of EHO to be the scheduling letter, the information received at the pre-hearing conference, and the courtesy and respect they received from the Board.
- Of greatest importance to Appellant Attorneys for their overall satisfaction is that Board Members fully attend to their hearing presentation and treat them fairly. The accuracy and completeness of the final report in illustrating the Board’s rich grasp of the information they presented will enhance satisfaction for Appellant Attorneys. Other improvements which would add to satisfaction include more detailed information regarding the hearing’s order of events and procedures, and reducing the amount of time to resolve the case.

#### **Mediation – Respondents (Attorneys and Respondent Pro ses Combined)**

- Mediation Respondents rated staff support very highly, but in terms of their overall satisfaction and other factors, these activities were relatively unimportant.
- Of greater importance for their satisfaction were the actions of the mediator. Mediation Respondent satisfaction can be improved by providing increased assurance that the Mediation Respondent’s interests were fully and completely made known and assuring that the opposition did not dominate the mediation.

### **Hearing – Respondent Attorneys**

- Of all party groups tested, Respondent Attorneys expressed the fewest needs. The greatest strengths of EHO that were highly related to overall satisfaction were fair treatment by the Board and the clarity of the written decision.
- To raise satisfaction among Respondent Attorneys, reduce the length of time to resolve the case and, as for Appellant Attorneys, provide a report that accurately and completely illustrates the Board's rich grasp of the information presented by the Respondent Attorney.
- While all areas dealing with the administrative staff were highly rated, they proved to be relatively unrelated to overall satisfaction compared to other factors tested.

## Appendix

# Questionnaire

*Environmental Hearings Office*

*Master Questionnaire*

*June 2003*

0409-010, 020, 030

Version 1.0

Hello, my name is \_\_\_\_\_, and I'm a research assistant for Hebert Research, an independent research firm in Bellevue, Washington. We are currently conducting a survey on behalf of the Environmental Hearings Office in order to improve their processes. You should have received a letter in the mail informing you of this survey. This call is for research purposes only and does not involve sales of any kind. Your individual answers will remain strictly confidential. Would now be a good time to speak with you? [**IF NO, SCHEDULE CALLBACK**]

Before we begin, we realize that you may have been involved with the Environmental Hearings Office for multiple cases. If this is so, please pick one case and answer the following questions based on that one case.

S1. First of all, I need to verify your position. Were you the attorney for the appellant, attorney for respondent, the appellant, or the respondent?

*More information: the appellant is the person who is appealing a decision they disagree with. The respondent is the person who is defending that decision.*

- |                            |                   |
|----------------------------|-------------------|
| 1. Attorney for appellant  | <b>SKIP TO S3</b> |
| 2. Attorney for respondent | <b>SKIP TO S3</b> |
| 3. Appellant               | <b>CONTINUE</b>   |
| 4. Respondent              | <b>CONTINUE</b>   |

S2. Did you represent yourself (pro se) or did you have an attorney represent you?

1. Represented myself (pro se)
2. Had attorney to represent me

S3. Did you, on this case with the Environmental Hearings Office, go through the hearing process ONLY, the mediation process ONLY, or both?

- |                           |                   |
|---------------------------|-------------------|
| 1. Hearings process only  | <b>SKIP TO Q1</b> |
| 2. Mediation process only | <b>CONTINUE</b>   |
| 3. Both                   | <b>CONTINUE</b>   |

S4. Was the case settled in mediation?

1. Yes
2. No

**EHO STAFF – ALL RESPONDENTS**

For each of the following statements, please rate the statement on a scale of 0-10, where 0 means you do not at all agree and 10 means you strongly agree. Please tell me "NA" if you did not deal with the administrative support staff on this issue.

1. The administrative support staff in the Environmental Hearings Office responded promptly to my questions.
2. The administrative support staff answered my questions with accurate information.
3. The administrative support staff were courteous and respectful toward me at all times.
4. The administrative support staff were very helpful to me in responding to my requests.
5. How could the staff at the Environmental Hearings Office have improved the assistance they provided to you? **VERBATIM**

**WEBSITE**

6. Have you accessed the EHO Website for information at any time?
  1. Yes
  2. No
  3. Don't know/Refused

**IF Q6 = 2 or 3, SKIP TO Q10**

7. Using the 0-10 scale where 0 is very poor and 10 is excellent, how would you rate the ease with which the Website can be navigated?
8. Did the EHO Website provide the information you needed?
  1. Yes
  2. No
  3. Don't know/refused

9. What did you find to be most helpful about the Website and how would you recommend that it be improved? **VERBATIM**

**ASK ONLY IF S3 = 1 OR 3; OTHERWISE SKIP TO Q34**

For each of the following statements about the hearings process, please rate the statement on a scale of 0-10, where 0 means you do not at all agree and 10 means you strongly agree.

10. Considering the complexity of the case, the total amount of time needed to bring the case to a resolution was reasonable.
11. The information I received in the scheduling letter from EHO clearly explained everything that would be expected (of me) at the pre-hearing conference.
12. The pre-hearing conference gave me a very helpful understanding of the expected sequence of events from the beginning of the appeal all the way to the final decision.

13. The pre-hearing conference clearly detailed each stage or step of the appeal process and what my responsibility would be at each stage or step.

**ASK ONLY IF S2 = 1; OTHERWISE SKIP TO Q15.**

14. At the pre-hearing conference, did the presiding officer inform you that help in understanding hearing procedures was available to you? (*ADDITIONAL INFORMATION: Help may take the form of person to person discussions with EHO staff via telephone, accessing the EHO handbook on the Website, or receiving examples of documents which must be submitted.*)

1. Yes
2. No

15. During the pre-hearing conference, did the presiding officer inform you that mediation was available as an alternative for resolving your case?

1. Yes
2. No
3. Don't remember

16. What recommendations can you offer that would help EHO improve the way in which it provides procedural assistance? **VERBATIM**

**ASK ONLY IF S1 = 1 or 2; OTHERWISE SKIP TO Q18**

17. Did you participate in the motions practice?

1. Yes
2. No

**IF NO, SKIP TO Q22**

17a. How do you think it could be improved? **VERBATIM**

**ASK Q18 ONLY IF S2=1; OTHERWISE SKIP TO Q22**

18. Were motions filed at any point in your case?

1. Yes
2. No

**IF NO, SKIP TO Q22**

19. Was it clear to you how to respond to the motions at the time they were filed?

1. Yes
2. No
3. Don't know/refused

20. Did you ask EHO for procedural assistance in dealing with the motions?

1. Yes **CONTINUE**
2. No **SKIP TO Q21b**

**ASK ONLY IF Q20=1**

21a. What did the staff do that was helpful or not helpful with the assistance you received? **VERBATIM**

**SKIP TO Q22**

**ASK ONLY IF Q20=2**

21b. NO: Why didn't you ask for assistance? **VERBATIM**

22. Before the hearing, were you aware that you could request that deadlines be extended if you needed additional preparation time?

1. Yes
2. No
3. Don't know/refused

Using the 0-10 scale where 0 is do not at all agree and 10 is strongly agree, please rate the following statements.

23. Prior to the hearing, I received full information on the hearing's order of events and procedures so I understood what would happen throughout the actual hearing proceedings.

**DURING THE HEARING**

24. The Board Members treated me fairly throughout the hearing.

25. The Board Members treated me with courtesy and respect.

26. The Board Members were attentive to the presentation of my case.

27. I was able to clearly understand the Board's written decision in the case.

28. The written decision indicated to me that the Board Members clearly understood the most important elements of the case I presented.

29. If you requested mediation but did not receive it, what was the reason you did not engage in mediation in the case? **VERBATIM**

30. Using the 0-10 scale where 0 is not at all satisfied and 10 is completely satisfied, how would you rate your overall satisfaction with the quality of the entire appeal and hearing process from beginning to end?

31. Did you win, lose or settle the case?

1. Won
2. Lost
3. Settled
4. Don't know/refused

32. How could the hearing process be improved? **VERBATIM**

**ASK ONLY IF S2=1**

33. What things, if any, could the EHO have done to aid or enhance your ability to participate in the process? **VERBATIM**

**IF S3=3, ASK THE FOLLOWING**

You noted that you participated in both the mediation and the hearings process. We do need respondents to evaluate the mediation process as well. Would I be able to ask you some additional questions about the mediation process now, or is there a good time I could call you back to conduct that survey?

- |   |                           |
|---|---------------------------|
| 1. Yes, go ahead                                    | <b>GO TO Q34</b>          |
| 2. Yes, but at another time                         | <b>SCHEDULE CALL BACK</b> |
| 3. No, I'm not interested in doing anything further | <b>SKIP TO CLOSING</b>    |

**MEDIATION – ASK ONLY IF S3 = 2 or 3 OTHERWISE SKIP TO CLOSING**

For each of the following statements about the mediation process, please rate the statement on a scale of 0-10, where 0 means you do not at all agree and 10 means you strongly agree.

34. The mediator managed the discussion so I always felt the opposition had respect for me as an individual.

35. The mediator helped to make sure my interests were completely and fully made known during the mediation process.

36. The mediator was impartial throughout the process.

37. The mediator ensured that the opposition did not dominate the mediation.

**ASK ONLY IF S4=1; OTHERWISE SKIP TO Q42**

38. The agreement was fair from my standpoint.

39. I felt the agreement was fair for the opposition.

40. The actions of the mediator were essential to resolving the case.

41. What were the advantages to you, if any, in using mediation instead of going to hearing in your case? **VERBATIM**

**ASK ONLY IF S4=2; OTHERWISE SKIP TO Q44**

42. Why didn't the mediation result in a settlement? **VERBATIM**

43. Even though the mediation was not successful, what positive outcomes came out of the proceedings? **(PROMPT: Anything regarding the issues, the facts, the lines of communication, etc.) VERBATIM**

44. What do you consider to be the major contribution of the mediator to the process?

**VERBATIM**

45. Using the 0-10 scale where 0 is not at all satisfied and 10 is completely satisfied, please rate your overall level of satisfaction with the mediation process.

46. Was the mediation process fair?

1. Yes
2. No
3. Don't know/refused

47. Why do you feel that way? **VERBATIM**

48. Based on your mediation experience, would you participate in mediation again?

1. Yes
2. No
3. **ATTORNEYS ONLY** If my client wants to use this process, yes.
4. Don't know/refused

**ASK ONLY IF Q48=1 OR 2; OTHERWISE SKIP TO Q50**

49. Why did you give that answer? **VERBATIM**

50. What recommendations can you offer the Environmental Hearings Office that would improve the mediation program? **VERBATIM**

**CLOSING**

Those are all of the questions I have for you. Thank you very much for your participation in our survey.

Date: \_\_\_\_\_

Interviewer: \_\_\_\_\_

# *Appendix*

## *G*

**This appendix represents the work of a subcommittee of the Task Force. The Task Force subsequently discussed these concepts at its September and October 2003 meetings. The reader should refer to the text of the Task Force report for discussion regarding which of the details contained in this appendix were endorsed by the Task Force.**

*September 22, 2003  
Revised Draft*

**A Specialized Water Court for Washington:  
Recommendation from Subcommittee to Full Task Force**

*This draft paper was developed by a subcommittee of the Water Rights Disputes Task Force for the purpose of developing a recommendation to the full Task Force regarding the structure, jurisdiction, organization, and funding of a specialized water court. This paper builds upon discussion at the July 24, 2003 Task Force meeting and at an August 7, 2003 subcommittee conference call.*

*In the context of this Specialized Water Court recommendation, the subcommittee recommends the following statement setting forth some basic caveats. The subcommittee recommends that the final report of the Task Force include the following language as part of its recommendation to the Legislature regarding this option:*

*In assessing possible new structures for resolving disputes involving water rights, particularly disputes that are currently only resolved through conducting a general adjudication, the Task Force identified two new structures that might be used to address these disputes: (1) a specialized Water Court; and (2) an Office of Water Commissioners. Whether the Legislature invests in the creation of either of these new structures depends in large part on whether a sufficient need for these services exists. Preliminary input from the Department of Ecology indicates that there is a significant need for adjudications throughout the state. Currently there are 74 petitioned adjudications on which the department has not acted by initiating a new adjudication. These petitions cover basins across the state. In addition, the department is aware of other basins where conflicts involving water usage regularly arise, suggesting even more need for a commitment of state resources to undertake a significant adjudications effort.*

*The Task Force does not view itself as an entity with sufficient expertise or qualifications to recommend this kind of commitment by the state. The Task Force recommends that the Legislature engage in a discussion of this topic with a goal of making a determination of whether there is a need for the state to embark on a program to adjudicate a substantial number of basins within the state. The Task Force recommends that the Legislature receive input from a broad group of interested and affected entities before making its determination.*

*Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force has developed two structures that could assist in this effort. The first structure, a specialized Water Court, is discussed in this paper. The second structure, an Office of Water Commissioners, is discussed in a second paper.*

***Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force recommends the creation of a Specialized Water Court only if there is adequate funding for its creation and operation. The Court must be set up such that it will operate separate from the general superior courts and be funded separate from the superior courts. The Task Force does not support placing new responsibilities on the judicial system without adequate funding.***

**Summary—A Specialized Water Court:** A specialized Water Court (hereafter the “Water Court”) would be created as a branch of the Superior Court system in the State of Washington.<sup>1</sup> It is assumed that a constitutional amendment would be required to create the Water Court.

The jurisdiction of this court would encompass jurisdiction over general adjudications currently provided for in RCW 90.03.105-90.03.245 and RCW 90.44.220 and jurisdiction over appeals from Ecology water right decisions.<sup>2</sup> Jurisdiction over these types of water disputes would no longer be in general superior courts but instead would lie exclusively with the Water Court. Therefore, the constitutional provisions establishing the general jurisdiction of the superior courts would be amended accordingly.

**Composition of the Water Court.** The Water Court would be comprised of four judges appointed by the Governor.<sup>3</sup> The Supreme Court would be asked to provide recommendations for candidates for each water judge position. Any candidate would need to meet the minimum qualification of 5 years in the practice of law. Desirable (but not mandatory) qualifications would include experience in the field of water law or related environmental areas and experience in a judicial or quasi-judicial setting. Each of the first three positions would be filled by individuals residing in counties within each of the three court of appeals divisions; *i.e.*, position 1 would reside in a county within division 1, position 2 would reside in a county within division 2,

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<sup>1</sup> As a branch of the Superior Court, the Water Court would be a court of record.

<sup>2</sup> At the July 24, 2003 meeting, the Task Force decided to recommend four options to address the process for resolving disputes involving Ecology water right decisions. Two of these options include a role for a specialized water court. Under option F, an Ecology water right decision would continue to be appealable to the PCHB, but the decision of the PCHB would then be appealable to the Water Court and reviewed according to APA standards. Under option G, an appeal of an Ecology water right decision would go straight to the Water Court, which would hold a *de novo* evidentiary hearing as it reviewed Ecology’s decision. During the August 7, 2003 subcommittee call, the subcommittee decided to recommend to the full Task Force the following variation on these alternatives: a person aggrieved of an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at the Water Court. If the appeal was filed directly at the Water Court, the Water Court would determine whether the case should stay at the Water Court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the Water Court referred the case to the PCHB), the decision of the PCHB could be appealed to the Water Court, who would consider the appeal pursuant to APA judicial review provisions.

<sup>3</sup> The subcommittee will receive information from Ecology during the September 30, 2003 Task Force meeting regarding the workload demand of this court. Based on this information, the Task Force should determine whether to recommend that initial staffing of the Water Court with 3 or 4 judges. If initially staffed with 3 judges, the authorizing legislation and constitutional amendment would provide for subsequent increases in staffing if the court’s workload increases.

and position 3 would reside in a county within division 3. Position 4 would be a “floating” position, the judge appointed to this position could come from any county in the state.

**Position Terms and Retention Elections.** Except for during the first terms of these positions, each position would serve for six years at a time, with at least one of the positions up for retention election every other year. The Governor would appoint judges to all four positions in the first year. Assuming the first appointments were made in 2005, then in November 2006, position 1 would be up for election, in November 2008, position 2 would be up for election, and in November 2010, positions 3 and 4 would be up for election. The retention election for each position would cover the geographic area of the division of the court of appeals from which the specific individual came. For the “floating” position, the retention election would cover the division from which the specific judge came. Whenever a position became vacant before the judge’s full term had concluded, either by retirement or by failure to be confirmed in a retention election, the remaining portion of the term of the vacated position would be filled by Governor appointment followed by a retention election at the regularly scheduled time for that position. Whenever a position became vacant at the conclusion of a judge’s full term, the vacated position would be filled by Governor appointment followed by a retention election during the general election in the next even numbered year with the judge serving out the remainder of the position’s term.

**Central Court Administrator for the Water Court; Regional Offices.** A water court administrator would be appointed and would be centrally located in Thurston County. There would be three regional offices of the Water Court established, one in each of the divisions. Water court staff would be located both at the central location and at the regional offices. Court filings would be at the appropriate regional office of the Water Court.

**Selection and Responsibilities of Presiding Judge and Assistant Presiding Judge.** The judges of the Water Court would select a Presiding Judge and an Assistant Presiding Judge consistent with GR 29. In addition to having the responsibilities designated by rule, the Presiding Judge would be responsible for assigning each new water case filed with the Water Court. Assignment decisions would generally follow this structure: a new case originating in one or more of the counties in division 1 would usually be assigned to the position 1 judge or the “floating” judge, a new case originating in one or more of the counties in division 2 would usually be assigned to the position 2 judge or the “floating” judge, a new case originating in one or more of the counties in division 3 would usually be assigned to the position 3 judge or the “floating” judge. In addition to considering the geographic origin of the cases in making assignments, the Presiding Judge should also make assignments in a way that equitably distributes the court’s workload between the four judges and that addresses any claims of conflict or affidavits of prejudice.

**Water Court as Court of State of Washington may sit in any Location around the State.** While the administration of the Water Court would be centralized and Water Court filings would be at the appropriate Water Court regional office, the judicial officers of the Water Court could hold hearings at any location around the state. At the outset of each case, the assigned Water Court judge would designate the appropriate venue for the case and thereafter endeavor to hold any evidentiary hearings in the case in or near the locality of the venue. For the

convenience of the parties and the court and to minimize unnecessary expenditures, preliminary hearings and other matters that do not require the taking of evidence could be conducted by phone at the discretion of the assigned Water Court judge.

**Role of Water Court in Reviewing Ecology Water Right Decisions.** Assuming the Legislature creates a Specialized Water Court, the Court could serve a role in reviewing Ecology water right decisions.

The subcommittee recommends to the full Task Force that it adopt a variation on two options involving review of Ecology water right decisions selected during the July Task Force meeting. (See footnote 2). Under the subcommittee's recommended variation, a person aggrieved by an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at Water Court. If the appeal was filed directly at the Water Court, the assigned judge would determine whether the case should stay at the court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the superior court referred the case to the PCHB), the decision of the PCHB could be appealed to the Water Court, which would consider the appeal pursuant to APA judicial review provisions.

The subcommittee recommends that the Water Court's decision of whether to retain a case filed directly with the court or send it to the PCHB for an original hearing should be governed by the following non-exclusive list of factors:

- Whether the unique resources of the PCHB (*e.g., ability to provide procedural assistance, ability to provide mediation services free of charge*) would benefit the parties in this case;
- Status of the parties;
- Type of dispute;
- Complexity of the issues;
- Projected size of the case;
- Potential for participation by multiple parties.

