

***A Report to the  
Washington State Legislature  
December 2003***

***from the  
Water Disputes Task Force***

***Attorney General Christine O. Gregoire, Chair***

***Senator Jim Honeyford***

***Senator Karen Fraser***

***Representative Kelli Linville***

***Representative Bruce Chandler***

***Judge John Schultheis, Court of Appeals***

***Judge Linda Krese, Snohomish County Superior Court***

***Judge Richard Hicks, Thurston County Superior Court***

***Judge Michael Cooper, Kittitas County Superior Court***

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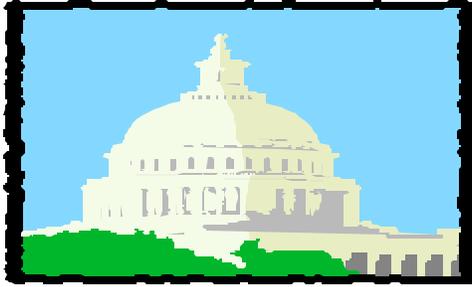
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# Water Disputes Task Force Report

## INTRODUCTION

In the 2002 Regular Session, the Washington State Legislature created a joint Task Force “to study judicial and administrative alternatives for resolving water disputes” and to issue a report to the Legislature no later than December 31, 2003.<sup>1</sup> The members of the Task Force included representatives of the Legislature, the Superior Courts, the Court of Appeals, the Environmental Hearings Office, Department of Ecology, and Attorney General’s Office. The names of the Task Force members were as follows:

Chairperson, Attorney General Christine Gregoire  
Judge John Schultheis, Court of Appeals  
Judge Linda Krese, Snohomish County Superior Court  
Judge Richard Hicks, Thurston County Superior Court  
Judge Michael Cooper, Kittitas County Superior Court  
Court Commissioner Sidney Ottem, Yakima County Superior Court  
Kaleen Cottingham, Pollution Control Hearings Board  
William Lynch, Pollution Control Hearings Board<sup>2</sup>  
Senator Jim Honeyford  
Senator Karen Fraser  
Representative Kelli Linville  
Representative Bruce Chandler  
Keith Phillips, Water Policy Specialist, Department of Ecology

Staff support to the Task Force was provided by the Office of the Attorney General, Legislative staff, and the Administrative Office of the Courts.

The Task Force members met eight times over sixteen months to pursue the directive of the Legislature that the Task Force recommend one or more methods to resolve water disputes.<sup>3</sup> The Task Force meetings were open to the public. The first several meetings were focused on providing background information and research through presentation of papers prepared by Task Force staff and outside speakers regarding the water disputes processes used in Washington and other western states. The Task Force used its remaining meetings to develop its recommendations and to make decisions. The recommendations in this report reflect, in most parts, the consensus of the full Task Force. For those recommendations where there was disagreement within the Task Force, this report identifies those points of dissent through footnotes to the text in lieu of one or more minority reports.

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<sup>1</sup> See Appendix A for the legislative language creating the Task Force.

<sup>2</sup> Mr. Lynch joined the Task Force because Ms. Cottingham's term as Board Member concluded before the completion of the Task Force's work.

<sup>3</sup> See Appendices B and C for summaries of the Task Force meetings and the worksheets developed during those meetings.

## TASK FORCE MISSION

In the legislation creating the Task Force<sup>4</sup>, the Legislature described the following objectives for the Task Force:

1. Examine and characterize the types of water disputes to be resolved;
2. Examine the approach of other states to water dispute resolution;
3. Recommend one or more methods to resolve water disputes including, but not limited to, an administrative resolution process; a judicial resolution process such as Water Court; or any combination thereof; and
4. Recommend an implementation plan.

In light of these instructions, the Task Force adopted the following statement of its mission:

**To 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.**

Further, the Task Force adopted the following list of considerations as the criteria it would use to guide it in the analysis and development of recommendations for a new process to resolve water rights disputes:

- What is the cost of the process, for both the participants and the public?
- Is it a unified process covering all types of water (e.g., ground water, surface water, rain water)?
- Does the process recognize the interests and authorities of other jurisdictions (e.g., other states, Tribes, federal government claims)?
- Is the process appropriately comprehensive?
- Does the process provide access to all, especially pro se<sup>5</sup> parties?
- Is the process timely and efficient?
- Is the process just and balanced?
- Is there certainty about scope of the process?
- Is there sufficient data to make the process work?
- Does the process build institutional memory and experience?
- Does the process have a built-in system of prioritization?

