

## Regulation Among Water Rights Based Upon Priority Dates

**The proposal:** Authorize Ecology to regulate through administrative orders to protect seniors where all the rights at issue are under permit or certificate, and to seek a court order to protect seniors where any of the rights involved are not under a permit or certificate.

**Elements of the proposal:** This proposal would closely track previous legislation to provide a "partial fix" to the Rettkowski decision. Under this proposal, the Legislature would authorize Ecology to regulate as among water rights in the following situations: (1) where all the rights are permitted or certificated rights; (2) where an instream flow rule has been adopted; or (3) whether water is being withdrawn without any right or authority whatsoever. Ecology may regulate in such situations through regulatory orders or by seeking a court order. In situations where one or more of the rights are not permitted or certificated, Ecology may bring a court action seeking relief, in the superior court where the water withdrawals or diversions sought to be regulated are located. It would expressly provide that nothing in the legislation affects the general adjudication or relinquishment laws, or modifies existing departmental powers except as provided in the legislation.

**Why it is needed:** At the second Stock Water Work Group meeting there was an extensive briefing on the Supreme Court's decision in Rettkowski v. Dept of Ecology, which prohibits Ecology from issuing regulatory orders to protect senior water rights when diversions or withdrawals by junior uses are causing impairment, unless based upon a general stream adjudication decree which sets out the relative priority of the rights. Only a few areas of the state have been adjudicated, and in many of these basins the adjudication did not include ground water or the decree is so old that it would not include many rights established since the decree. Undertaking new general stream adjudications will likely be on a very limited basis given the time and costs of completing the proceedings. Water rights based upon exempt well uses are subject to the "first in time is first in right" rule of the Water Code, and the Work Group discussed the need to have workable tools to regulate as among water rights to the same ground or surface water source in order to protect senior rights. Requiring each senior user to seek court relief against each junior contributing to the impairment of her use is inefficient and costly. The "partial fix" proposed here has received widespread support among water interests when proposed in the past (see, e.g., the bill report for SB 6536 in the 1994 session, with all testimony "pro").

**Related elements:** The proposal to develop a state workplan for conducting general stream adjudications would, once the plan is developed and implemented, provide additional tools for regulating as among water rights to the same water source during times when not all rights may be fully met.