**Anticipated Workload.** As noted above, the jurisdiction of the Water Court would be the jurisdiction to hear original general adjudication actions filed by the Washington State Department of Ecology and to hear appeals from Ecology water right decisions.

*General Adjudications Workload.* To manage the general adjudication workload of the Water Court, the Department of Ecology would prepare a proposed list of adjudications to be conducted throughout the state. This proposed list would be submitted to the Legislature. The Legislature would develop a final list setting out a ranking for the priority and sequence of the adjudications. The Legislature would also identify the source of the funding that would allow for timely implementation of the listed adjudications. The priority and sequence of the schedule for conducting general adjudications would distribute the timing and sequencing of cases such that the workload in each division of the Water Court is appropriately balanced. *I.e.,* the schedule might provide for "round 1" of adjudications, anticipated to take place between 2005 and 2015.

The “round 1” schedule would provide for the conducting of at least one general adjudication in each division, although it might provide for conducting multiple adjudications in a single division assuming sufficient projected capacity in the Water Court.

Appeals from Ecology Water Resources Decisions Workload. If the role of the PCHB is retained, as under Option F, it is projected that approximately 10 APA styled appeals of PCHB water right decisions would be filed each year. This breaks down to each of the four judges handling approximately 2.5 of these cases each year that would be in the nature of APA appeals.

If the role of the PCHB is eliminated, as under Option G, and the Water Court handles *de novo* evidentiary hearings of appeals from Ecology water right decisions, it is expected that the Water Court would hear approximately 85 of these cases per year. This breaks down to each of the four judges handling about 21 of these cases each year.

If the PCHB can be skipped over at the election of appellants, as under the subcommittee’s variation on Options F & G (see footnote 2 and discussion in text above), it is impossible to project the court’s workload for this category of cases other than to say it would fall somewhere between 10 and 85 cases a year.

Jurisdiction to maintain and update adjudication decrees. The adjudication statutes would be revised to authorize the water court to periodically maintain and update adjudication decrees. However, from a workload perspective, the tasks of maintaining and updating decrees would be considered secondary to the initial tasks of the Water Court to complete adjudications throughout the state and to process appeals from Ecology water resource decisions. Therefore, it is expected that the Legislature would not include these tasks in its initial schedule for conducting adjudications.

Jurisdiction to hear cases involving water quality. At the outset of the operation of the Water Court, its workload would include conducting general adjudication actions filed by the Washington State Department of Ecology and hearing appeals from Ecology water right decisions. However, the Task Force notes that issues involving water quality and water quantity are integrally related. Therefore, the Task Force recommends that the constitutional amendment establishing the jurisdiction of the specialized Water Court be broad enough to allow the Legislature to take action in the future to empower the Water Court to handle cases involving water quality issues (assuming sufficient funding and capacity).

Jurisdiction of Water Court judges in non-water cases. Water Court judges would only have jurisdiction over the water-related cases described in this paper. Water Court judges would not have jurisdiction over other cases typically handled by other judges of the superior court.

**Authority to Appoint Water Court Commissioners, Special Masters, Referees, and other Court Staff.** Judges of the Water Court would have the same powers as do other superior court judges to appoint court commissioners, special masters, referees, and other court staff to assist them in handling any of the water cases pending before the Water Court. This could be done using a number of approaches. Commissioners and other staff could be assigned to support the Water Court (they would be permanent staff of the Water Court) and their services could be

used by any of the Water Court judges on an as-needed basis. Presumably, under this approach, the commissioners would be housed either at the location of the central Water Court or one of the regional offices but could travel to the locality of a case as needed in the same manner as would the judges. A second approach would be to empower the Water Court judges with authority to appoint commissioners and other court staff on a case-by-case basis. Under this approach, the commissioner would not necessarily be housed at the location of the central Water Court or one of the regional offices. Instead, the commissioner might reside in the venue of a particular case. The first option would probably better serve the value of developing and utilizing expertise. The second option would probably better serve the value of keeping the court connected to the locality of the dispute. A third option would be for the Task Force not to identify a specific option for appointing court staff but instead to include in its report a statement that it would be expected that the Water Court could appoint and utilize commissioners in the same manner as does the Superior Court. *See* RCW chs. 2.24 and 4.48 (for commissioner and referee appointments) and CR 53.3 (for special master appointment).

Any estimate of the budget associated with the creation and operation of the Water Court should include costs associated with all court staff, including commissioners, special masters, referees, and other staff.

**Funding.** The Water Court should be funded by a combination of public funding and fees paid by litigants. Because a court (even a specialized court) is a public entity, the subcommittee believes the large majority of the funding should be public. The subcommittee believes this portion should be state funded (not local funded).

A small portion of the court's funding should come from litigant fees. The subcommittee recommends that a statutory fee schedule be established by the Legislature at a range equal to or similar to the current fees of \$250 to initiate a lawsuit and \$25 to file a claim. The fee schedule could identify one fee for participants in an adjudication and another fee for participants in an appeal of an Ecology Water Right decision. Under any fee schedule approach, the Legislature should include incentives for early resolution, such as reduced fees for participants that resolve their claims early in the process and/or without the need for a contested court hearing.

# *Appendix*

## *H*

**This appendix represents the work of a subcommittee of the Task Force. The Task Force did not discuss any of the details contained in this paper during any of its Task Force meetings. Without necessarily endorsing the specifics of this concept, the Task Force includes this paper as an appendix to its report to document the work of its subcommittee.**

*September 12, 2003  
Revised Draft*

**“SECOND CHOICE” ALTERNATIVE TO CREATING WATER COURTS:  
Creating a State-Wide Pool of Experienced Special Judicial Water Commissioners  
to Assist Superior Court Judges with General Adjudication Hearings and other Water  
Resources Cases**

**Introduction and qualifications regarding this recommendation**

*This draft paper is provided by a subcommittee of the Water Rights Disputes Task Force to the full Task Force for consideration at the September 30, 2003 Task Force meeting. The subcommittee recommends that the full Task Force endorse this alternative as a “second choice” alternative to its primary recommendation for a Specialized Water Court.*

*The concept of developing a second-choice alternative was discussed at the Task Force’s meeting on July 24, 2003. Providing a second-choice alternative would give policy-makers another option should they determine the primary recommendation is not feasible. Unlike the Specialized Water Court option, this “second-choice” alternative would not require an amendment to the state constitution.*

*In the context of both its Specialized Water Court recommendation and this “second-choice” option, the subcommittee recommends the following statement setting forth some basic caveats. The subcommittee recommends that the final report of the Task Force include the following language as part of its recommendation of this option:*

***In assessing possible new structures for processing disputes involving water rights, particularly disputes that are currently only resolved through conducting a general adjudication, the Task Force identified two new structures that might be used to address these disputes: (1) a specialized Water Court; and (2) an Office of Water Commissioners. Whether the Legislature invests in the creation of either of these new structures depends in large part on whether a sufficient need for these services exists. Preliminary input from the Department of Ecology indicates that there is a significant need for adjudications throughout the state. Currently there are 74 petitioned adjudications on which the department has not acted by initiating a new adjudication. These petitions cover basins across the state. In addition, the department is aware of other basins where conflicts involving water usage regularly arise, suggesting even more need for a commitment of state resources to undertake a significant adjudications effort.***

***The Task Force does not view itself as an entity with sufficient expertise or qualifications to recommend this kind of commitment by the state. The Task Force recommends that the Legislature engage in a discussion of this topic with a goal of making a determination of whether there is a need for the state to embark on a program to adjudicate a substantial number of basins within the state. The Task Force recommends that the Legislature receive input from a broad group of interested and affected entities before making its determination.***

*Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force has developed two structures that could assist in this effort. The first structure, a specialized Water Court, was discussed in a prior paper. The second structure, an Office of Water Commissioners, is discussed in this paper.*

*Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force recommends the creation of an Office of Water Commissioners only if there is adequate funding for its operation. The Office must be set up such that it will operate separate from the general superior courts and be funded separate from the superior courts. The Task Force does not support placing new responsibilities on the existing superior courts without adequate funding.*

**Summary—State-Wide Pool of Judicial Water Commissioners.** Under this alternative, the statutory process for general adjudication would be kept largely as-is – a general adjudication case would still be heard by a local superior court judge. The innovation under this alternative is that the State Supreme Court would create an Office of Water Commissioners. For individual water cases, the superior court judge assigned to the case could draw on one of these commissioners to assist the superior court judge with the case. The superior court judge would still have ultimate responsibility for all aspects of the case. The judicial water commissioners would be employed by the Office of Water Commissioners on an on-going basis, and would be expected to work on multiple water cases at any given time. This would mean that the experience each commissioner acquired could be drawn on in subsequent cases.

**Rationale for the Proposal.** This proposal is intended to enhance judicial expertise in water right cases while maintaining the existing structure of superior courts, including the existing general adjudication process. This proposal should be easier to implement than the recommendation to create specialized water courts because it would not require a constitutional amendment or the creation of an entirely new court.

**Appointment of Judicial Water Commissioners/Assignments of Particular Water Commissioners to Provide Assistance on Individual Cases.** The judicial water commissioners would be appointed by the Supreme Court to the Office of Water Commissioners. The services of the water commissioners would be drawn on by the superior court judges on an on-going basis, so that their expertise could be carried over from case to case. Appointment to the Office of Water Commissioners could either be indefinite or for a specific term (with a review process to determine reappointment for another term). Assignments of a particular commissioner to a particular case would be done on a case-by-case basis by the superior court judge requesting assistance. When the need for a new assignment arose, the administrator of the Office of Water Commissioners would identify to the requesting judge which commissioner(s) were available and had the capacity to provide assistance in a new case and then the requesting judge would make a formal designation “assigning” the commissioner to the case.

**Qualifications of Judicial Water Commissioners.** The minimum qualifications for judicial water commissioners would be the same, or nearly the same, as those decided on for water court judges: a mandatory requirement of 5 years as an attorney and a list of desirable qualifications such as experience in water law or related environmental areas and/or experience in a judicial or quasi-judicial setting. The requirement of five years practice as an attorney, or something along these lines, is important given that evidentiary hearings in water adjudications

are governed by the rules of evidence. Based on its determination of projected workload, it is expected that the Legislature will determine how many commissioners should be appointed to the Office of Water Commissioners. Once the number is determined, appointments should aim to make the residence of commissioners roughly proportionate to the projected proportion of casework coming from each geographic region of the state. *I.e.*, If it is expected that roughly half of the new adjudication work will originate in eastern Washington, then half of the commissioners should be appointed from eastern Washington candidates. Assuming there are at least three commissioners appointed initially, at a minimum at least one commissioner should come from each of the three geographic regions representing the three court of appeals divisions.

**Role of Judicial Water Commissioner.** This is an important issue. If too much authority is given to the judicial water commissioners, then it undermines the interest in having a local decision-maker (the judge) who is responsible to the local electorate. If too little authority is conferred, then the advantage of acquired expertise is lessened and the judges' workload can become excessive. The effect on the judges' workload becomes even more significant depending on whether the judge is responsible for other cases in addition to the general adjudication.

In an attempt to strike an appropriate balance to address these issues, the subcommittee recommends that the judicial water commissioner have the authority to act in any water case in the same capacity as the judge. In general, the water commissioner would have those powers listed in RCW 2.24.040 (provided to superior court commissioners) applicable to his/her work on a water case. In an individual case, the assigned judge would determine what responsibilities to give to the commissioner. This could include authority to hold evidentiary hearings to determine the facts underlying individual and multiple claims and authority to issue decisions for the court, including decisions on both factual and legal issues. As with superior court commissioners, decisions of the water court commissioner would become the final decision of the court unless they were the subject of a motion for revision filed with the judge pursuant to RCW 2.24.050. The "revision" option should ensure that the local judge will have the final say on all decisions in every case.

**Local Administration of General Adjudications.** Although a specialized water court would be centrally located in many aspects, the second-choice alternative would involve primarily local administration in that the judge with ultimate responsibility in the case would be a local superior court judge and the case administration would be handled by the local superior court staff.

The local focus would simplify the sharing of information within the particular case (filing of claims, pleadings, and exhibits, etc. would all be handled locally). However, to the extent that information sharing among different courts hearing different adjudications serves to facilitate development of expertise and consistency in decisions, the local focus would be more of an obstacle. However, it would be expected that the water commissioners would consult with one another to facilitate the sharing of expertise across cases.

**Authority to Appoint Special Masters, Referees, and other Court Staff.** In addition to being able to draw on the services of a Water Commissioner, judges assigned to a water case would have the same powers as do other superior court judges to appoint special masters, referees, and other court staff to assist them in handling their water cases. *See* RCW chs. 2.24 and 4.48 (for referee appointments) and CR 53.3 (for special master appointments).

**Judicial Water Commissioners — Role in “PCHB Cases”** Assuming the Legislature creates an Office of Water Commissioners to assist in adjudications, the same commissioners could be available to assist in providing review services for water right cases that currently go through the PCHB.

The subcommittee recommends to the full Task Force that it adopt a variation on two options involving review of Ecology water right decisions selected during the July Task Force meeting. Under the subcommittee’s recommended variation, a person aggrieved by an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at the local superior court. If the appeal was filed directly at the local superior court, the assigned judge would determine whether the case should stay at the court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the superior court referred the case to the PCHB), the decision of the PCHB could be appealed to the superior court, which would consider the appeal pursuant to APA judicial review provisions. Under this model, when the superior court retained one of these cases for an evidentiary hearing or when the court did not retain a case but the case came to it on appeal from the PCHB, the court could seek the assistance of a water commissioner.

The subcommittee recommends that the court’s decision of whether to retain a case filed directly with the court or send it to the PCHB for an original hearing should be governed by the following non-exclusive list of factors:

- Whether the unique resources of the PCHB (*e.g., ability to provide procedural assistance, ability to provide mediation services free of charge*) would benefit the parties in this case;
- Status of the parties;
- Type of dispute;
- Complexity of the issues;
- Projected size of the case;
- Potential for participation by multiple parties.

**Anticipated Workload.** As noted above, the judicial water commissioners would assist with general adjudications as well as on cases involving appeals from Ecology water right decisions.

*General Adjudications Workload.* To manage the general adjudication workload, the Department of Ecology would prepare a proposed list of adjudications to be conducted throughout the state. This proposed list would be submitted to the Legislature. The Legislature would develop a final list setting out a ranking for the priority and sequence of the adjudications. The Legislature would also identify the source of the funding that would allow for timely implementation of the listed adjudications. The Legislature would consider the capacity of the water court commissioners when setting the schedule for new adjudications workload of the superior courts.

*Appeals from Ecology Water Resources Decisions Workload.* If the role of the PCHB is retained, as under Option F (July task force meeting), it is projected that approximately 10 APA-styled appeals of PCHB water right decisions would be filed each year.

If the role of the PCHB is eliminated, as under Option G (July task force meeting), and the superior courts handle *de novo* evidentiary hearings of appeals from Ecology water right decisions, it is expected that the superior courts would hear approximately 85 of these cases per year. As noted above, the water commissioners could be used to reduce some of the superior court workload impact of these cases.

If the PCHB can be skipped over at the election of appellants (new variation recommended by the subcommittee), it is impossible to project the superior court (and corresponding commissioner) workload for this category of cases other than to say it would fall somewhere between 10 and 85 cases a year.

It should be noted that the expected costs to the public of this proposal would be more than just the expenses incurred by the new judicial water commissioners. In the counties where general adjudications are begun, the superior courts, county clerks, and other staff would have significantly higher workloads. In addition, an increase in the volume of adjudications work throughout the state would mean an increase in associated staffing at the Department of Ecology and the Attorney General's Office.

**Funding.** The Office of Water Commissioners could be funded through a combination of public funding and fees paid by litigants. For funding of the specialized water court option, the subcommittee recommended that the large majority of the funding should be public and the public funding should be state funded (not local funded). The same recommendation could be made for funding the Office of Water Commissioners.

In the context of the specialized water court, the subcommittee determined that a small portion of the court's funding should come from litigant fees. This recommendation could also be made for the funding of the Office of Water Commissioners. The Legislature could establish a statutory fee schedule at a range equal to or similar to the current fees of \$250 to initiate a lawsuit and \$25 to file a claim. The fee schedule could identify one fee for participants in an adjudication and another fee for participants in an appeal of an Ecology Water Right decision. Under any fee schedule approach, the Legislature should include incentives for early resolution, such as reduced fees for participants that resolve their claims early in the process and/or without the need for a contested court hearing.

# *Appendix*

## *I*

**Water Court Assumptions:**

*Estimates are based on 2003 fiscal note assumptions with some modifications for water court scenarios.*

*Administration Staffing:*

2.4 staff per judicial officer used in 2003 fiscal notes.

1.4 per judicial officer used for this estimate as 1 court reporter FTE not included (electronic recording).

*Clerk's Office Staff:*

4 staff per judicial officer used in 2003 fiscal notes and assumed for the water court scenarios.

*Salary/Benefits:*

Commissioner salary/benefits assumed to be at 90% of judge salary/benefits.

Administrator salary assumed to be \$95,000 + 23% benefit rate (salary based on recent survey)

*Courtroom Facilities:*

Courtroom space is provided for each judge.

Commissioners will share courtroom space with judge.

Approximately 2 days per week commissioners will need additional courtroom space - conference room

Assumed 48 week year.

Assumed \$300 per day per conference room.

Square footage per judge does not include usual jury room or court reporter space.

*Operational Costs:*

2003 rate includes such costs as jury and indigent defense which water courts would not have.