## SCOPE OF THE TASK FORCE'S RECOMMENDATIONS

Given the make-up of the Task Force and the objectives defined by the Legislature, the Task Force focused exclusively upon ways to improve Washington's processes for resolving water disputes; the Task Force did not address the broader water resources management policy controversies that are the subject of many disputes. The recommendations in this report are therefore not intended and should not be read to suggest any particular water resources management policy.

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<sup>4</sup> See Appendix A for full text of the budget proviso creating the Task Force.

<sup>5</sup> The term "pro se" is used to describe a person not represented by an attorney.

The Task Force compiled a list of water rights disputes potentially within the scope of the Task Force's mission. After a review of a variety of water rights disputes, the Task Force decided to address the disputes in the following categories:

1. Historic claims disputes;
2. Federal and Indian reserved water rights disputes;
3. Water rights management and enforcement disputes; and
4. Instream flow disputes.

These four categories of disputes and the recommendations associated with each are discussed in more detail below.

Categories of disputes that the Task Force determined were beyond the scope of what the Task Force could reasonably address given the time frame for developing recommendations included the following:

1. Two party water rights disputes;
2. Interstate water rights disputes; and
3. International water rights disputes.

The Task Force believes that consideration of ways to more effectively resolve these kinds of disputes would be worthwhile and recommends that the Legislature give consideration to funding further work in these areas.

## **EXECUTIVE SUMMARY**

The Task Force offers the following recommendations which, together with the attachments to this report, fulfill its obligation to the Legislature to recommend methods for resolving water rights disputes.

**Creation of a Water Court System** One overriding recommendation, which the Task Force believes would be useful as part of the process for resolving each category of water rights disputes, is the creation of a specialized water rights court. The Water Court would be created as a branch of the superior court system and would require a state constitutional amendment. The Water Court would be comprised of up to four Judges, with one Judge coming from the geographic regions of the three Court of Appeals divisions, and one Judge "floating" statewide.

The remainder of the Task Force's recommendations can best be understood within the context of the categories of disputes addressed.

### **Historic Claims Disputes**

The Task Force believes that adjudications provide the best means of resolving disputes regarding historic claims (i.e., claims that pre-date the 1917 surface water code and the 1945 groundwater code) and for providing increased certainty to all water right holders (i.e., including persons with water rights that post-date the surface water or groundwater codes). Washington's system of adjudications can, however, be improved. In addition to the creation of a Water Court to perform adjudications, the Task Force recommends the following modifications to the manner in which adjudications are performed:

- The Department of Ecology should have the responsibility for developing comprehensive background information regarding a water right and reporting that information to the Water Court or superior court<sup>6</sup> early in the adjudication process.
- The Water Court or superior court should have the authority to perform limited and specialized adjudications among a subset of water right holders, or limited stream reaches or groundwater areas.
- The Water Court or superior court should be provided with tools to expand the use of mediation to resolve disputes arising during an adjudication.
- The Water Court or superior court should be expressly authorized to allow the use of pre-filed testimony to streamline the submission of evidence to the court.

### **Federal and Indian Reserved Rights Disputes**

As an initial matter, the Task Force recommends that the state undertake government to government discussions with the Tribes and federal government to receive input from those governments regarding their ideas for ways to improve the state water rights disputes resolution processes involving their water right claims.

The Task Force recommends that the state explore the following recommendations with the federal and Tribal governments:

- Retain the existing general system for performing adjudications, but create special incentives to encourage settlements of federal and Tribal water rights, including:
  - Special funds for water conservation or water delivery projects for claimants that settle; and
  - Special funding for mediation services.
- Pursue the other recommendations for streamlining adjudications identified above under the historic claims disputes category.
- Create a compact commission charged with the task of negotiating with other sovereigns. Any settlement reached could either be entered as part of a decree in a state adjudication, or in federal court as a consent decree after sufficient opportunities for notice, comment and objection by non-parties.

### **Water Rights Management and Enforcement Disputes**

Regarding management and enforcement disputes, the Task Force recommends,

- The current Pollution Control Hearings Board (PCHB) process and standards should be retained except that the Task Force recommends that mediation be mandatory for certain types of cases.
- If the Legislature creates a Water Court system, the Water Court should be authorized to hear appeals of PCHB decisions involving water rights management and enforcement disputes.

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<sup>6</sup> In the event that the Legislature does not create a new Water Court system, these recommendations could be applied to make the superior court adjudications process more efficient.

- In this category of cases, the appellate courts should accord deference to the Water Court or Superior Court decision.