However, same rate is used as water courts will incur other unusual expenses related to multiple court s

**Water Court Estimated Costs - 4 judges and 2 commissioners**

<b>Salary Costs</b>	FTEs	Rate	Total Sal/Ben	<b>Totals</b>
Judges	4	\$139,544	\$558,176	
Commissioners	2	\$125,590	\$251,179	
Admin staff (1.4 per jud off)	8.4	\$69,775	\$586,110	
Clerk's staff (4 per jud off)	24	\$41,582	\$997,968	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$2,580,058
Total FTEs	40.4			

<b>Operational Costs</b>	FTEs	Rate	Op Costs	
Per Jud Off	6	\$236,859	\$1,421,154	
Per Clerk staff	24	\$6,263	\$150,312	\$1,571,466

<b>Judge/Staff Capital Costs</b>	FTEs	Sq Ft/FTE	Cost	Capital Costs	
Judges courtroom/chambers	4	1450	\$165	\$957,000	
Comm chambers	2	250	\$165	\$82,500	
Staff offices	34.4	120	\$165	\$681,120	
Computers/furniture	40.4		\$10,000	\$404,000	
Recording equipment/courtroom	4		\$20,000	\$80,000	\$2,204,620

<b>Commissioner Facility Rental</b>	FTEs	Days/yr	Cost/room	Fac Rental	
Conference room rental	2	96	\$300	\$57,600	\$57,600

**\$6,413,744 Year 1**  
**\$4,209,124 Year 2**

**Water Court Estimated Costs - 3 judges and 1.5 commissioners**

<b>Salary Costs</b>	FTEs	Rate	Total Sal/Ben	<b>Totals</b>
Judges	3	\$139,544	\$418,632	
Commissioners	1.5	\$125,590	\$188,384	
Admin staff (1.4 per jud off)	6.3	\$69,775	\$439,583	
Clerk's staff (4 per jud off)	18	\$41,582	\$748,476	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$1,981,700
Total FTEs	30.8			

<b>Operational Costs</b>	FTEs	Rate	Op Costs	
Per Jud Off	4.5	\$236,859	\$1,065,866	
Per Clerk staff	18	\$6,263	\$112,734	\$1,178,600

<b>Judge/Staff Capital Costs</b>	FTEs	Sq Ft/FTE	Cost	Capital Costs	
Judges courtroom/chambers	3	1450	\$165	\$717,750	
Comm chambers	1.5	250	\$165	\$61,875	
Staff offices	26.3	120	\$165	\$520,740	
Computers/furniture	30.8		\$10,000	\$308,000	
Recording equipment/courtroom	3		\$20,000	\$60,000	\$1,668,365

<b>Commissioner Facility Rental</b>	FTEs	Days/yr	Cost/room	Fac Rental	
Conference room rental	1.5	96	\$300	\$43,200	\$43,200

**\$4,871,864 Year 1**  
**\$3,203,499 Year 2**

**Water Court Estimated Costs - 2 judges and 1 commissioner**

<b>Salary Costs</b>	FTEs	Rate	Total Sal/Ben	Totals
Judges	2	\$139,544	\$279,088	
Commissioners	1	\$125,590	\$125,590	
Admin staff (1.4 per jud off)	4.2	\$69,775	\$293,055	
Clerk's staff (4 per jud off)	12	\$41,582	\$498,984	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$1,383,342
Total FTEs	21.2			

<b>Operational Costs</b>	FTEs	Rate	Op Costs	Totals
Per Jud Off	3	\$236,859	\$710,577	
Per Clerk staff	12	\$6,263	\$75,156	\$785,733

<b>Judge/Staff Capital Costs</b>	FTEs	Sq Ft/FTE	Cost	Capital Costs	Totals
Judges courtroom/chambers	2	1450	\$165	\$478,500	
Comm chambers	1	250	\$165	\$41,250	
Staff offices	18.2	120	\$165	\$360,360	
Computers/furniture	21.2		\$10,000	\$212,000	
Recording equipment/courtroom	2		\$20,000	\$40,000	\$1,132,110

<b>Commissioner Facility Rental</b>	FTEs	Days/yr	Cost/room	Fac Rental	Totals
Conference room rental	1	96	\$300	\$28,800	\$28,800

**\$3,329,985 Year 1**  
**\$2,197,875 Year 2**

# *Appendix*

## *J*

# **Expected Efficiencies Resulting from the Alternatives Proposed by Streamlining the Water Rights General Adjudication Procedures**

A Report Issued by  
Washington Department of Ecology  
and  
Office of the Attorney General

The “Streamlining the Water Rights General Adjudication Procedures” report was delivered to the Washington State legislature in December 2002. The current report addresses the impacts in terms of staff, court and claimant time, reduction of claims, and costs associated with the implementation of the alternatives proposed in that document.

It is not possible to specifically quantify the time and cost savings for the nine strategies offered in the Streamlining Adjudications report, since adjudications vary greatly depending on the size of the area, number of water sources, number of claims, available documentation, and so on. It should also be noted that there is little correlation between the duration of the adjudication and the cost associated with the case. The actual costs are dependent upon the amount of activity, both formal and informal, that occurs. So, for this report, Ecology looked at each strategy in light of expected efficiencies instead of specific costs.

In order to have a baseline to work from, Ecology examined five previous evidentiary hearings conducted by adjudicative court Referees. These five were selected because they are relatively recent, and because they represent rural as well as suburban areas of water use.

The five evidentiary hearings were for Adjudications of the:

- Little Klickitat River Drainage Basin (excluding the waters of Blockhouse Creek and Mill Creek);
- Surface and Ground Waters of the Wolf Creek Drainage Basin;
- Waters of the Duck Lake Ground Water Management Area;
- Surface Waters of the Yakima River Drainage Basin; Subbasin No. 1 (Cle Elum River); and
- Surface Waters of the Yakima River Drainage Basin, Subbasin No. 31 (Richland).

The following table summarizes the basic information of the evidentiary hearings conducted to produce the Reports of Referees. The table will be referred to in the subsequent discussions of the potential efficiencies represented by each of the alternatives.

**Table 1. Summary of Claim Activity in Five Adjudications**

Adjudication	No. of total Claims	No. Claimants appearing at hearing	No. of Rights Confirmed	No. of Denials of entire Claims	No. of Ecology Recommendations made for Claims	Duration of case (in months)	No. of State Certificates within Adjudication area	No. of Certificates of Change within Adjudication Area
Little Klickitat	155	119	98	85	0	76	33	5
Wolf Creek	37	8	8	30	0	156	2	0
Duck Lake	134	120	124	36	0	68	29	5
<sup>1</sup> YRDB Sub 1	26	2	15	11	12	*	17	1
<sup>1</sup> YRDB Sub 31	63	37	29	38	12	*	15	0
Average	69	48	46	33		100	16	2
Total	415	286	274	200	24		96	11

Several clarifications should be made here regarding this paper as a whole. First, as used within this document, “claim” refers to a claim filed with a superior court to become a party to an adjudication and to defend a water use. Authority for water use can be reflected by a 90.14 claim (see below), a permit, a certificate, a federal reserved right, or a permit exception. The term “RCW 90.14 claim” is used within this document when referring to a Statement of Claim filed in the state water right claim registry. A water right claim is intended to document an assertion to a water right that pre-dates permit requirements (1917 for surface water, 1945 for ground water).

Secondly, it is good to remember that while this document only considers the direct costs of an adjudication, there may be additional costs to claimants. Since the initiation of an adjudication places all included water rights in doubt, it may be difficult to obtain approval for loans to fund the planting of crops, for example, or for building when water rights associated with the land are being adjudicated. Property sales are more difficult since it may not be realistically appraised when the water rights are in question.

Finally, it should also be noted that the nine strategy recommendations included within the original report complement each other, and when implemented together increase the effectiveness of each. Efficiencies will usually be increased by implementing different strategies simultaneously, rather than one at a time. For instance, Strategy No. 1 (Ecology to Make Tentative Determinations – Claimants to Present Fully Documented Claims at the Outset) is more easily implemented if Strategy No. 4 (Ecology to Provide Comprehensive Background Information Early in the Proceedings) is also implemented. Strategy No. 8 (Expand the Use of Mediation) furthers the objectives associated with Strategy No. 1 and Strategy No. 4, as well as others.

The remainder of this paper reviews each of the nine strategies individually. A summary of the alternative is presented first, and then a discussion and the conclusions on efficiencies.

<sup>1</sup>The Adjudication of the surface waters of the Yakima River Drainage Basin was filed during 1977 and is ongoing. The Report of Referee for Subbasin 1 was issued June 15, 1988; the Report of Referee for Subbasin 31 was issued October 25, 1991.

## **Strategy 1: Ecology to Make Tentative Determinations – Claimants to Present Fully Documented Claims at the Outset**

This strategy encompasses two recommendations. The second part must be fulfilled in order for the first part to be possible, so having claimants present fully documented claims is examined first.

### Claimants to Present Fully Documented Claims at the Outset

Ecology does not routinely meet with the claimant until field investigations are conducted within the adjudication area. This can be a significant time after claims have been filed with the court.

This part of the strategy requires that the claimant and Ecology meet *prior* to the filing of a claim to the court by the claimant. Ecology and the claimant would share documentation. If additional information is needed, the claimant would be responsible for obtaining it within a reasonable period. Through meetings with claimants, Ecology could assist in the filing of an adequate claim and assist in resolving issues concerning the filing of claims involving several parties or overlapping interest between parties.

### Conclusion

Court time is expensive for the state and for the claimants. By facilitating the presentation of valid, well-documented claims at hearings, considerable dollars would be saved. Based upon the data in Table 1, it is estimated that 10% of all claims filed with the court in the sampling could be avoided if potential claimants were to meet with Ecology prior to the filing with an adjudicative court.

### Ecology to Make Tentative Determinations

The first part of Strategy 1 proposes that Ecology review all supporting documentation at the outset of an adjudication and perform the initial determination on the validity of water rights. It is estimated that through the proposed process of having claimants prepare complete documentation at onset, Ecology could make recommendations on as many as 80% of all claims.

Applying the 80% figure to the five adjudications summarized in Table 1, Ecology would have recommended 200 claims for approval. Assuming that nearly all (say, 90%) of the claimants who received a favorable recommendation would not file an objection, the court would have been saved the burden of holding hearings for 180 claims. Resolving those claims prior to hearing would save the court approximately 20 days of hearings, along with countless days of evaluation.

Ecology would probably be more cautious in recommending denials than approvals, to ensure that each claimant has every opportunity to present their case for approval. Further, it is assumed that about 70% of the claimants receiving a denial would be satisfied with the decision and not proceed further. (The 70% assumption is based upon the approximate rate at which appeals of denials issued through Ecology's administrative permitting functions are appealed to the Pollution Control Hearings Board – PCHB.)

It is estimated that nearly half of the total claims denied by the court would also be denied by Ecology, on a purely factual basis. Therefore, the court's burden would be reduced to dealing with only about half of the denials, ones that are predominantly legal in nature. Based upon Ecology's estimates, the total savings of the 200 denied claims in the sample would have been 97 claims, saving expenses and about ten days of evidentiary hearing along with the evaluation of those claims.

This strategy shifts costs to the beginning of an adjudication and shifts costs from the court to Ecology. A net saving should be realized through the rapid resolution of claims and the reduction of duplicative effort as Ecology and the claimants each separately investigate claims later in the adjudicative process.

#### Conclusions:

- 1) In total, the implementation of Strategy 1 might have saved the court 30 days of claimant hearings (involving 277 claims) that occurred because this strategy is not in place. There would be additional savings on staffing costs and administrative costs made at public expense.
- 2) By Ecology identifying the relevant claims in a case up front, the duration (averaging 100 months in three sampled adjudications) and cost (a million dollars a year, based on Acquavella) of a future adjudication would be greatly reduced.
- 3) Ecology estimates that recommendations could be provided to the court for the approval of as much as 80% of those court filed claims that would eventually be affirmed by the court.
- 4) Ecology estimates that recommendations could be provided to the court for denial of at least 50% of those claims that would eventually be denied by the court.

#### **Strategy 2: Create a New Process for Ecology to Validate Registered 90.14 Water Right Claims**

This proposal suggests a means to resolve RCW 90.14 claims<sup>2</sup> of questionable validity and extent, absent a general adjudication or a means to clarify the record prior to an adjudication being conducted. As with Strategy 1, Ecology would meet with the property owners of the claimed right to discuss the validity of the RCW 90.14 claim and share documentation. If additional information was needed, the property owner(s) of the claimed right would be responsible for obtaining such documentation within a reasonable timeframe.

In the five adjudication hearings sampled, certificates of water rights and certificates of change represented only 26% of the claims filed with the court. (The relationship of each state certificate and the claims heard was not researched.) At least 74% percent of the claims filed with the court were based on RCW 90.14 claims or on permit exempt use of ground water as authorized by RCW 90.44.050. Generally, water rights based upon a state issued certificate are easier to resolve than those that are not. Without a state water right document, there is no single source of record for the origin, development, and legal

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<sup>2</sup> "90.14 claims" refers to Statements of Claim documenting a water right within the state water right registry.

basis for the water use. County, state, and federal records must be researched to create evidence to support the claim.

This alternative would allow quick administrative processes with the opportunity to appeal to the PCHB as a means of clarifying the record based upon water right claims, thus reducing the duration and cost of adjudications.

There are approximately 169,000 RCW 90.14 claims registered with the state. Many of those RCW 90.14 claims, filed in or prior to 1974, do not represent the present water use under the water right.

### Conclusion

Administratively addressing many of these water uses would reduce the duration and cost of the formal adjudication process. It is difficult to quantify efficiencies because of the complexity of many of these undocumented claims. And, the longer adjudications are delayed, the more complex the process is likely to be since it becomes progressively harder to get good documentation.

### **Strategy 3: Allow Limited Special Adjudications**

Washington law currently only provides for adjudications to cover water rights for an entire water source or basin. While general adjudications are an effective means of determining the extent and validity of all such rights, they are not as useful a tool for resolving disputes among a limited number of claimants or for stream reaches or limited ground water areas instead of entire basins.

The public cost of conducting an adjudication the size of the surface waters of the Yakima basin (with approximately 2,500 claims to rights) is about one million dollars annually (dividing the total cost by the number of years). Utilizing limited adjudications could reduce the number of claims to be investigated and to be heard by the court, which would likely reduce the number of issues to be resolved. This will create substantial savings.

Ecology would obtain an additional tool for resolving water related controversy through this strategy. Many adjudications conducted within the past 30 years did not include federal reserve water rights and could have been conducted as limited adjudications.

### Conclusion

Limited adjudications would increase efficiency and reduce cost by focusing the process on the issues that require resolution by the court and only involving parties interested in a particular controversy.

### **Strategy 4: Ecology to Provide Comprehensive Background Information Early in the Proceedings**

Ecology presently does not provide comprehensive background information until the commencement of the hearing process, which can occur a significant period of time after

filing for an adjudication. This proposal shifts much of the research work that is performed later in the adjudication process to the beginning of the process. As a result, there would be a greater cost in the initial preparation of the adjudication but greater savings later in the adjudication.

If this alternative was adopted, most of the research, available documentation, and the initial evaluation of the documentation would be compiled by Ecology early in the process and made available to all parties. (Individual property title search would still be the responsibility of each claimant.)

Savings would be created by reducing the burden on record-holding entities to respond to numerous duplicative requests for public records. There would be savings created by assisting claimants in researching the factual background of their water rights, since claimants could submit an accurate water right claim to the court. The court would, early on, be provided with most of the information it would require to have a comprehensive understanding of the factual circumstances related to the area being adjudicated.

#### Conclusions:

- 1) An adjudication would be more efficient if there was a quick production of the most relevant information. This would allow for quicker filing of claims, scheduling of hearings, and accurate rulings of the court.
- 2) Local, state or federal agencies would be less impacted if the number of inquiries (often duplicative requests for public records) was reduced.

#### **Strategy 5: Authorize Pre-Filed Testimony**

Although the current procedural authority, at times, allows specific claimants to pre-file testimony because of witness availability, there are no clear provisions authorizing this process other than the use of legal depositions. Depositions are expensive, requiring the time of attorneys, Ecology and court staff, and claimants.

A typical claim may take ½ hour to present at hearing, while complex claims may take several hours. Pre-filed testimony could significantly reduce the time necessary for court hearings of claims and could provide additional information to the court process that would be valuable in providing recommendations for the confirmation of rights.

While one may testify to information that applies to several claims filed with the court, typically each claimant is expected to appear and testify to their current and historical water use practices. The five sampled adjudications represented 31 days of hearings at an average rate of seven claimants testifying per day. Pre-filed testimony would reduce the burden placed upon claimants to appear and would reduce hearing time.

#### Conclusions:

- 1) The duration of the hearings phase of an adjudication may be shortened and made more efficient resulting in a cost savings and quicker progress toward the evaluation of claims by the court.
- 2) An early record could be made of the information known by “old timers.”

## **Strategy 6: Utilize Information Technology More Efficiently**

The expansion of information technology within the adjudication process can produce substantial time savings through:

- the automation of routine court processes and documents;
- better tracking of claimants and claims, by mapping the water rights and connecting them with county parcel information;
- production of high quality maps and digital photographs; and
- satellite imagery.

Upon completion of an adjudication, information systems can serve as the tool for maintaining information in an easy-to-update format, providing easy access to pertinent documentation. It thus serves as a means for permanently preserving evidence.

GIS based maps could reduce the time necessary for the field investigation of claims. A field investigation of a single claim typically requires 1-3 hours. By using GIS to display relevant information for the investigator and the claimant, the investigation time should be reduced by about 50%. The reduction in the time required for the investigation would result from a reduction in data to be collected. Information typically located by the investigator (property boundaries, points of diversion, irrigated areas, farm roads, spring and stream locations) could be identified in advance and merely verified by the investigator.

### Conclusions:

- 1) Through the automation of many court processes and reliable access to data once collected, an adjudication and the administration of adjudicated water rights can be more efficient.
- 2) Information technology can be employed at many phases of an adjudication, and can provide a detailed record of a case for lasting understanding of the rulings of the court and an historical record of the properties involved. This information in turn will save time in future administrative activities, such as making changes to certificates and ensuring compliance.

## **Strategy 7: Develop Aerial Photograph Interpretation Expertise**

A substantial body of the information required by an adjudicative court is available through aerial and satellite photography. This information includes property boundaries, points of diversion, irrigated areas, distribution systems, water sources, and buildings and roads. By extracting available information, Ecology reduces the requirement to use staff for field investigations and creates an information base that is available to claimants. To efficiently use photography, Ecology needs to continue to develop the expertise within its staff.

### Conclusions:

- 1) The accuracy and efficiency of an adjudication can be increased through the collection of existing information from aerial and satellite photography and interpretation depicted maps and acreage data.
- 2) The cost of an adjudication would be reduced through the reliance of photography rather than employing staff to visit every place of water use associated with claims.
- 3) Ecology staff should have on-going training in order to remain up-to-date, to better serve the adjudication process.

### **Strategy 8: Expand the Use of Mediation**

Currently, mediation or other alternative dispute resolution is not formally encouraged in the adjudication process. Mediation could be used to resolve specific issues among parties to an adjudication or to resolve claims entirely. It would complement Strategy 1, assisting in making recommendations to be advanced to the court. The cost of outside mediation sources is expensive, but state expertise could be developed through training.

### Conclusion

Mediation resulting in the settlement of issues or of claims would reduce costs by eliminating issues to be decided by the court.

### **Strategy 9: Develop Guidance on How to Maintain and Document a Water Right**

Currently, very little guidance is available to claimants on the preparation and presentation of their claims in an adjudication. The adequate documentation of water use and the historic development of a water right is a significant problem encountered during an adjudication. Support of a claim filed with a court, the ability of Ecology to recommend that a water right be confirmed, and the affirmation of a water right by the court are all dependent upon the evidence provided in support of the claim. Providing extensive public education may reduce the controversy that leads to adjudication. Once an adjudication is initiated, the process is expedited by an efficient production of factual data.

### Conclusions:

- 1) Informed water right holders who have retained important water use information would be better prepared to participate in an adjudication, improving the efficiency of the adjudication process.
- 2) The costs of the adjudication associated with delays and the hearing of arguments not consistent with basic water law principles may be reduced through a better educated public.

# *Appendix*

# *K*

## **Water Rights Adjudications**

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Distributed separately:

1. Map: Number of water right permits, claims and certificates by watershed, with pending adjudication petitions
2. Map: Number of pending applications for new water rights and water right changes, with current tribal reservations and treaty ceded areas

## **Reasons for Water Right Adjudications**

1. To quiet title of all vested water rights (a job to be done last century)
2. To provide certainty of rights and certainty of water to water users
3. To protect senior rights from impairment (and, where needed, to be able to regulate junior rights with certainty and authority)
4. Protect rights currently held in and/or for the stream
5. To determine water availability (and to prevent hoarding and speculation with water)
6. To make decisions on pending applications for new water rights
7. To support water marketing and water right changes and transfers (to protect consumers and rate payers; to enhance the value of rights through increased certainty)
8. To ensure that the water right record is current and to develop a water budget for management of water in the basin

## **Adjudication Workload ~ Geographic Distribution of the Work**

### Completed Adjudications

There are 82 completed adjudications, decrees rang from 1918 to 1990

Many are incomplete (mainstem diverters only, no ground water, sometimes no federal/tribal rights). Many are obsolete (no upkeep).

### Pending Adjudications

There are 6 adjudications that were started, but remain incomplete, with start dates ranging from 1921 through 1980.

There are 74 pending adjudication petitions; with filing dates that range from 1912 to 2000.

33 of these are from Central Regional Office  
24 of these are from Eastern Regional Office  
16 of these are from Southwest Regional Office  
5 of these are from Northwest Regional Office

(A few of the petitions involve more than one region.)

### Unadjudicated Claims

There are approximately 170,000 unadjudicated water right claims on file with the state. These are distributed across the state -- there are unadjudicated claims in every watershed.

Over 95,000 of the claims are in Western Washington, where most watersheds have several thousand claims each.

(See the map of claims and pending petitions.)

## **Adjudication Workload ~ Adjudication Process and Workload Factors**

Adjudication steps include:

1. Petition (or state initiated action)
2. Case development and filing
3. Notice and summons
4. Filing of claims
5. Field investigation and mapping
6. Prehearing conference
7. Evidentiary hearings
8. Report on hearing
9. Post-hearing briefings
10. Exceptions (filings, hearings, responses)
11. Report on exceptions
12. Supplemental report (and second supplemental report, if needed)
13. Appeals, remands
14. Conditional final and final orders (decree)
15. Superceding certificates, archiving
16. Compliance (watermasters/stream patrols, monitoring, enforcement)

(Plus a constant flow of motions – to join, change status, late claims, etc. Acquavella sees “a foot of paper” each month – printing and mailing costs for the case were \$170,000 last biennium.)

Some reasons for the heavy workload of an adjudication:

- Evidence goes back to 1870’s; hearsay evidence is admissible
- Water rights are fact-driven; and require consideration of technical information and hydrological models
- Multiple parties, often hard to find, often arriving late, many unrepresented
- Much of the water code is case law (and is not codified in statute)
- Exceptions and appeals are common
- The authorizing environment is mixed (cases are affected by external proceedings)

## **Adjudication Workload ~ Roles in an Adjudication**

The assigned Superior Court judge allocates the work of an adjudication:

- Leave it all to the Referee
- Have the court do all the work (decisions written by judge or clerks)
- Some combination

The Yakima adjudication is a combination:

- The 31 subbasins were left to the Referee (22 at Conditional Final Order)
- The 36 major claimants were kept by the Court (19 are at CFO)

There are 7 court staff involved in the Yakima Adjudication Court:

- The Judge has two staff:
  - ✓ A commissioner (full time) (holds hearings, bench rulings, writes decisions)
  - ✓ A clerk of the court (about half time on the adjudication)
- The Referee (full time) has three full-time staff:
  - ✓ One senior person dedicated to the subbasins proceedings
  - ✓ Another senior person dedicated to the major claimants proceedings
  - ✓ An administrative assistant
- Judge was full time earlier in the adjudication – now is half time, given stage of the case and experience of the commissioner.

There are 7 Ecology staff dedicated to the adjudication

The AG's Office dedicates the equivalent of 1 full-time attorney to the adjudication

Funding is also provided for a private court recorder and a private mediator.

There are around 2000 individual claimants participating in the adjudication, representing around 40,000 water users.

**Adjudication Workload ~  
Costs of the Yakima Adjudication**

Ecology's Adjudication Unit	\$ 847,000 per biennium
Referee's Office	\$ 717,000 per biennium
Ecology indirect costs	\$ 490,000 per biennium
Attorney General	\$ 410,000 per biennium
Ecology/Yakima County contracts	\$ 436,000 per biennium
Yakima Superior Court (estimate)	\$ 735,000 per biennium
<b>TOTAL</b>	<b>\$ 3,635,000 per biennium</b>

[NOTE: Historical costs for Acquavella are estimated at an average of \$2 M per biennium since the initiation of the adjudication in 1977.]

## **Adjudication Plan ~ Factors in Selecting the Next Adjudication**

### Petitions

- ✓ Pending historical petitions
- ✓ Statutory priority to any petitions filed by watershed planning units

### Needs

- ✓ Limited water availability
- ✓ Large backlog of pending applications
- ✓ Active water marketing

### Conflicts

- ✓ Need for regulation of rights, enforcement, etc.
- ✓ Growth and economic needs
- ✓ Instream flow needs
- ✓ Unresolved/unrecognized federal/tribal rights
- ✓ Endangered species/water quality issues
- ✓ Filings in federal court

### Workload

- ✓ Resources at Ecology, AG's Office and local Superior Court
- ✓ Complexity of the surface/ground water interactions
- ✓ Availability of scientific data on the hydrology of the basin

### Local conditions

- ✓ Local and legislative support
- ✓ Unsuccessful watershed planning efforts
- ✓ Ability of community to respond and participate

## **Adjudication Plan ~ Possible Next Steps**

The Default Future ~ current resources and current laws

Acquavella will ramp down next biennium  
File next adjudication in 05-07 biennium  
Reinvest the \$3.6 M per biennium

Adjudicate 2 basins every 5-10 years

An ongoing activity (200 years to quiet title?)

An Alternative Future ~ dedicated expertise and streamlining/efficiencies

Assume 3 water courts and 4 judges (or equivalent investment)  
Assume 3-5 basins per court, with 2-10 years per basin

10 years to 70 years to adjudicate the state

\$12 M per biennium

A More Modest Future ~ prioritize and start small

Prioritize and adjudicate 15 basins (1/4<sup>th</sup> of the state)  
Start with two water courts?

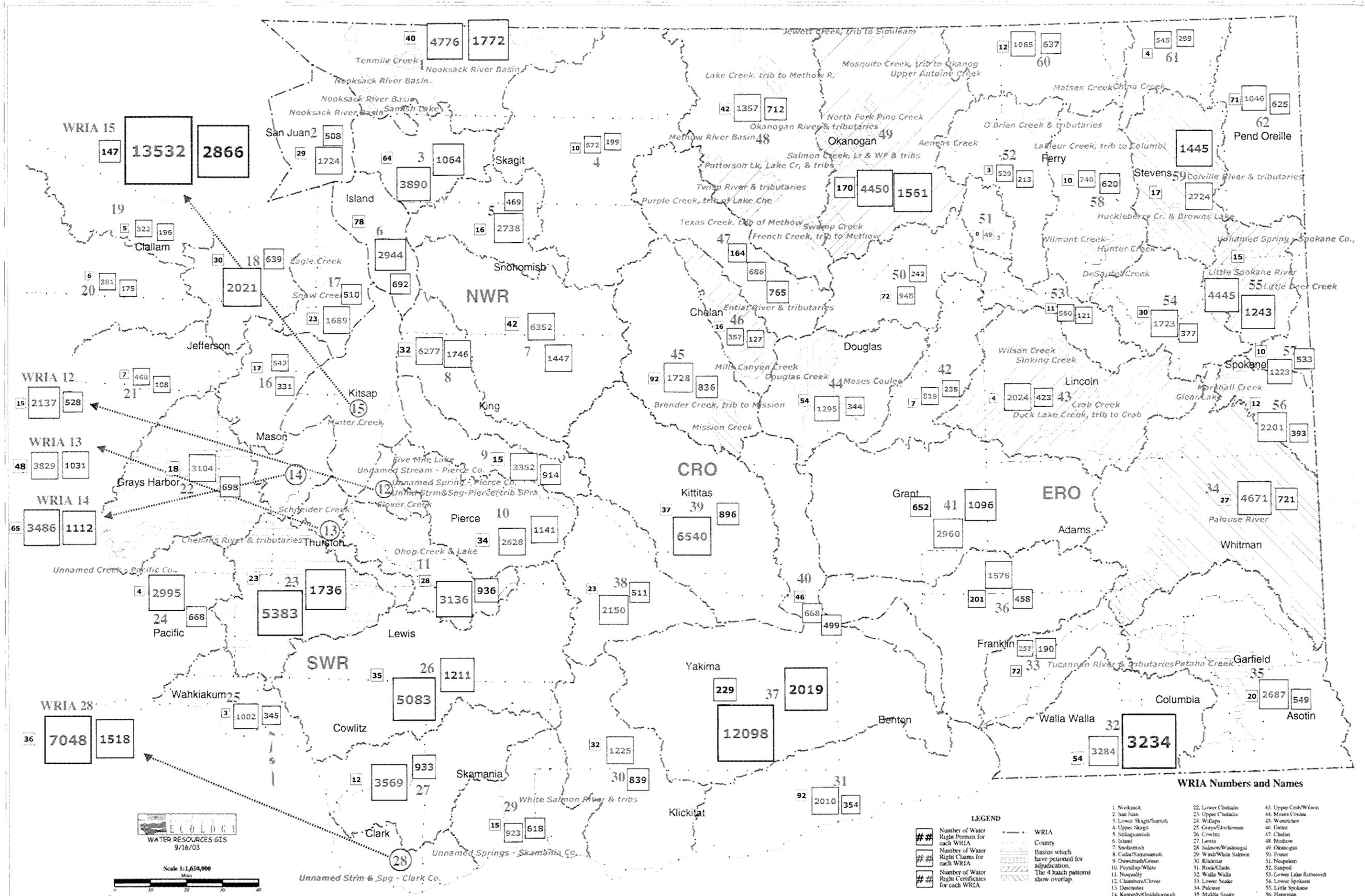
Decide long-term plans based on these initial basins

\$6 M per biennium

A choice for the Legislature

Completion of the Acquavella case will require decisions on  
implementation and next steps.

Ecology plans to bring these decisions to the Governor and the Legislature  
as part of the 05-07 budget request.



WATER RESOURCES GTS
   
 9/16/03
   
 Scale 1:1,650,000

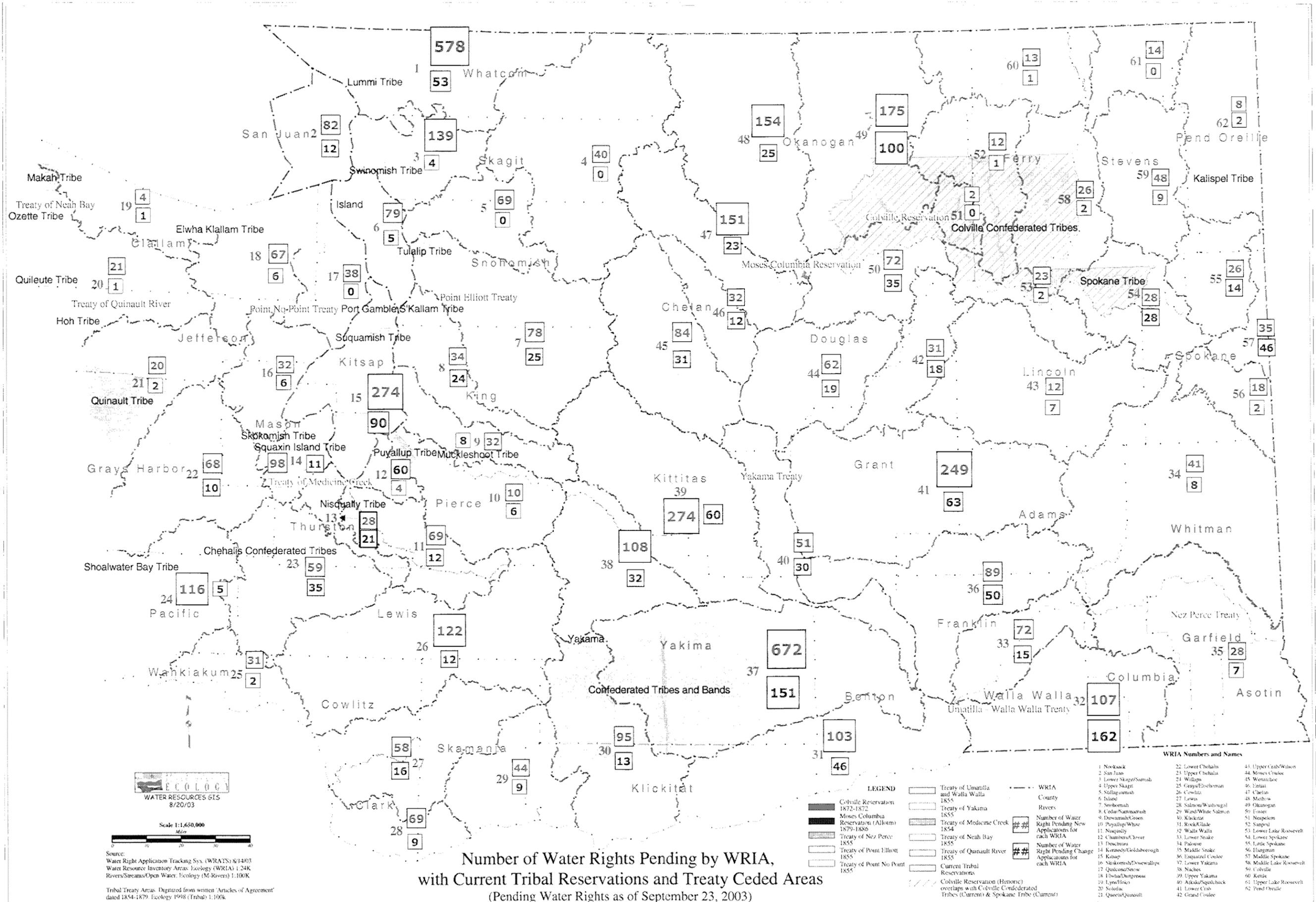
Source:
   
 Water Right Application Tracking Sys. (WRATS) 8/14/03
   
 Water Resource Inventory Areas, Ecology (WRIA) 1:34K
   
 Rivers/Streams/Open Water, Ecology (M-Rivers) 1:100K
   
 Petioned Basins, Ecology (WA St. Adjudicated Areas) 2001

**Number of Water Right Permits, Claims & Certificates by WRIA, with Petioned Basins**
  
 (Water Right Permits, Claims & Certificates as of September 15, 2003)

**LEGEND**

- ## Number of Water Right Permits for each WRIA
- ## Number of Water Right Claims for each WRIA
- ## Number of Water Right Certificates for each WRIA
- WRIA
- County
- Basins which have petitioned for adjudication. The 4 hatch patterns show overlap.

WRIA Number	WRIA Name
1	Nooksack
2	San Juan
3	Lower Skagit/Samish
4	Upper Skagit
5	Southern Skagit
6	Island
7	Snohomish
8	Cedar/Sammamish
9	Duwamish/Green
10	Puyallup/White
11	Nasqually
12	Cummins/Clover
13	Dumfries
14	Kennedy/Goldenough
15	Kittitas
16	Sakomish/Duwamish
17	Quilicura/Saw
18	Elwha/Dungeness
19	Lyre/Hoko
20	Soleole
21	Queets/Quinalt
22	Lower Cowlitz
23	Upper Cowlitz
24	Walla Walla
25	Grays/Hochatown
26	Cowlitz
27	Lewis
28	Salmone/Washougal
29	Wind/White Salmon
30	Klickitat
31	Roski/Glade
32	Walla Walla
33	Lower Snake
34	Palouse
35	Middle Snake
36	Esquatzal/Cooler
37	Lower Yakima
38	Naches
39	Upper Yakima
40	Alkali/Squitchuck
41	Lower Crab
42	Grand Coulee
43	Upper Crab/Wilson
44	Moses Coulee
45	Wentworth
46	Entiat
47	Chelan
48	Methow
49	Okanogan
50	Foster
51	Nasqually
52	Stapod
53	Lower Lake Roosevelt
54	Lower Spokane
55	Little Spokane
56	Hangman
57	Middle Spokane
58	Middle Lake Roosevelt
59	Colville
60	Kettle
61	Upper Lake Roosevelt
62	Pend Oreille



**ECOLOGY**  
 WATER RESOURCES GIS  
 8/20/03

Scale 1:1,650,000  
 Miles

Source:  
 Water Right Application Tracking Sys. (WRATS) 8/14/03  
 Water Resource Inventory Areas, Ecology (WRIA) 1:24K  
 Rivers/Streams/Open Water, Ecology (M-Rivers) 1:100K

Tribal Treaty Areas. Digitized from written 'Articles of Agreement' dated 1854-1879. Ecology 1998 (Tribal) 1:100K

# *Appendix*

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# **FEDERAL AND INDIAN RESERVED WATER RIGHTS**

## **A Report To The Washington State Legislature**

**October 2002**

Pursuant to Laws of 2002, ch. 371, § 122(4)(a), the Attorney General provides this report to the Washington Legislature on federal and Indian reserved water rights. The report is presented in three parts:

**PART 1: The Issues Presented In Defining Federal And Indian Reserved Water Rights**

- A. The Basic Principles Of Washington State Water Rights Law**
- B. The Basic Principles Of Law On Reserved Federal Water Rights For Indian Reservations And Other Purposes**
- C. Accounting For Federal Reserved Water Rights While Operating A State Water Rights System**

**PART 2: How Other States Deal With Federal Reserved Water Rights**

**PART 3: Methods For Dealing With Federal Reserved Water Rights**

### **INTRODUCTION AND SUMMARY**

Washington, as a sovereign state, administers and regulates the right to use water, but state water law exists within a larger federal context. When Congress created the Washington territory, and later when the territory was admitted as a state, most of the land was still owned by the United States. Portions of the land were occupied by Indian tribes and bands that had depended upon the area's resources for thousands of years. Through treaties or other federal arrangements, water was reserved for tribal use as a matter of federal law. Certain federal lands were set aside for specific federal uses, ranging from national forests to military installations. Although Washington has the responsibility to manage water and other natural resources as one of the attributes of statehood, that responsibility must account for, and yield to when necessary, water rights reserved and protected by the laws of the United States.

As Washington's population grows, its water supply faces increasing demands from Indian tribes, federal agencies, municipalities, developers, industry, farmers, and others. Requests for new water rights and requests for changes to existing water rights must be evaluated in light of existing water rights and instream needs such as flows necessary to support fish.

Federal and Indian reserved water rights are among the water rights that place current and future demands on many Washington watersheds. Many of these rights have not yet been judicially confirmed, quantified, or prioritized. The uncertainty surrounding the existence, quantity, and priority of these rights in a particular watershed gives rise to an overall uncertainty among all water users in the watershed.<sup>1</sup>

The current means to address these uncertainties is through the general adjudication process.<sup>2</sup> A general adjudication may be filed in state or federal court. The general adjudication process is frequently criticized as slow and costly. To date, 82 general adjudications have been completed in Washington. However, these proceedings adjudicated only approximately 10 percent of the surface waters in the state and many were completed in the 1920's in relatively small watersheds. The only general adjudication currently ongoing in Washington is the Yakima basin adjudication. The Yakima River adjudication, which involves approximately 4,000 parties and 40,000 land owners and covers over 10 percent of the surface waters in the state, was initiated in 1977 and is not expected to conclude for another 5 to 10 years.