### **Instream Flow Disputes**

With regard to instream flow disputes, the Task Force recommends,

- The current process for challenging agency rule-making defined in the state Administrative Procedure Act<sup>7</sup> should be retained.
- If a specialized Water Court system is created, the Water Court should have jurisdiction to hear challenges to instream flow rules adopted by the Department of Ecology.
- The Legislature should clarify that the Department of Ecology has authority to petition a superior court, or Water Court if one is created, for an order protecting an instream flow that is based upon a senior trust right in an unadjudicated basin.

## **ORGANIZATION OF THIS REPORT**

This report is organized into four major sections, each corresponding to one of the four categories of water disputes addressed by the Task Force. PART 1 deals with historic claims disputes, PART 2 with federal and Indian reserved rights, PART 3 with water rights management and enforcement disputes, and PART 4 with instream flow disputes. Each section provides a brief overview of the dispute, a description and evaluation of the current process, and recommendations for improving that process. An implementation plan developed by the staff of the Office of the Attorney General is attached as the final appendix to the report.

Attached to this report are the following appendices which document the work of the Task Force and provide additional background:

- A. Budget Proviso Creating the Task Force
- B. Meeting Summaries
- C. Task Force Worksheets
- D. Department of Ecology Adjudications Strategic Plan
- E. Overview of Water Disputes Heard by the Pollution Control Hearings Board
- F. Results of PCHB Survey
- G. A Specialized Water Court for Washington (Recommendation of Task Force Subcommittee)
- H. “Second Choice” Alternative to Creating Water Courts (Recommendation of Task Force Subcommittee)
- I. Fiscal Analysis of Water Court Option
- J. Fiscal Analysis of Streamlining Adjudications Options
- K. Department of Ecology Information Briefing from September 30, 2003 Task Force Meeting
- L. Federal and Indian Reserved Rights, A Report to the Washington State Legislature by the Office of the Attorney General, October 2002, (without appendices)
- M. Implementation Plan

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<sup>7</sup> RCW Chapter 34.05, Part V (Judicial Review and Civil Enforcement).

## **PART 1: HISTORIC CLAIMS DISPUTES**

### **A. Background**

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 statements of claim to preserve these pre-code rights. There have been four open periods for filing statements of claim 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 statute operates to relinquish the water right.

Under Washington water law, to maintain a water right, the right must be perfected and thereafter 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.<sup>8</sup> Historic claims disputes generally involve questions regarding the validity of the water right represented by the claim, including questions regarding the establishment of the right and whether the right has been put to continuous beneficial use. Related questions include issues about the quantity and priority date of such rights.

Historic claims disputes may arise in a number of contexts. Following are the most common examples: (1) When the Department of Ecology (Ecology) or a water conservancy board processes an application to change the purpose of use, place of use, or point of withdrawal or diversion of a water right and that right is represented by an administrative claim, the conservancy board or Ecology must make a “tentative determination of extent and validity” of the water right. The decision on the application for change of water right, including the tentative determination of the extent and validity of the water right represented by the claim may be appealed to the Pollution Control Hearings Board. (2) When the holder of an historic claim uses water in an unauthorized manner, Ecology may take enforcement action to stop the unauthorized use. Ecology’s enforcement actions may be appealed to the Pollution Control Hearings Board. (3) When the Department of Ecology, on its own initiative or in response to a petition, decides that the water rights in a particular basin should be adjudicated, it may file a lawsuit in superior court. Under current law, the only process that results in a final determination of the validity, quantity and priority date of an historic claim is this third process, the superior court general adjudication.

As a result of the four open periods for filing statements of claim, there are an estimated 170,000 water right claims registered in Washington. Most of these claims have not been the subject of a general adjudication. Therefore, they have not been confirmed to represent valid rights, nor have their quantity limits or priority dates been determined.<sup>9</sup>

### **B. Existing Process in Washington**

This part addresses only those historic claims disputes that arise within the superior court general adjudication process used to produce a final determination of the validity, quantity and

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<sup>8</sup> These citations generally relate to statutory relinquishment, also known as “forfeiture” which is defined as the voluntary failure, without sufficient cause, to continuously use water for five consecutive years. In addition to statutory relinquishment, pursuant to Washington case law, a failure to put a water right to continuous beneficial use through “abandonment” may also result in a loss of a water right. Abandonment generally requires proof of an intentional nonuse of water and is more difficult to prove than relinquishment. *See, e.g. Okanogan Wilderness League, Inc. v. Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997).

<sup>9</sup> See Appendix D for Ecology’s strategic plan for addressing adjudications.

priority date of an historic claim. Historic claims disputes that arise in the context of an Ecology or water conservancy board decision, e.g., a water right change decision or an Ecology enforcement decision, are addressed in PART 3 (Water Right Management and Enforcement Disputes) of this report.