In order to determine whether alternative approaches might be used in Washington to address water rights issues associated with federal and Indian reserved water rights, the 2002 Legislature directed the Attorney General's Office to prepare a report on the topic of federal and Indian reserved water rights. The report was intended to (1) examine and characterize the types of water rights issues involved; (2) examine the approaches of other states to these issues; and (3) examine methods for addressing these issues including administrative, judicial, and other methods, and combinations of these methods, with a brief discussion of implementation and funding requirements.

Federal reserved water rights and Indian reserved water rights are based on principles of federal law. However, these rights are frequently addressed in the context of Washington's state law-based systems because they are defined within the context of the state's priority system and must be considered as the state makes water rights decisions. Furthermore, as discussed below, federal water rights are addressed and resolved in state court general adjudications. Therefore, to provide a backdrop for addressing federal and Indian reserved water rights issues, Part I of this report begins with a description of basic principles of Washington water law.

Washington water law was originally developed as common law by the courts. Since 1917 when the first comprehensive water code was adopted, Washington's water law has been based on both statutes and case law. Pursuant to the "prior appropriation" doctrine, the first to initiate the diversion of water and put it to use holds the most senior right to the water. Other basic tenets of Washington water law provide that a water rights holder must put her water to

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<sup>1</sup> This uncertainty may also prove helpful in some scenarios. For example, the presence of a reserved (but unconfirmed and unquantified) claim in a particular watershed may create incentives for the water users to work together to better manage the limited resource.

<sup>2</sup> Ad hoc litigation involving two or more competing claims may resolve the rights of the litigating parties, but will not resolve the potentially competing claims of those who have rights to the same body of water but are not joined in the case.

continuous use to preserve her water rights and water rights can be finally fixed and quantified only by a judicial proceeding.

When land is reserved by a tribe under a treaty, or when the federal government reserves public land for federal purposes, sufficient water is reserved either explicitly or implicitly to meet the purposes of the reservation. Issues, such as whether a particular reservation creates a water right and, if so, for what quantity and with what priority date, are questions that depend upon the particular facts, circumstances, and legal documents surrounding the creation of the reservation. In other western states, these issues are addressed most frequently in the context of general adjudications, similar to those conducted in Washington. As part of these proceedings, the parties often attempt to settle these claims through traditional settlement negotiations. However, in most western states, including Washington, there are no specific procedures established in state law for negotiating these rights.

Some states, most notably Montana, have employed innovative approaches to resolving federal and Indian reserved water rights. Montana has created a commission, consisting partly of legislators and partly of executive branch appointees, with the specific mission of negotiating with Indian tribes and federal government agencies on questions of reserved water rights. Successful negotiations produce compacts that define the extent and nature of federal or tribal reserved water rights in a given area. The compacts are subject to approval by the state Legislature, by the tribal council, and by appropriate federal government agencies.

Montana combines its Reserved Rights Compact Commission with a state Water Court of specialized judges. The Water Court is currently conducting a long-term, statewide adjudication of water rights within the state, and the resolution of reserved rights is part of that adjudication. Other western states employ negotiation with federal and tribal agencies as part of their administration of water rights, usually implemented as part of a general adjudication (as in Idaho) or a water court system (as in Colorado).

By examining the approaches used in Washington and in other western states, we have identified three administrative and four judicial options for addressing federal and Indian reserved water rights. Some of these options can be used alone and some are more likely to be used in combination with others. The administrative options include: (1) a compact commission or similar state body like the one created by Montana's Legislature, (2) ad hoc negotiations led by the state's water resource agency, and (3) more aggressive watershed planning. Judicial options include: (1) more aggressive use of general stream adjudication, (2) negotiations coupled with commencement of general adjudications, (3) ad hoc approach of mixing litigation with negotiations when specific cases arise, and (4) creation of water courts.

The report identifies the costs and implementation issues associated with each of these options. If implemented in a wholesale manner, such as by creating state-wide water courts, many of these options will require new legislation and substantial financial investment on the part of the state. As an alternative, some of these options may be able to be implemented on a focused basis, such as by funding negotiations and adjudications in a few watersheds where the need for certainty is greatest.

## PART I

### ISSUES PRESENTED IN DEFINING FEDERAL AND RESERVED WATER RIGHTS

#### A. Basic Principles Of Washington Water Law

The primary purpose of this report is to assess the issues involved with accounting for federal and Indian reserved water rights. Even though these rights are based on principles of federal law, they frequently need to be addressed in the context of state systems (e.g., state permitting decisions or state adjudications) because they involve water bodies and watersheds that are also subject to state-based water rights claims. Thus, to understand the issues involved with federal and Indian reserved water rights, we begin with fundamentals of Washington state water law.

##### 1. Washington Water Law Is Based On The “Prior Appropriation” Doctrine

When the United States was formed by the union of thirteen former British colonies, all located on the Atlantic seaboard of North America, water was abundant, especially given the small colonial population. The colonies inherited the law of water rights as part of the common law of Great Britain, where no land is far from a lake, stream, or underground aquifer. Part of this common law heritage was the notion that water is a public resource, subject to regulation by the state. All fifty of the American states adopted this view.

Other common law rules defined how to allocate the right to use water and resolve disputes. The basic common law doctrine was that of “riparian” rights, in which the owner of a piece of land had a right to use water located within or next to that land. All of the “riparian” owners had an equal right to use of any body of water touching more than one property, with various rules developed to handle disputes.

*Example 1: A, B, and C own land in Crystal Valley, a small watershed containing Crystal Creek. A and B own the land directly abutting the creek, while C’s property is some distance from the stream. C’s predecessor in title began diverting water from Crystal Creek in 1880 for farming purposes. The land has been farmed ever since, using this water. B’s predecessor in title began diverting water from Crystal Creek in 1910 for domestic and stock-watering purposes. This use has also continued since that date. A’s land has never been developed in any way, except that a fishing cabin was built on the land in 1915. A uses the cabin two or three times a year, and takes water out of the creek for domestic needs at those times.*

*If Crystal Valley is in a riparian rights state, A and B have an equal right to use water from Crystal Creek. C has no right to this water, and could be ordered to stop all use. At common law, it would make no difference that A and B use the water for different*

*purposes. A and B could use the water in common, so long as they did not interfere with each other's reasonable uses.<sup>3</sup> If there is a water shortage, A and B must share the limited resource, with no priority established for either over the other.*

As miners and farmers began to settle the arid west, the “riparian” theory of water rights proved inadequate. Miners often needed great quantities of water, and their mines were often quite distant from the nearest water source. Almost all the land was still in public ownership, including most of the land “riparian” to the water sources. For farmers, the most irrigable land was not necessarily “riparian” to any water body. By the end of the nineteenth century, almost all the western states had adopted, in place of the “riparian rights” doctrine, a “**prior appropriation**” doctrine which awards water rights to the person who first took the water and put it to beneficial use, without regard to “riparian” ownership.<sup>4</sup>

***Example 2:** Assume the same facts as in Example 1, above. In a pure “prior appropriation” state, C, B, and A all have water rights in Crystal Creek, and in that order of priority. Early Washington case law gives riparian owners a priority date based on the date their land was patented, however, if Crystal Creek is in Washington, the priority dates for A and B might be their patent dates, which could be much earlier than the date when water was first beneficially used. For this example, assume the patent dates for A and B are the same as their original diversion dates. In that scenario, the order of priority for water use from Crystal Creek is C, then B, then A.*

## **2. Water Law Was Originally “Common Law” Developed By The Courts, But Is Now Based On A Statutory System Enacted By The Legislature**

In 1917, the Legislature enacted a water code which for the first time required all users of surface water in the state to apply for and obtain a permit from the state as a prerequisite to appropriating state water.<sup>5</sup> This code is codified primarily in RCW 90.03. The code adopts the “prior appropriation” system and sets forth several other basic principles discussed

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<sup>3</sup> About 30 states, all in the eastern half of the United States, have water right laws based on the riparian rights doctrine. Many have developed individual variants on the basic common law, such as setting aside certain uses of water as a higher priority, or allowing use by “non-riparian” property owners in certain circumstances.

<sup>4</sup> In early case law the Washington courts adopted a “mixed” system, in which prior appropriation applied only to water on public land and the riparian doctrine was used as to disputes between private citizens. Since the enactment of the 1917 Water Code, which clearly adopts prior appropriation as the governing principle of Washington water law, the courts have followed the Legislature’s policy choice. For all intents and purposes, Washington is now a “prior appropriation” state. The only diversionary riparian water rights that are now recognized in Washington are those that were perfected through beneficial use prior to 1932. *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Such rights must have been preserved through the filing of a statement of claim and can only be confirmed through a superior court general adjudication. If there was a general adjudication conducted prior to 1932 for the water body where a particular riparian water right is claimed, the right had to be decreed in such adjudication. *Dep’t of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P.3d 800 (2002) (“*Acquavella IV*”).

<sup>5</sup> There were earlier codes, but they either did not cover the whole state or were purely voluntary.

below. In 1945, the permit system was extended to ground water. The ground water code is RCW 90.44. It is now unlawful to appropriate any water in the state (with limited exceptions not relevant to this discussion) without first obtaining a water rights permit. The administrative duty of processing and approving permits was originally assigned to the state engineer, but that officer's powers and duties have now devolved to the state Department of Ecology.

There are a large number of pre-1917 water rights, which not only survive the enactment of the water codes but have high priority under both the riparian doctrine and the prior appropriation doctrine. Through a series of statutes, the Legislature has required holders of pre-1917 rights to preserve them by filing written claims with the state. The statute provides that claims not filed by the statutory deadlines will be cut off. There is no "approval" or other regulatory process as to these claims. They are simply kept on file, and only judicial proceedings in the form of general water rights adjudications can confirm or quantify the water rights represented by such claims. *See* RCW 90.14.041-.121.<sup>6</sup>

### **3. As Among Competing Claims To A Water Source, The Law Gives Priority Based On The Date When Water Was First Appropriated<sup>7</sup>**

As noted earlier, there is no set "priority" among users in a "riparian rights" state. By contrast, "prior appropriation" states like Washington grant priority to those claims which were first established through the beneficial use of water.<sup>8</sup> In theory then, all the rights to any body of water in Washington can be ranked, with the highest priority granted to the oldest appropriation and the lowest priority granted to the most recent. If there is insufficient water to meet the needs of all claimants, the "junior" rights must cease using water, starting in "reverse seniority" order, until all "senior" claims are satisfied. Claimant No. 1 is first entitled to full satisfaction of his/her water right. When that claim is satisfied, Claimant No. 2 is next in priority, and so on.

*Example 3: Assume the same facts as in Example 1 and the same patent dates specified in Example 2. If Crystal Creek does not produce enough flow to satisfy the water rights of A, B, and C, the law gives first priority to C, who is entitled to use sufficient water to meet the historic uses of its land. Once C's right is fully satisfied, B is entitled to use the*

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<sup>6</sup> As is discussed in more detail below, the state has no power to require persons claiming water rights under *federal* law to file claims with the state. The claims statute's requirements therefore apply only to those claiming pre-1917 rights acquired under state law.

<sup>7</sup> In some cases, the law recognizes that posting or other public expression of intent, followed by actual water use within a reasonable time, establishes the date of priority. For water rights established since the water codes were adopted, the date of application for a permit establishes the priority, so long as water is appropriated within a reasonable time after the permit is granted.

<sup>8</sup> As noted earlier, Washington does recognize some pre-1932 water rights based on riparian status, and to that extent is not a "pure prior appropriations" jurisdiction. The priority dates for such a right is based on the date the riparian land was patented from the federal government.

*remaining water. When C's and B's rights are satisfied, A may resume using the water still remaining.*

#### **4. To Preserve A Water Right, Its Owner Must Put The Water To Continuous Beneficial Use**

One important characteristic of prior appropriation law is that a water right first must be perfected by actual diversion and use of water,<sup>9</sup> and then the water must be put to continuous beneficial use to maintain and preserve the water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998); *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997). The term “beneficial use” is a term of art. The cases interpret the term to include virtually any reasonable use of water, so long as the public resource is not simply wasted. *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993). Even though a water right is a vested property right, it may be lost for nonuse. If a water user stops using the water for long enough, her right may be subject to loss through statutory relinquishment (voluntary failure to continuously use water for five or more consecutive years unless a specified statutory exemption to excuse the nonuse is shown) or through common law abandonment (intentional nonuse of the water). Statutory relinquishment is governed by RCW 90.14.130-.180. A water right may be lost either completely (by ceasing to use any water at all) or partially (by reducing the amount of water taken and used beneficially).

*Example 4: Assume the facts of Example 1, except that, in many years, C significantly reduced the amount of land irrigated with Crystal Creek water and therefore significantly reduced the amount of water taken. C might be found by a court to have relinquished or abandoned part of its water right, and C would have its original priority date only as to the amount of water put to continuous beneficial use. If C, having abandoned or relinquished part of its water right, now wishes to resume a higher level of use, C must apply for and obtain a water permit for the additional water. If granted, the permit will have a later priority date than B or A has. C will then be “senior” to B and to A as to some water, but “junior” as to the remainder.*

#### **5. A Water Rights Holder May Not Change The Place He Diverts The Water, The Place He Uses The Water, Or The Purpose Of Use To Which The Water Is Put, Without Obtaining Permission From The State**

A basic principle of Washington water law is that the characteristics of a water right are essentially “fixed” when water is appropriated for beneficial use (either under the common law or under a statutory permit system). The amount of water appropriated, the place at which the

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<sup>9</sup> More precisely, the right is perfected when the user gives public notice of intent followed by actual diversion within a reasonable time. Since this is a broad overview, this report will not discuss the specific statutes and case law explaining what acts satisfy these requirements.

water is diverted, the place at which the water is used, and the purpose of use of the water all define the nature of the right in question. Furthermore, except in limited circumstances, the owner of a water right does not have the right to change either the point of diversion or the purpose or place of use without obtaining approval for the change. Whether the change is approved depends on (1) whether the change would cause impairment of other existing water rights and (2) whether the change would result in an increase of the amount of water used or otherwise enlarge the right; and (3) for groundwater (but not surface water) changes, whether there is any public interest or welfare reason to deny the change. Water rights can be changed or transferred through statutory application procedures provided under RCW 90.03.380 and 90.44.100.

*Example 5. In our continuing example, assume that C previously withdrew water from Crystal Creek far downstream from B's place of diversion. To reduce the length of its diversion pipes, C proposes to change its place of diversion to a point upstream from B's place of diversion. If C applies for a change in point of diversion, whether the request can be granted will depend upon whether the change would interfere with any other water rights in the area, including those of both A and B.*

On a related note, water rights are generally appurtenant (i.e., “attached to” in a legal sense) to the land on which the water is used. Case law holds that the transfer of land includes transfer of the water rights appurtenant to that land, unless the water rights are specifically reserved in the deed or other instrument of transfer. *Drake v. Smith*, 54 Wn.2d 57, 337 P.2d 1059 (1959). Thus land can be sold or conveyed separate from its appurtenant water. Statutes prescribe and limit the manner in which water rights may be transferred separate from the land to which they are appurtenant. RCW 90.03.380, 90.44.100.

## **6. Water Rights In Washington Cannot Be Finally Fixed Or Quantified Except Through A Judicial Proceeding**

As noted above, Washington's water rights law began as a form of common law, dependent on case law decision. Since the enactment of the surface water code in 1917 and the groundwater code in 1945, Ecology has collected information about the permits issued concerning each body of surface water or underground aquifer, including certificates issued showing which water rights have been perfected through appropriation. However, Ecology may or may not have complete and accurate information about continuous beneficial use, changes in place of use or point of diversion, changes in land ownership or use of water, or other factors which would affect the determination of the extent of individual water rights. For pre-1917 water rights, Ecology may have written claims showing the water claimants believe they are entitled to, but cannot be certain whether the claims are accurate in all respects. Permits, statements of claims, and certificates provide the state with a rough sense how much water has been appropriated in a particular watershed and allow the exercise of judgment as to whether there is additional water available for appropriation, but they fall far short of the information needed to quantify or prioritize individual water rights.

To the extent that quantification and prioritization of water rights is necessary or desirable in Washington, it must be undertaken through court action. See *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993) ("*Sinking Creek*").<sup>10</sup> This court action can take the form of a *general adjudication*, in which all the water rights in a particular stream or watershed are determined,<sup>11</sup> or the form of specific cases in which a few competing claims are brought to court for determination. General adjudications can be complicated and costly, unless they are small in scope.<sup>12</sup> Other cases may take the form of quiet title actions brought between individual water rights holders. However, these other cases will only resolve disputes as between the parties to the action. They will not establish priorities for all water uses within a watershed.

Where there is sufficient water to meet all current needs, there is no urgent necessity in adjudicating specific water rights. When the supply of suitable water grows short, however, questions of who has priority and for how much water come to the forefront. While judicial actions provide a thorough and fair process, their length, cost, and complexity may reduce their attractiveness as a solution to uncertainty concerning water rights.

## **B. Basic Principles Of The Law Of Federal Reserved Water Rights, Including Water Rights Reserved For Indian Reservations**

Up to now, this discussion has been confined to Washington state law concerning water rights. Washington is one state within a federal union, however, and the United States government's role must be considered in analyzing any legal issue. At the very minimum, the United States is a major owner of land within the state and conducts various government operations which require water. Washington contains military reservations, national parks, national forests, wilderness areas, marine sanctuaries, and a host of other federally owned and operated facilities.

In addition to these direct federal government operations, nearly 30 Indian reservations have been established within the external boundaries of Washington. Each of these has been set aside as a homeland for one or more bands or tribes of Indians, through treaty, congressional act, or federal executive order. These tribes also need water, both for daily living and to conduct

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<sup>10</sup> The *Rettkowski* decision held that the Department of Ecology lacks administrative authority to quantify water rights, even tentatively, for purposes of enforcement actions. Under current law, Ecology cannot enforce without first establishing, through litigation, the priority and quantification of the rights in question. *Rettkowski* leaves open the possibility that the Legislature could establish some basis for administrative quantification of water rights. Subsequent cases have clarified that Ecology has authority to make tentative determinations regarding the extent and validity of water rights when processing applications to change water rights. *Merrill v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Pub. Util. Dist. v. State*, 146 Wn.2d 778, 794, 51 P.3d 744 (2002).

<sup>11</sup> The procedures for general water rights adjudications in superior courts are set forth at RCW 90.03.110-.245.

<sup>12</sup> Washington is currently undertaking only one general adjudication, covering the surface water rights in the Yakima River basin. The case was filed in 1977 and will not be completed for several more years.

various activities. This part of the report sets out the major issues encountered in trying to “fit” these federal and tribal reserved water rights into a state water rights system.

**1. When The United States Reserves Land For Some Federal Purpose, Including An Indian Reservation, The Federal Government Thereby Also Reserves Sufficient Water To Meet The Primary Purposes Of The Reservation. The Priority Date Of A Federal Reservation, For Prior Appropriation Purposes, Is The Date The Reservation Was Created<sup>13</sup>**

A basic principle of federal reserved water rights law, consistently followed by the federal courts since *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), is that when the United States acquires or sets aside land through reservation for some specific federal purpose, including an Indian reservation, the federal government also reserves sufficient water to meet the purposes of the reservation.<sup>14</sup> Since the laws and treaties of the United States preempt state law, a state may not cut off or limit the operation of these federal *Winters* rights. *Winters* concerned the creation of an Indian reservation in Montana, but later cases establish that the same basic principles apply to other types of federal reservations such as military bases and national parks.<sup>15</sup>

*Example 6:* Again assume the facts as in Example 1, except note that Crystal Creek is a tributary of Large River. The territory just across Large River from the mouth of Crystal Creek has been part of an Indian reservation since 1875. The Indian tribe draws some water from Large River for irrigation of tribal land. In the treaty creating the reservation, the tribe reserved the right to fish at its usual and accustomed places, which includes Crystal Creek. It is a safe assumption, given these facts, that the tribe has a federally protected reserved right to take water from Large River to satisfy the primary purposes of the reservation. The priority of this right is, at the latest, the date of the reservation, 1875.

*A question still before the courts is the extent to which a treaty fishing right implies a federally protected water right in specific off-reservation surface water bodies such as an instream flow right to maintain fish. The existence of such rights is clearly implied by*

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<sup>13</sup> On some occasions, courts have declared that certain tribal rights have a priority of “time immemorial” because they derive from the tribe’s pre-existing sovereignty. This is particularly true of fishing rights reserved by a tribe in a treaty. In the case of most of Washington’s Indian reservations, the date of creation of the reservation was so early that the reserved rights are the most senior water right in a watershed. Thus, it makes no practical difference whether the date of the reservation or “time immemorial” is named as the priority date.

<sup>14</sup> Cases uniformly hold that federal (non-Indian) reserved water rights are limited to the “primary purpose” of the federal reservation. An Arizona court has suggested that Indian reserved water rights may not be not limited in the same way. *In re the Adjudication of the Gila River*, Superior Court No. WC-90-0001-IR (filed November 26, 2001) (“Gila V”).

<sup>15</sup> There have been some efforts, particularly within the federal government itself, to define one or more categories of federal water rights based on something other than the *Winters* analysis. None of these alternate theories have been tested in litigation, however. This report concerns traditional “reserved” water rights, but some of the analysis might be applicable to federal water rights asserted to be based on some other theory.

*such cases as Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257, 850 P.2d 1306 (1993) (“Acquavella II”), and cases cited in that opinion, but the precise nature and extent of such rights have not been conclusively determined.*

**Example 7:** *In 1960, the United States purchased a portion of C’s land, where it has constructed and operated a salmon hatchery. When the government acquires land previously held in private ownership, the government may acquire water rights for its use of the land following the appropriate state procedures. In this case, the government may have acquired a portion of C’s water rights as part of the land purchase. If so, the government should have applied to the state to change the purpose of that right from irrigation to fish propagation. Alternatively, the government may have applied to the state for a new water right. Assuming the U.S. applied for a new water right in 1960, the Indian reservation water right is senior to those of A, B, and C, and the fish hatchery water right dates to 1960, and is thus junior to those of the private landowners. If the U.S. obtained its fish hatchery right by obtaining a change in C’s right, the right would still be junior to the Indian reservation, but it would retain the same priority date as C’s original right. Note that the federal government has no reserved rights with respect to the fishery. The “reserved rights” doctrine applies only when the United States reserves federally-owned land for a federal purpose.*

## **2. A Federal Reserved Water Right Is Not Subject To The “Continuous Beneficial Use” Or “Use It Or Lose It” Requirements Of State Law**

As noted earlier, state water rights generally must be kept in continuous beneficial use or they will be reduced in scope or eliminated altogether. Federal case law makes it clear that this “use it or lose it” requirement does not apply to federal reserved rights. For instance, if an Indian reservation is set aside in a treaty for “farming and fishing purposes”, the measure of the water rights reserved is not the actual amount of water appropriated at some historic time, but the amount of water which is necessary, now or in the future, to meet the purposes of the reservation. For farming, this might involve a calculation as to the amount of water it would take to irrigate those portions of the reservation which are “practically irrigable”, whether or not this land has yet been irrigated.

**Example 8:** *A has been approached by D company about the possibility of buying A’s land to develop a “destination resort” on it. The company’s plans include creating an artificial lake with water from Crystal Creek, building a golf course, a large hotel, and several hundred housing units. To accomplish this goal, D will need to apply for large additional water rights. In assessing whether there is water available, D (and Ecology) might have to consider, in addition to the rights of B and C, whether the additional water appropriations will impair the Indian tribe’s existing water supplies or an asserted tribal right to preserve the fishing in Crystal Creek. In addition, possible future needs of the Indian reservation might affect whether there will be continued water available for the resort. These additional needs are often difficult to estimate.*

**3. Federal Reserved Rights May Be Used For Any Of The Primary Purposes Of The Reservations, And Changed From Time To Time As Among Those Purposes, Without Obtaining State Permission**

As noted above, state water rights may not be changed as to the point of diversion, place of use, or purpose of use without obtaining authorization from the state. These limitations do not apply to federal reserved water rights, so long as the reserved water is used for the primary purposes of the reservation. In some cases, this begs a question what the “primary purposes” of a reservation are. For instance, most of the Indian treaties mention agriculture as a primary purpose (sometimes the only primary purpose) for the establishment of Indian reservations. Much reservation land however is not suitable for agriculture or could not be profitably used for that purpose. Some reservation land could be profitably used for commercial or industrial purposes not mentioned in the treaty or executive order creating the reservation. The types of purposes that may be considered to be “primary purposes” for quantifying an Indian reserved water right, and the extent to which water rights set aside for one purpose may be shifted and used for another, are not clearly established.<sup>16</sup>

**4. The Law Of Federal Reserved Water Rights Does Not Establish What Particular Body Of Surface Water Or Aquifer Otherwise Available For Use By An Indian Tribe Is Subject To The Reserved Water Rights**

The *Winters* case involved a dispute between an Indian tribe and a non-Indian water company over the waters of a river which was apparently the only source of irrigation and domestic water in the area. What if a federal or Indian reserved water right could be satisfied by appropriating water from any of several lakes and streams, or some combination of them, each with a different set of potentially competing water rights claimants? Aside from the implication that any body of water lying within or bordering the reservation could be used for this purpose, the federal case law does not address this issue.<sup>17</sup>

All of the federal law precedent on reserved rights involves the right to water in surface water bodies located on or next to a reservation. No federal case has squarely established

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<sup>16</sup> See discussion in footnote 14 above concerning the significance of “primary purposes” in determining reserved water rights. The Wyoming Supreme Court ruled that water rights set aside for agriculture could not be used instead for instream flows for fishing where fishing was not one of the primary purposes of the reservation and the instream flows would harm the rights of junior appropriators. The decision was closely divided, however, and affirmed by the United States Supreme Court on a tie vote with no precedential value. *In re the Water Rights of Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion in Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989). As a closely divided opinion coming from another state, the *Big Horn* case is not significant precedent in this state, but it illustrates how hard courts struggle to define the precise nature of reserved water rights.

<sup>17</sup> The Arizona Supreme Court has ruled that federal reserved water rights may apply to groundwater as well as to surface water, especially if the two are in continuity. *In re the Water Rights of Gila River System & Source*, 980 P.2d 739 (Ariz. 1999). Neither the federal courts nor Washington state courts have directly ruled on this issue yet, although it may be addressed in a pending case, *Lummi Indian Nation v. Ecology, United States District Court, Western District of Washington, Cause No. C01-0047Z*.

whether there are *Winters* rights to groundwater. There is also a question whether a federal reserved water right might include the right to take water located *outside* the reservation, especially if the tribe could demonstrate that on-reservation water sources are insufficient to meet the purposes of the reservation.

*Example 9: There is an Indian community located on reservation land, near the mouth of Crystal Creek, which lacks an adequate supply of water for drinking and domestic purposes. The closest sources of good water appear to be Crystal Creek itself or groundwater wells which might be drilled in the Crystal Creek watershed. Could either source of water be used as an exercise of the tribe's reserved water rights? Would a diversion of water for that purpose be junior or senior to the rights of A, B, and C, or to the federal fish hatchery? Who can decide these issues? On questions such as these, existing case law provides few clear answers. The specific facts and history of a particular controversy may determine the allocation of water rights in that area, without necessarily providing legal precedents for dealing with other situations.*

#### **5. Much Land On Indian Reservations Has Changed Ownership, Sometimes Many Times, Giving Rise To Additional Levels Of Complexity Concerning The Water Rights Appurtenant To Such Land**

Although Indian reservations were originally set aside as homelands for Indian tribes, the land ownership patterns within reservations are often complicated. Some land is owned by the United States in trust for a tribe, or for individual tribal members. Some land is owned by Indian tribes in their own right. On many reservations, tracts of land were allotted to individual tribal members. Some of these are still owned by the allottees or by their descendants.<sup>18</sup> Some tribal members sold or conveyed their allotments to non-members. Large portions of some reservations are now owned in fee by non-members. Some of this “fee land” has been reacquired by the tribe or by the federal government, and some of that has been restored to “trust” status. Portions of some reservations were directly opened to non-Indian settlement pursuant to various federal land programs and contributed further to the extent of “fee land” within reservations.

What about the reserved water rights appurtenant to these various categories of property? The law is complex, but some general principles stand out. When land is allotted to an individual tribal member, it carries with it a portion of the water rights reserved for the reservation. These water rights are acquired by anyone who acquires the land, including a non-member.<sup>19</sup> *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). To maintain the water right, the nontribal member must adhere to State law of continuous beneficial use of

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<sup>18</sup> Some tribal members received allotments outside the boundaries of the reservation, and these off-reservation allotments are treated as Indian lands for some purposes.

<sup>19</sup> The case law appears to hold that in the hands of someone other than a tribal member, a *Winters* right loses its distinct federal character and is more like an ordinary state water right—that is, its continuation depends on beneficial use, and it may be lost through common law abandonment or statutory forfeiture.

the water or risk losing the right. If the land is later reacquired by the United States or by the reservation tribe, the water right, if it remained valid while in non-tribal ownership, may again become a reserved water right. Land opened to non-member settlement and sold in fee (that is, without ever being allotted to an individual tribal member) does not carry federal reserved water rights with it. This is an especially complicated issue, however, and many questions relating to “allottee” water rights are still unresolved.

**6. Although The Law Remains Unresolved, Indian Off-Reservation Fishing Rights May Be A Basis For A Tribal Claim Of Rights For Instream Flow To Protect The Fish**

Many Indian tribes in the Pacific Northwest are parties to treaties with the United States that secure to the tribes a “right of taking fish at all usual and accustomed places” outside of Indian reservations. Most of the tribes whose treaties contain such language have urged that the treaty right carries with it a right to have fish habitat protected from human-caused degradation, including water diversions. The courts have generally confirmed that such rights exist as to surface waters that run through or adjacent to reservations,<sup>20</sup> but the extent to which these rights include groundwater, or water outside the reservation, remains uncertain. Note the discussion in Example 6, above.<sup>21</sup>

**7. The United States Has Consented To Participation In General Water Rights Adjudications In State Courts; Otherwise, Neither The Federal Government Nor Indian Tribes May Be Joined Without Their Consent In State Court Litigation Concerning Water Rights**

Just as Congress chose to allow each state to develop its own law of water rights, Congress has also expressed a policy preference for adjudication of water rights by state courts, at least where states undertake general adjudications. In the McCarran Amendment, codified as 43 U.S.C. § 666(a), Congress waived federal sovereign immunity and allowed the United States to be named in state water rights general adjudications conducted by state courts.<sup>22</sup> However, in cases that do not amount to general adjudications of a watershed, federal and tribal governments enjoy sovereign immunity and may not be joined without their consent.

The table on the next page depicts the key differences between state-based water rights and federal reserved water rights.

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<sup>20</sup> See, e.g., *Dep’t of Ecology v. Yakima Reservation Irrig. Dist.*, 121 Wn.2d 257, 282-86, 850 P.2d 1306 (1993); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

<sup>21</sup> In a general water rights adjudication in Idaho concerning allocation of water in the Snake River basin, the Nez Perce Tribe and the United States asserted that the reserved treaty “right of taking fish” carries with it a right to instream flows sufficient to fulfill the purpose of the reserved fishing right. The trial court rejected the claim, but the appellate courts have not yet considered the issue.

<sup>22</sup> The case law makes it clear that the waiver of federal sovereign immunity covers the federal government both in its direct capacity and as trustee for Indian tribes.

**DIFFERENCES BETWEEN STATE-BASED AND  
FEDERAL RESERVED WATER RIGHTS**

<b>ISSUE</b>	<b>STATE LAW BASED WATER RIGHT</b>	<b>FEDERAL OR INDIAN RESERVED WATER RIGHT</b>
<b>Applicable Legal Authority</b>	Mix of statute and case law.	Case law.
<b>On what principles is existence of water right premised?</b>	Principles of prior appropriation and actual beneficial use.	Principles of sovereignty and prior appropriation.
<b>How is priority determined?</b>	For pre-code riparian rights, by date of land patent; For pre-code prior appropriation rights, by date appropriation is initiated; For code-rights, by date of permit application, assuming water is put to beneficial use within reasonable time.	Date of reservation or earlier (e.g., time immemorial).
<b>How is right quantified?</b>	Extent of actual use.	Purposes of reservation.
<b>Is Continuous Beneficial Use Required?</b>	Yes. Unused rights subject to statutory relinquishment (unless specified statutory exemption is applicable) and common law abandonment.	No. Not lost if not used.
<b>Does a change or transfer require state approval?</b>	Most changes or transfers require state approval.	No.
<b>What is the effect of a change or transfer?</b>	Unless modified, original conditions remain attached to changed right; new conditions may be added.	If transfer is to non-tribal member, right becomes subject to requirement of continued beneficial use.

**C. Accounting For Federal Reserved Water Rights While Administering A State Water Rights System**

From the discussion above, several major issues arise in accounting for federal reserved water rights. Because the rights rest on federal and/or tribal sovereignty rather than the state's, the state has no legal authority to change or shape the substance of federal reserved water rights, or even to impose procedural prerequisites on the establishment of such rights. Because most federal reserved water rights are (1) high in seniority and (2) significant in size and (3) not previously quantified, the existence of such water rights raises serious water management issues in watersheds where there are federal reservations.

**1. Because The Federal Reserved Water Rights Are Senior And Not Quantified, The State Does Not Know How Much Water In A Water Body Is Still Available For Appropriation**

Ecology is directed by state statute to consider effects on senior water rights and availability of water for appropriation when the state reviews an application for a water rights permit or for a transfer or change of water rights. The existence of potentially large quantities of water reserved for federal or tribal purposes but not yet used complicates management decisions. Should Ecology avoid issuing any more permits related to water bodies which “on paper” appear to be fully appropriated, or is it more prudent to permit junior appropriators to use water which may or may not eventually be curtailed to allow for the exercise of senior (including federal) rights? What notice, if any, should Ecology place in its permits or correspondence to advise citizens about federal reserved rights? These management decisions are even more complicated where the law is still unsettled, and the state cannot be sure of the existence, nature, or quantification of some asserted senior right as it tries to make state water policy or carry it out through permit decisions and enforcement actions.

**2. Federal Reserved Water Rights Make It Difficult For Junior Appropriators To Plan Future Water Usage**

The State is not the only party impacted by the uncertainty regarding how much water in an area might be needed to meet federal needs. Existing junior appropriators are impacted in deciding which crops to grow, how much to invest in wells and pumps and pipes, whether to employ conservation practices, and whether to consider changing the use of their water. The lower a user’s priority, the larger the question marks become. Cities and community water systems are uncertain whether they have, or will continue to have, sufficient water to meet community needs. Industries considering construction or relocation may not have enough solid information to assess where there might be sufficient water, or how long it will be available.

**3. Federal Reserved Water Rights Make It Difficult To Coordinate State, Tribal, And Federal Natural Resource Policies**

The United States, Indian tribes, and the State all operate governments which, among other things, adopt and enforce policies concerning natural resources. One of those resources is water itself. Beyond that, however, the availability of water affects the management of fish and wildlife, timber and agricultural crops, commerce and industry, and land use planning. The existence of large but undefined federal and tribal reserved water rights leaves governments uncertain as to which natural resources are subject to their jurisdiction, as well as uncertain whether a shortage of water will frustrate government policy objectives in other areas.

**4. A State’s Choices Essentially Are To Litigate Questions Of Federal Reserved Water Rights Or To Attempt To Negotiate Them**

Because the state has no power to legislate concerning federal reserved water rights, such rights can be quantified and resolved by either of two other processes: *litigation* and *negotiation*. Litigation, in addition to being costly and time-consuming, requires finding a court that has

jurisdiction to decide state, tribal, and federal claims at the same time. As noted earlier, the United States has consented to state court jurisdiction on water law issues, but only as to comprehensive general adjudications. Thus, the state may include federal rights along with all other rights by commencing the adjudication of a stream or aquifer, but the state may not commence separate litigation concentrating solely on the reserved water rights in a given area.<sup>23</sup> Litigation can be an awkward and inflexible tool for resolving federal reserved water rights issues, effective only when the state is otherwise committed to a general adjudication of all water rights.

Although negotiation sounds like an attractive alternative to lawsuits and conflict, current federal and state law provide no clear procedure for negotiations concerning federal reserved water rights. State law has not authorized any officer or agency to conduct negotiations, or established what the scope of such negotiations might be. If a federal agency or an Indian tribe expressed an interest in negotiations, it is unclear how the state could respond, other than by seeking new legislation to authorize negotiations and to set limits on the process. In the absence of a specific statutory negotiation framework, each negotiation is an ad hoc process which must be tailored to fit the particularity issues at hand.

To date, then, federal reserved water rights issues have been resolved either through ongoing general adjudications or on an ad hoc basis as they happened to arise in litigation in suits brought in federal court by the United States and tribes. The question then becomes whether Washington should look for a more systematic approach and should investigate the legal changes which would allow for it.

## **PART II**

### **HOW OTHER STATES DEAL WITH FEDERAL RESERVED WATER RIGHTS**

As requested by the Legislature, the Attorney General's Office contacted a number of other states to find out how they handle federal reserved water rights issues. These contacts included a dozen or more telephone conversations, legal research into the laws of other states, and a written survey distributed to other western states. Contacts were generally limited to western states that use the prior appropriation doctrine for determining water rights, because (1) the legal issues presented by federal reservations are quite different in "riparian rights" states, (2) the amount of federal land in those states is relatively small, and (3) most have relatively abundant supplies of water.

The contacts and research revealed that most of the "prior appropriation" states, like Washington, have not created specific institutions or programs to deal with federal reserved water rights. In most of the western states, federal water rights issues are dealt with as "one

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<sup>23</sup> Federal reserved water rights are sometimes litigated in cases that are not general adjudications. Typically, these would be cases brought by the United States (on its own behalf or on behalf of an Indian tribe) in federal courts against the state and/or private water right claimants.

piece in the puzzle” and are resolved as they may arise in general adjudications or in other water rights litigation.<sup>24</sup>

This part of the report is itself divided into three parts. Part A summarizes the system used in Montana, which provides the most comprehensive model directly addressing federal and Indian reserved water rights. Part B discusses the experiences of seven other states, all of which are making special efforts to resolve reserved rights questions but without adopting Montana’s Compact Commission system for doing so. Part C summarizes the survey results from those states that report no particular emphasis on resolution of federal reserved water rights.

## **A. Montana**

There is one state which has developed a specific goal of seeking to resolve federal reserved water rights issues: Montana. In connection with that effort, Montana uses two institutions not present in Washington: a *water court* and a *reserved rights compact commission*. A third element of Montana’s water law policy is a *statewide water rights adjudication*. These three ideas will be examined more closely.

### **1. Water Courts**

Montana did not create its water courts for the specific purpose of dealing with federal reserved water rights issues, but the water courts do play a key role in Montana’s overall strategy for resolving such issues. Montana is not the only state with a water court, either. Colorado also has a water court consisting of judges, referees, clerks, and other staff dedicated solely to water rights adjudication.<sup>25</sup> In each of these states, the water judges are either sitting or retired judges of the state’s general trial level court<sup>26</sup> designated either primarily or exclusively to handle water rights adjudications.<sup>27</sup> Water referees, clerks, and other staff are assigned to the water courts. For purposes of appeal, authority to issue orders, etc., the water courts are treated as the equivalents of other general jurisdiction trial courts in the state.

The water court system is designed to provide a set of knowledgeable judges specializing in the resolution of water rights disputes. Over time, the law is developed by these specialists rather than by “generalist” trial judges who encounter water rights cases only by the “luck of

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<sup>24</sup> For instance, there has been ongoing litigation concerning water rights to the Colorado River for decades. This litigation involves the allocation of water among several states, the allocation of water between the United States and Mexico, and thousands of private water rights along with the water rights associated with several Indian reservations and other federal facilities in the Colorado River basin. For several states, adjudication of Colorado River basin claims includes a high proportion of their reserved water rights issues.

<sup>25</sup> Nevada and Idaho also use the term “water court”, but unlike Montana and Colorado, neither of these states has created a separate court with its own staff. The term “water court” as used by Nevada and Idaho appears to simply refer to a regular trial court conducting a water rights adjudication.

<sup>26</sup> In both Montana and Colorado, these courts are called “district courts”, but they are analogous to Washington’s superior courts.

<sup>27</sup> In Montana, the water judges are chosen by the district court judges whose counties lie within each division of the water court. In Colorado, the water judges are designated by the chief justice of the state supreme court. In both states, the divisions of the water court correspond generally with the major watersheds in the state.

the draw”. The system of specialized water courts assures that water rights cases will receive a certain level of priority. Furthermore, state funding of the water courts may relieve financial and workload burdens that might otherwise fall on county governments playing host to major water rights litigation.

Both the Montana and Colorado water courts serve conceptually as a part of a statewide water rights adjudication. The existence of specialized judges and other staff for this purpose facilitates the progress of the adjudications and helps to produce a consistent approach over time.

## **2. Reserved Water Rights Compact Commission**

Montana is the only state to date which has established a commission whose specific mission is to negotiate federal reserved water rights. In 1979, the Montana Legislature created the Reserved Water Rights Compact Commission in connection with legislation providing for a statewide general adjudication of water rights in Montana. The commission has nine members: four appointed by the governor, two by the presiding officer of the state senate, two by the speaker of the state house of representatives, and one by the state Attorney General. The commission has a staff including attorneys, a historical researcher, an agricultural engineer, two hydrologists, a soils scientist, a digital geographer, and administrative staff.

The commission is authorized by Montana statute to conduct negotiations with federal agencies and Indian tribes claiming federal reserved water rights. Many of the negotiations have been federal/tribal/state processes concerning reserved water rights associated with Indian reservations, but the commission has also negotiated compacts with federal agencies concerning national parks, recreational areas on Bureau of Land Management, and wildlife refuges. When a settlement is negotiated, it is subject to ratification by the Legislature and by tribal councils, and to approval by the federal agencies. In some cases, Congressional approval is sought, especially where federal appropriations or federal statutory changes are needed to implement the compact. As of 2001, the commission had negotiated 10 compacts, though not all have been finally approved.

Although Montana’s negotiation of federal reserved water rights furthers the state policy of moving to adjudication of all water rights claims, negotiations are not conducted explicitly under the “adjudication” umbrella. By statute, claims under negotiation are suspended from adjudication in the Montana Water Court. The commission is required to report every six months to the chief water judge concerning the commission’s activities and transmit each compact to the Water Court upon ratification and approval. The Water Court has upheld the state’s authority to enter into compacts and to determine federal reserved water rights in this manner, although the courts have reserved the right to overturn compact provisions which are clearly unlawful.

## **3. Statewide General Water Rights Adjudication**

As noted above, Montana instituted its Reserved Water Rights Compact Commission as part of an effort to achieve a statewide general adjudication of all water rights, which has been commenced and is an ongoing process in the state’s Water Court.

As evidenced by its request for this Federal and Indian Reserved Rights Report, the Washington Legislature is interested in the possibility of negotiating some or all federal reserved water rights in this state. However, the Legislature has not expressed a strong interest in favor of commencing a statewide adjudication of all Washington water rights. Looking at the Montana model, then, an obvious question arises: Could Washington adopt some version of a compact commission to negotiate federal and tribal reserved water rights without tying this process to a statewide adjudication?

The answer to the question is not entirely clear. It appears, first of all, that Montana commenced a general water rights adjudication for independent policy reasons and not simply as a pretext for negotiating federal reserved water rights. At least part of Montana's rationale, however, may have been that the state could invoke McCarran Amendment jurisdiction over federal water rights because of the general adjudication, with this jurisdiction providing a legal backdrop for engaging in the compact process. If there is no adjudication pending, questions arise concerning (1) the willingness of federal and tribal agencies to engage in negotiation and (2) if they are willing, how to confirm and enforce the terms of any compacts resulting from such negotiation. These are significant issues, but if resolved, there is no inherent reason why Washington would have to engage in a general adjudication as a prerequisite to the establishment of a tribal/state/federal negotiation process.

Materials relating to the Montana Commission and Montana survey results are included in the Appendix.

## **B. Arizona, Colorado, Idaho, New Mexico, Oregon, Utah, and Wyoming**

In addition to the opportunities presented by the Montana experience, experiences of seven other states may prove useful:

### **Arizona**

Arizona officials report that determining Indian water rights is among the most important water resource issues in their state today. There are currently two means by which Indian water rights claims are resolved in Arizona: negotiation of water rights settlements and adjudication of water rights.

Two general stream adjudications of water rights are now in progress in Arizona. In the adjudication of the Gila River system, eleven Indian tribes have filed claims. In the Little Colorado River system adjudication the Hopi, Navajo, San Jaun Piate, and Zuni nations filed claims. In the absence of comprehensive settlements, the adjudications will eventually resolve the Indian claims and the claims of all other water users in these watersheds. To date, several settlements of water rights claims have been reached and negotiations regarding other settlements are underway.

When the settlement process begins in Arizona, parties potentially impacted by the Indian water rights claims identify the sources of water necessary to satisfy the tribal needs. A federal negotiating team works with the parties to assure that federal concerns are addressed. The Arizona Department of Water Resources (ADWR) participates in the settlement discussion, offering technical assistance and ensuring state water laws and policies are followed. In addition to ADWR's efforts, until last year an Office of Indian Water Rights Settlement Facilitation existed to serve as a mediator and facilitator between ADWR and tribes. Materials describing reserved rights settlements to which Arizona has been a party are included in the Appendix.

## **Colorado**

**Colorado Water Courts.** The Water Right Determination and Administration Act of 1969 created seven water divisions based upon the drainage patterns of various rivers in Colorado and located in each of the major river basins (South Platte, Arkansas, Rio Grande, Gunnison, Colorado, White, and San Juan rivers). These divisions make up Colorado's water courts. Each division is staffed with a division engineer, appointed by the state engineer; a water judge, appointed by the Supreme Court; a water referee, appointed by the water judge; and a water clerk, assigned by the district court. Water judges are district judges appointed by the Supreme Court and have jurisdiction in the determination of water rights, the use and administration of water, and all other water matters within the jurisdiction of the water divisions. Water Court adjudications include determinations regarding federal and Indian reserved water rights.

Federal and Indian reserved water rights have been addressed in a number of the divisions. For example, in the San Juan division, eleven tribal claims were asserted. Nine were the subject of unconditional settlements. Two were the subject of provisional settlements that included an agreement by the state to develop a water project for the area and allocate a share to the tribe. The project has yet to be developed, but efforts are still being made. If the project is not completed, the tribe can revisit the provisional settlement.

**Colorado Water Conservation Board.** The Colorado Water Conservation Board (CWCB) was created in 1937 and is responsible for water supply protection, flood protection, water supply planning and finance, stream and lake protection, and water conservation and drought planning, as well as management of related water information. The role of the CWCB, as defined in statute, includes, among other duties: mediating and facilitating resolutions of disputes between basins and water interests; establishing policy to address state water issues; and representing citizens within individual basins. The CWCB is required to cooperate with federal agencies and other states to better utilize water resources. In addition, the CWCB coordinates the interface with other states and federal entities.

## **Idaho**

Idaho is currently involved in a general adjudication of the Snake River basin, which covers approximately 87 percent of the state's area. Approximately 200,000 claims have been

filed in this adjudication, including both federal and tribal reserved water rights claims. In addition, all rights previously decreed in Idaho's two prior adjudications are included in the Snake River basin adjudication. Although Idaho does not have any formal mechanism for addressing federal reserved water rights similar to Montana, Idaho officials report that the state has a clear policy of attempting to resolve federal reserved water rights through negotiation before focusing on litigation. As a result, Idaho has been successful in obtaining several settlements. Court-ordered mediation that is focusing on reserved water rights claims of the Nez Perce Tribe is currently underway.

### **New Mexico**

New Mexico's attorneys report that adjudications are currently underway in both federal and state courts in New Mexico. State officials report that they negotiate over federal and tribal reserved water rights claims only within the context of a filed adjudication. Officials also report that they typically work first through informal negotiation processes, then through court-ordered mediation, and lastly through litigation. New Mexico officials observe that negotiations have proven to be far more complex and lengthy than originally anticipated and that litigation may have been less time-consuming. Nevertheless, state officials report that the parties appear to participate in negotiations to avoid potential unintended consequences of litigation.

The approach used in New Mexico in several adjudications may provide some lessons for Washington. In the Lower Rio Grande and Nutt-Hockett basin adjudications, originally filed in 1986 during the height of the litigation surrounding the applications of the City of El Paso for water from southern New Mexico, the Office of the State Engineer has been successful in its request to the court to adopt procedures to streamline the adjudication process. In place of traditional adversarial litigation, the court established an alternative dispute resolution process for resolution of legal issues and factual disputes before any formal hearings or trials are scheduled by the court. New Mexico officials report that this process is intended to allow for acceptance of negotiated or mediated offers of judgments over the course of a couple of months after the original offer of judgment is served upon a water rights claimant.

### **Oregon**

Approximately two-thirds of Oregon's water systems have been adjudicated (covering the eastern and some Willamette valley areas of Oregon). Approximately 100 decrees have been issued on individual streams. Tribal and federal reserved water rights are addressed through these adjudications. There are five or six Indian tribes in Oregon and a number of federal interests. Oregon officials report that whether there are opportunities to negotiate varies with each claimed right.

Oregon has a specific statute that authorizes negotiations with tribes outside of the adjudication system. Under this statute, the Water Resources Director may negotiate with

representatives of any federally recognized Indian tribe that may have a reserved water right claim in Oregon. All negotiations are open to the public. The director must provide public notice of the negotiations, allow for public input, and provide regular reports on the progress of the negotiations to interested members of the public. One example of the use of this process was the negotiations and ultimate resolution of issues involving the Warm Springs tribal rights. Oregon officials report that the case was well-suited for this approach because there were not very many non-tribal or non-federal entities with interests in the subject watershed.

## **Utah**

Utah has an adjudication procedure defined by statute. Utah officials report that in most cases, attempts are first made to resolve issues through negotiation or settlement, with litigation as the last resort. The Utah State Engineer's Office and the Attorney General's Office report some recent successes in negotiating federal reserved tribal water rights. They also report success in negotiating other federal reserved water issues. A prime example is the negotiations addressing water rights for Zion National Park. The process used for the Zion negotiations has been used as a model for subsequent negotiations. Utah officials reported that the process focused on technical solutions to water rights disputes, particularly on significant data gathering and exchange of information. Many discussions occurred between mid-level state and federal officials without involving attorneys or the legal dispute process. Utah reports that success in this process was attributable to determinations made by both sides of the amount of water necessary for their respective needs and uses as well as an acknowledgement by both sides of the legitimacy of the other side's needs and assertions.

## **Wyoming**

Wyoming has a general adjudication statute, 1-37-106. One general adjudication, the Big Horn River general adjudication, has been ongoing since 1977. This adjudication has involved both federal and tribal reserved water rights (BLM, Forest Service, and a fraction of Yellowstone National Park). The adjudication was divided into 3 phases: Phase I dealt with tribal reserved water rights and has been finalized and quantified; Phase II involved the federal reserved water rights and resulted in a stipulated settlement agreement and an interlocutory decree; Phase III is ongoing and involves individual and private water claims. Wyoming officials believe that dividing the adjudication into three phases made the adjudication more manageable. Finally, due to the cost and time-consuming nature of general adjudications, Wyoming officials report that they make every possible effort to settle claims.

## **C. Other Western States**

Several other states provided information which may be useful, but none of these states has established a priority of resolving federal reserved water rights issues or developed any specific strategy for doing so. In several of these states, federal reserved water rights are simply not a major issue.

## **Alaska**

Alaska does have a general adjudication process established in statute. This statute was specifically written so that federal reserved water rights can be addressed through the adjudication process. The nature of tribal rights in Alaska is very unique. Pursuant to the Alaska Land Claims Settlement Act, no water, hunting, fishing, etc., rights were reserved for the tribes (with the exception of one tribe in South Eastern Alaska). Alaskan natives voted to become corporations and received a monetary settlement of these types of claims. Alaskan tribes now operate as corporations and businesses. As a result, there has been no litigation or negotiations as they relate to federal reserved tribal water rights.

## **California**

The California State Water Resources Control Board allocates water rights and adjudicates water right disputes. The Board's duties include conducting statutory adjudications and serving as a court referee. The statutory adjudication is a comprehensive determination of all water rights in a stream system that involves the Board and the appropriate superior court. California officials report that the trend has been away from general adjudications with the focus instead on individual actions on specific claims. Reserved tribal water rights have been acknowledged and confirmed in past adjudications, but there are no current or recent disputes regarding the existence of or extent of federal reserved Indian water rights.<sup>28</sup> There also are no current disputes involving other federal reserved water rights.

## **Hawaii**

In 1978, Hawaii adopted amendments to the state constitution regarding the state's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people". In 1987, the Hawaii Legislature enacted the state water code and created the Commission on Water Resource Management. Hawaii does not have a general adjudication system. Instead, Hawaii has the ability to designate water management areas when the water resources in the area may be threatened by existing or proposed withdrawals or diversions of water. This process appears to be similar in some respects to a general adjudication system. Hawaii officials report that the state has not found it necessary to resolve federal reserved water rights (tribal or otherwise) issues.

## **Kansas**

Kansas does not have a general adjudication system for surface water rights. With respect to ground water, which is separate and distinct from the surface appropriation process, Kansas' chief engineer has the authority to allocate water among users as well as among priority dates. This process is similar to a general adjudication except that it is done by an administrative agency.

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<sup>28</sup> California's comments were not intended to ignore the ongoing litigation associated with the Colorado River referenced in footnote 24 above.

There are four tribes in Kansas that are small in terms of numbers of members and amount of reserved land. Kansas officials report that water rights for these tribes have never risen to a level where litigation or negotiation has become necessary. Kansas has one military installation but no other major federal interests that are likely to claim water rights. Water rights and/or water uses for this base and other federal entities have never risen to a level where litigation or negotiation has become necessary.

### **Nevada**

Nevada reports that it has dealt with federal and tribal reserved water rights claims, but that it did not develop any special procedures that officials felt would be useful to Washington.

### **North Dakota**

North Dakota has not found it necessary to resolve federal reserved water rights (tribal or otherwise) issues.

### **South Dakota**

South Dakota has a general statewide adjudication process. General adjudications are filed directly with the courts, with notification to interested parties upon which the individuals must file a claim. There has been only one effort to conduct a general adjudication in the 1980's (Missouri water right basin). However, the adjudication was never actually started due to the estimated cost of proceeding with adjudication. No further general adjudications have been attempted since that time. South Dakota officials report that no reserved water rights claims have been filed on behalf of either the federal government or tribes and, therefore, South Dakota has not found it necessary to deal with these issues.

### **Texas**

There are only three federally recognized tribes in Texas. The reservations for two of these tribes are in areas in which there have been general adjudications. These two tribes did not submit claims for reserved water rights. The watersheds for the area in which the third tribe is located have not yet been adjudicated. However, Texas officials do not anticipate that this tribe will submit any reserved water rights claim. As a result, Texas has not dealt with any issues related to tribal claims for reserved water rights. Texas officials also are not aware of any other federal reserved water rights or claims. Texas officials note that, in general, the federal government applies for water rights through the state permitting process.

Please see the surveys attached in Appendix 1 for more information regarding these states' systems. The office was unsuccessful in contacting or obtaining information from Nebraska or Oklahoma.

## PART III

### POSSIBLE LEGISLATIVE OPTIONS FOR RESOLVING FEDERAL RESERVED WATER RIGHTS ISSUES

#### A. Possible Administrative Options<sup>29</sup>

##### 1. A Compact Commission Or Similar State Body Authorized To Negotiate Reserved Water Rights With Federal Government Agencies And Indian Tribes

Montana appears to have struck a useful approach in using federal/state or tribal/federal/state compacts as an alternative to litigation concerning federal reserved water rights. As discussed above, current federal and state law provide no clear procedure for negotiating compacts or similar agreements. In contrast, a system which authorized the state to enter into compacts could be used to reach agreement on the validity, extent, and priority of federal reserved water rights, including both tribal and non-tribal claims. The establishment of a state body and procedures for such negotiations would facilitate the compacting process.

Relevant highlights of the Montana Compact Commission system are as follows: The Montana Compact Commission is composed so as to represent both the executive and legislative branches of state government and is designed to deal with the state's policy goals as well as with purely legal or technical questions; the commission also has the resources at hand to do its job, including experts in law, history, and science; and compacts negotiated by the commission are subject to ratification by the Legislature, so the state Legislature retains ultimate policymaking authority in this area.

The Montana Compact Commission was created as part of a commitment by the state to commence general water rights adjudications of the entire state. To make this model work in Washington, primarily in order to meet the legal and policy concerns of the federal government and of the Indian tribes, Washington might have to make a similar commitment. It is unclear whether Washington could successfully implement a compacting process without linking it to a water rights adjudication. Tribal governments and federal agencies, however, might be responsive to such an approach. Washington has more Indian reservations, more non-Indian federal reservations, and a larger population than Montana, so the tasks awaiting a negotiating team would be at least as complex as those faced in Montana, if not more so.

#### ***Implementation And Cost Considerations***

*Although the governor or the director of Ecology could administratively emphasize negotiation of federal reserved water rights under existing law, a fully effective and fully-funded effort would require legislation. Following Montana's model*

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<sup>29</sup> These are identified as administrative options because the activity of negotiation occurs through an administrative process. However, where these options contemplate effectuation by a court, they may also be characterized as judicial.

*and creating a commission with its own full-time staff would entail considerable start-up costs as well as a commitment to ongoing costs of operation. The composition of the commission and the size and professional mix of the staff would depend on legislative and administrative policy choices, and different options could lead to different cost levels.*

*The current annual budget for Montana's compact commission (not including court costs) is about \$746,000. Washington's costs could be higher or lower, depending on decisions about the type of commission created, the number and professional levels of staff, the duties and responsibilities assigned, and the extent to which the commission's work "replaced" similar staff work already being performed. A successful compact commission approach could also save litigation costs in the long run.*

## **2. Ad Hoc Negotiations To Be Conducted As Specific Issues Arise**

As an alternative to creation of a commission with the specific mission of negotiating federal reserved water rights, the Legislature could authorize a specific officer or body (the Department of Ecology, or a committee or commission designated by law) to negotiate federal reserved water rights issues without commencing any specific new adjudications. Negotiations could be conducted against the background of current adjudications (as in the Yakima River basin) or as they might relate to other specific issues where litigation has already been filed or is likely to be filed. The experiences of several states discussed in Part II B, above, provides examples of this general approach. This solution would be a less "global" approach than a full compact commission. Presumably it would not involve the creation of a new body with its own staff, but would redirect existing staff efforts.

### ***Implementation And Cost Considerations***

*The Legislature could enact new legislation directing current officers or agencies as to a negotiation or other process. Costs would depend on the extent to which the legislation would add or shift staff and other resources. This option would be cheaper and easier to implement than option A1, but it might be less effective, or the redirection of effort might be achieved at the expense of other existing programs. Note elsewhere that any "negotiation" approach should be considered together with options to handle areas where negotiation is unsuccessful (general adjudications, ad hoc litigation, other forms of dispute resolution).*

## **3. More Aggressive Watershed Planning**

RCW 90.82 authorizes the creation and operation of watershed planning units to develop watershed plans for the purpose of managing water resources and for protecting existing water rights. As watershed planning units are authorized to, among other things, recommend instream flows to Ecology for potential adoption as regulations, there is potential for this process to help resolve issues related to treaty fishing rights or other federal claims relating to instream flows.

The current statutory framework is probably inadequate to include any serious consideration of federal reserved water rights. It is designed for the relatively narrow purpose of achieving local consensus on instream flows. Moreover, once adopted, the instream flows arrived at through the efforts of watershed planning obtain a junior priority date (based on the date the regulation establishing the instream flows is adopted). This does not preclude the use of watersheds in devising a broader approach, such as some form of reserved water right negotiations or a program of watershed adjudications. Both Montana and Colorado organize their water rights systems around watershed planning, which is logical in that a watershed geographically defines, for most purposes, the “corpus” of water which is available for sharing among those who are using it, or seek it for future use.

Indian tribes can participate in watershed planning, and some have chosen to do so. Watershed plans could result in the maintenance of sufficient instream flows in some bodies to satisfy federal and tribal concerns, making it unnecessary (at least for the time being) to adjudicate or quantify the reserved rights. Of course, neither federal nor Indian reserved water rights can be determined by this process, and watershed planning cannot prevent the federal government or an Indian tribe from starting litigation. Furthermore, there is no way to force federal agencies or Indian nations to participate in the watershed planning process or to abide by the results. However, if successful, watershed planning could provide a forum for the exchange of ideas and legal views, either facilitating actual negotiations about water rights or making litigation unnecessary. If watershed planning becomes a possible focus of legislation, ways to encourage federal agency and tribal participation could be explored. Ecology is already funding and engaged in assisting a large number of communities in watershed planning efforts, so this option would be an enhancement of an existing process. As noted earlier, the watershed planning process would probably have to be considerably broadened in scope and altered in form to be useful for resolution of reserved water rights issues.

### ***Implementation And Cost Considerations***

*Like the previous option, this one could be implemented with a relatively modest shifting of program priorities, or it could be the subject of additional staffing at the state and/or local levels. Costs would depend on the extent to which staffing would be added or the goals and objects of planning were changed. Significant changes in the nature of watershed planning would require implementing legislation and continued budgeting.*

## **B. Potential Judicial Options**

### **1. More Aggressive Use Of General Stream Adjudications**

Montana and Colorado both are engaged in a long-term process of adjudicating all water rights in their respective states. These stateside adjudications, working together with the McCarran Amendment, provide a legal backdrop for Montana’s Reserved Rights Compact Commission and its work.

Either together with or separate from the establishment of a compact commission, Washington could commit to a more aggressive use of general adjudications. Washington could adopt Montana's approach and undertake a statewide adjudication, or it could simply prioritize adjudications (*see* RCW 90.03.110-.245) in watersheds which contain Indian reservations and/or national parks, national forests, and other federal land. Either a uniform approach could be taken where adjudications would be commenced in sequence in all watersheds with such lands, or adjudications could simply be commenced in select watersheds where federal reserved water rights produce the most uncertainty in managing water resources. Adjudications could be very large (Idaho is currently adjudicating its Snake River basin, covering 85 percent of all the surface and water rights claims in the whole state) or relatively small (such as many conducted in Washington in the 1920's and 1930's).

Under the McCarran Amendment, 43 U.S.C. § 666(a), the United States can be named as a defendant in a general adjudication, both in its direct capacity and as trustee for one or more Indian tribes. Thus, this process would result in the determination of federal and Indian water rights in the area chosen for adjudication, along with claims based on state law.

### ***Implementation And Cost Considerations***

*Undertaking a statewide adjudication would require implementing legislation and ongoing budget. Ecology lacks the staff and the resources to make such an undertaking without legislative sanction. The costs would be significant, but the Legislature could manage the costs over time by deciding how rapidly to proceed and how much staff and financial resources to devote to adjudication.*

*Currently, Washington budgets approximately \$1.2 million annually for the Yakima basin adjudication. This is generally inclusive of the court, referee, other staff, and attorney costs. For another example, Idaho's Snake River basin adjudication has cost Idaho between \$4.4 and \$5.3 million per year in the most recent years. In both states, the costs have fluctuated over time as the litigation has moved from one stage to another.*

## **2. Negotiations Coupled With The Commencement Of State General Water Rights Adjudications**

This is essentially the approach Montana has taken and combines proposals A1 and B1, discussed above. In tandem with general adjudications, negotiations could be pursued with Indian tribes and federal agencies to resolve federal reserved water rights. The approach would not necessarily involve creation of a separate compact commission. For instance, Idaho and the Nez Perce Tribe are engaged in court-ordered mediation in the Snake River basin adjudication. Idaho's approach has been to enter into settlement negotiations with reserved water rights claimants who are willing to negotiate. Then, if negotiations fail, rights can be determined through the adjudication itself.

For this approach, it would be necessary to create either a body such as a commission or at least a designated process to conduct negotiations. Negotiations could be essentially independent of the adjudication itself (as in Montana) or incorporated into the adjudication and approved by the court conducting the adjudication process.

### ***Implementation And Cost Considerations***

*This would require new legislation defining how the state would conduct negotiations and how these would relate to adjudications. For costs of a compact commission, see option 1A, above. The costs of an adjudication, as noted above, would be considerable over time. However, there would be flexibility in spreading the adjudication over a number of years. One possible approach would be to devote early effort to negotiating federal reserved water rights (using a commission or some other mechanism), deferring the rest of the adjudication to a later time. This would reduce start-up costs and spread the adjudication over more years. It might also simplify and shorten the adjudication process if the resolution of reserved water rights issues removed a major tangle in the process or facilitated the negotiation of other major water rights issues.*

### **3. Ad Hoc Approach Mixing Litigation And Negotiations As Specific Cases Arise, Probably In Federal Court**

The survey showed that this is the approach adopted by most of the western states and is basically Washington's historical approach. Where there is no general water rights adjudication pending, the state cannot compel either the federal government or an Indian tribe to litigate water rights in state courts. If litigation arises over federal reserved water rights, then it is usually initiated by the United States on its own behalf or as trustee for an Indian tribe. Historically, the bulk of such litigation has been handled by federal courts. This has occurred in the past in cases related to the water rights of the Colville Tribe and the Spokane Tribe and is now occurring in litigation brought by the United States on behalf of the Lummi Nation.

This is necessarily a reactive approach since it is hard to "plan" to be sued in federal court. Each case has the potential for resolving the specific reserved water rights issue before the court and might produce useful precedent for dealing with similar claims in other parts of the state. Federal reserved water rights often depend heavily on the history and factual context of a particular federal reservation, however, which often reduces the precedential value of specific decisions. Since the federal court cases are not general adjudications, state-based water rights are not determined by them.

### ***Implementation And Cost Considerations***

*Since this essentially describes Washington's current strategy, it would not necessarily entail additional implementing legislation or additional cost. However, the Legislature would still have the option of redirecting effort or adding additional resources to improve the state's ability to respond to situations as they arise. If the costs*

*are largely driven by litigation brought against the state, it is hard to predict which cases will be filed when, and how much they will cost.*

#### **4. Water Courts**

As noted above, Colorado and Montana have created separate water courts— specialized trial courts whose judges devote their time either primarily or exclusively to water rights cases. The water courts in both states are financially supported by the state and include referees, clerks, and administrative staff, as well as the judges themselves. In both states, the water court fits in with the policy goal of conducting a statewide general adjudication of all water rights. The jurisdiction of the water courts is based primarily on watershed boundaries, so that local watershed planning, ongoing water rights negotiations, and administrative management can be coordinated with the work of specific courts.

Of course, states can conduct general adjudications without creating specific water courts. If adjudications are conducted by the general jurisdiction superior courts, however, issues arise such as workload allocation with a court dealing with a large adjudication, state versus county issues as to financial support for adjudications, and potential delays in the process caused by competition for court time with criminal and other civil matters.

#### ***Implementation And Cost Considerations***

*Establishing specialized water courts would require significant new legislation defining the nature and duties of these courts and relating their work to the rest of the court system and to the administrative process. Creation of new courts with judges additional to those now serving, with attendant needs for staff and housing, would be significant. In addition to the costs of maintaining the courts themselves, there would be added costs for the agencies that would appear in those courts, either as parties or as attorneys.*

*Separate water courts on the Montana or Colorado model are not the only possibility here. The Legislature could provide for the designation of existing judges as “water judges” with jurisdiction over adjudications and other water rights cases, possibly with different jurisdiction and venue provisions from other superior court cases. This option might not involve significant increased cost, unless it were paired with increased adjudication efforts or linked to increased staffing.*

# *Appendix*

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# WATER DISPUTES TASK FORCE REPORT

## IMPLEMENTATION PLAN

### **Introduction:**

The budget proviso creating the Water Disputes Task Force includes the following provision:

(ii) The objectives of the Task Force are to: . . .

D) Recommend an implementation plan that will address:

- (I) A specific administrative structure for each method used to resolve water disputes;
- (II) The cost to implement the plan; and
- (III) The changes to statutes and administrative rules necessary to implement the plan.

The following plan is organized to address each of the elements requested by the Legislature within the context of the recommendations in the Water Disputes Task Force Report (“Report”)

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### **PART 1: HISTORIC CLAIMS DISPUTES**

#### **Recommendation 1: Create a Specialized Water Court**

A. Administrative Structure: A detailed description of the composition of the Water Court is captured in pages 10 through 16 of the Water Disputes Task Force Report (“Report”). In sum, the Water Court would be comprised of four judges, one for each of the three Courts of Appeal, and one floating statewide. These judges could appoint commissioners, special masters, referees and other court staff as needed to accomplish their work. The exact structure of the Office of the Water Court should be left to the judges to define based upon workload.

B. Cost: The cost of implementing the Water Court recommendation is in the range of \$3.3 to \$6.4 million for the first year, and \$2.2 to \$4.2 million for the subsequent year depending upon the number of judges and commissioners. These costs are described in more detail in Appendix I to the Report.

C. Statutory and Administrative Rule Changes: The creation of a Water Court will require a state constitutional amendment. Article IV, Section 1 of the Constitution states that “the judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace and such inferior courts as the legislature may provide.” To amend this structure, the state Constitution would need to be amended in a manner similar to that used in Article IV, Section 30 to create the court of appeals.

Specific statutory changes would also be needed to implement this recommendation including changes to RCW Titles 34 (Administrative Law) and 90 (Water Rights – Environment) as well as to RCW Chapters 43.21A (Department of Ecology) and 43.21B (Environmental Hearings Office – Pollution Control Hearings Board). The precise changes to these statutes will depend upon the choices made by the Legislature regarding the jurisdiction of the Water Court.

**Recommendation 2:** Ecology Develops Comprehensive Background Information Early in the Process and Submits a Report to the Court at Outset of the General Adjudication

A. Administrative Structure: The Department of Ecology could implement this recommendation under its current structure but would need additional staff and resources.

B. Cost: The Task Force did not ask Ecology to quantify the costs of this recommendation but does note that Ecology will need significant additional resources in order to have the capacity to perform this work. The costs incurred by Ecology should be offset by savings to the court and the participants during the adjudications process.

C. Statutory and Administrative Rule Changes: This recommendation could either be implemented by the court performing the general adjudication as part of a court-approved process, or through changes to RCW Chapter 90.03 specifically authorizing Ecology to perform this work.

**Recommendation 3:** Authorize Limited Special Adjudications

A. Administrative Structure: This recommendation would not require any changes to the current court or administrative structure.

B. Cost: The cost of implementing this recommendation would vary depending on the number and scope of additional general adjudications undertaken. To estimate the costs of this recommendation would require an analysis of which specific watersheds or stream basins would benefit from a limited special adjudication.

C. Statutory or Administrative Rule Changes: This recommendation appears to be generally authorized under RCW Chapter 90.03 but might require a specific authorization or legislative direction in order to be fully implemented.

**Recommendation 4:** Expand the Use of Mediation

A. Administrative Structure: This recommendation would not require any changes to the current court or administrative structure.

B. Cost: The cost of this recommendation depends upon how it is implemented. Under the current court structure or under the proposed Water Court structure, judges, commissioners or referees could be used as mediators. Alternatively, the parties might retain an outside neutral mediator at a shared cost among the participants including some expense to the state. Another option with different cost implications would be for the state to fund the entire cost of mediation as an incentive to the parties to seek a negotiated resolution. Finally, the state might want to prioritize funding for water storage, conservation, delivery or other projects to facilitate settlements with those who resolve their issues through mediation.

C. Statutory or Administrative Rule Changes: The courts already have the authority to encourage the parties to mediate their disputes and the state has the authority to settle the state's claims in a general adjudication. The legislature should consider whether to include a statutory intent provision encouraging the use of mediation.

## **PART 2: FEDERAL AND INDIAN WATER RIGHTS DISPUTES**

### **Recommendation 1: Create Incentives to Encourage the Settlement of Federal and Indian Reserved Rights**

A. Administrative Structure: This recommendation would not require any changes to the current court or administrative structure.

B. Cost: See Part 1, Recommendation 4 above. Additional variables relevant to an evaluation of the costs of this recommendation include the potential use of federal or Tribal funds for water storage, conservation, delivery and other projects, and the potential for tapping into Tribal or federal funds to assist in the settlement process in other ways.

C. Statutory or Administrative Rule Changes: See Part 1, Recommendation 4 above.

### **Recommendation 2: Endorse Recommendations for Improving the Adjudications Process (See Part 1, Recommendations 2 through 5 above)**

### **Recommendation 3: Create a State Compact Commission**

A. Administrative Structure: If modeled on the Montana Compact Commission, this recommendation would require the formation of a compact commission composed of members of the Legislature, members appointed by the Governor, and a member appointed by the Attorney General. In addition, the compact commission would require staffing by technical, legal and administrative personnel.

B. Cost: The current annual budget for Montana's compact commission (not including court costs) is about \$746,000. Washington's costs could be higher or lower depending on decisions about the type of commission created, the number and professional levels of staff, the duties and responsibilities assigned, and the extent to which the commission's work "replaced" similar staff work already being performed. A successful compact commission approach could also save litigation costs in the long run.

C. Statutory or Administrative Rule Changes: The creation of a state compact commission would require a new statute.

## **PART 3: WATER RIGHT MANAGEMENT/ENFORCEMENT DISPUTES**

### **Recommendation 1: Retain the Current PCHB Process and Standards and Enhance Mediation Authority**

A. Administrative Structure: No changes to the existing structure of the PCHB or courts are required in order to implement this recommendation.

B. Cost: The overall cost implications of this recommendation should be neutral. Any additional upfront costs associated with the use of PCHB judges as mediators should be offset by savings in hearing costs.

C. Statutory or Administrative Rule Changes: The PCHB has the current authority to direct the parties to explore mediation and frequently does so. The PCHB could seek to make mediation mandatory for certain categories of cases through case-by-case decisions or through

rule-making, but legislation making mediation mandatory would ensure that this recommendation is implemented.

**Recommendation 2: Authorize Specialized Water Court to Hear Appeals of PCHB Decisions**

A. Administrative Structure: See Part 1, Recommendation 1 above.

B. Cost: See Part 1, Recommendation 1 above for the cost of creating a Water Court. Generally, simply authorizing the Water Court to substitute for superior courts in the review of PCHB decisions should not cause an overall increase in costs for the state and over time should result in a net savings given the expectation that a Water Court would make decisions more efficiently once it developed expertise in the area of water rights. If, however, the Legislature adopts the alternative offered in this recommendation that appeals of Ecology decisions directly to the Water Court, there would be a shift in funding from the PCHB to the Water Court with some increase in overall costs given the Task Force's conclusion that the PCHB process is generally more cost-effective than the process for appealing Ecology decisions to a court.

C. Statutory or Administrative Rule Changes: See Part 1, Recommendation 1 above.

**Recommendation 3: Superior Court (or Water Court) Decisions Should be Given Deference by the Appellate Courts**

A. Administrative Structure: This recommendation does not require any changes to court or administrative structure.

B. Cost: The expectation of the Task Force is that providing greater deference to the decisions of the superior court will result in fewer appeals, and a more efficient appeals process for those decisions that are appealed. It is difficult to quantify any cost savings as it is the current practice of many litigants to seek direct appellate review of PCHB decisions.

C. Statutory or Administrative Rule Changes: Express statutory language, most appropriate in RCW Title 34, would be required to implement this recommendation.

**PART 4: INSTREAM FLOW DISPUTES**

**Recommendation 1: Retain APA Rule-Challenge Process for Resolving Disputes Over Instream Flow Rules**

A. Administrative Structure: This recommendation would not require any changes to court or administrative structure.

B. Cost: See Part 1, Recommendation 1 above for the cost of creating a Water Court. Filing instream flow rule challenges in a Water Court instead of a superior court would not cause any additional cost beyond the initial start-up costs of a Water Court. Over time, review of instream flow rules by a specialized Water Court should result in a more efficient review and lower costs than rule challenges brought in superior court. If the Legislature changes the superior court or Water Court standard and scope of review for instream flow rule challenges, the time and cost associated with that review could increase substantially, varying based upon the nature of the changes.

C. Statutory or Administrative Rule Changes: See Part 1, Recommendation 1 above. Express statutory language would be required to shift jurisdiction from superior courts to a Specialized Water Court, and would also be needed to change the standard and scope of judicial review. Such statutory changes would be made to RCW Title 34.

**Recommendation 2:** Authorize the Department of Ecology to Enforce Instream Senior Trust Rights

A. Administrative Structure: No change to court or administrative structure necessary to implement this recommendation.

B. Cost: No additional cost associated with implementation of this recommendation.

C. Statutory or Administrative Rule Change: Statutory language clarifying Ecology's authority should be included in RCW Title 90.