A general adjudication of water rights in Washington is conducted according to procedures provided in the Water Code. See 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 all existing water rights for a specific basin, surface water body, or ground water body.<sup>10</sup> The product of a general adjudication is a final decree followed by adjudication certificates issued by Ecology. The final court decree and the adjudication certificates specify the validity of each water right in the basin and identify the priority and quantity of each right. These products serve the prior appropriation system by establishing the priority of rights. By themselves, however, these products do not “manage” or “administer” water use. Rather, they provide information that is used in the management and administration of Washington’s water. For example, in a water short year, in a basin that has been adjudicated, Ecology may regulate (reduce or turn off) junior water rights to ensure that senior water rights receive the water to which they are entitled.<sup>11</sup> Also, the adjudication decree provides baseline information that Ecology uses when it makes decisions in an adjudicated basin on applications for new water rights or applications for changes to existing water rights.

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 is charged with determining whether a claim asserting a surface water right dating back to 1910, for example, represents a valid water right. To make this determination, the court examines the entire history of the use of that water right, beginning in 1910 and continuing to 2003, to determine if the water right was put to beneficial use or if it was lost by nonuse under common law abandonment or statutory forfeiture.

### **C. Evaluation of the Current Process**

Eighty-two general adjudications have been completed in Washington, encompassing about ten percent of the state’s land area. Many of these adjudications took place in the 1920s and 1930s, so the resulting information is not current, i.e., the results of the adjudication do not address rights acquired since the decrees were entered, nor do they address the effect of post-adjudication changes to the use of the adjudicated rights. Thus, with a few exceptions, such very old decrees are of limited value in administering water rights in a basin. Adjudications of large watersheds take many years, but adjudications of smaller areas take much less time.

The only general adjudication presently proceeding before a court in Washington is the Yakima basin surface water adjudication, also referred to as the *Acquavella Adjudication*. This adjudication covers over 4,000 registered water right claims and over 40,000 landowners. The case was filed in 1977 and may not conclude for at least another five to ten years. Much of the first ten years was spent litigating issues involving jurisdiction and other legal questions, which

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<sup>10</sup> The current superior court general adjudication process addresses all water rights, not just those represented by historic claims to water rights based upon state law. Other rights include those represented by permits or certificates, those represented by statutory exemptions, and those represented by claims based on federal law. See Appendix J.

<sup>11</sup> Ecology’s authority to regulate in this manner is limited in the absence of an adjudication. See *Rettkowski v. Department of Ecology*, 122 Wn. 2d 219, 858 P.2d 232 (1993).

delayed the start of evidentiary hearings until 1987. During the duration of the Yakima adjudication, 13 other smaller adjudications have been completed.

Additional information regarding these 13 general adjudications as well as overall numbers and types of general adjudications that have been conducted in Washington State is found in *2002 Ecology/AGO Report to the Legislature: Streamlining the Water Rights General Adjudications Procedures*, December 2002, Ecology Publication No. 02-11-019, (<http://www.ecy.wa.gov/biblio/0211019.html>).

The Task Force identified the following strengths of Washington's existing general adjudication system:

- (1) The end result (the final adjudication decree) provides complete legal certainty among water users. This legal certainty facilitates water management and enforcement.<sup>12</sup>
- (2) The final decree also provides reliable documentation of the extent of water rights appurtenant to property. This can facilitate sales of land and development of markets for transfers of water rights.
- (3) Because the local superior court judge serves as the forum for conducting general adjudications, it is relatively easy for local citizens to attend the hearings.
- (4) The general adjudication process can take advantage of Ecology's expertise and resources. For example, the agency provides reports to the court and provides a referee to conduct some hearings.
- (5) The general adjudication process allows for voluntary participation in Alternative Dispute Resolution (ADR) processes such as mediation.
- (6) While the case is pending, the court provides interim regulation so that water rights related transactions can continue while the court works on the adjudication.
- (7) Washington's general adjudications are sufficiently comprehensive so as to satisfy the Federal McCarran Amendment thereby allowing Washington courts to adjudicate federal and Tribal water rights.

The Task Force identified the following weaknesses of the existing general adjudication system:

- (1) When a large water body is adjudicated, such as is the case in the Yakima adjudication, the case is likely to be complex, costly, and time-consuming.
- (2) The current general adjudication structure and process may allow claimants too many opportunities to provide evidence supporting their claims. Providing claimants multiple opportunities to support their claims adds to the time and cost of the proceeding.

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<sup>12</sup> But see Weakness number (7) below.

- (3) When the entire water body or basin is adjudicated at one time, the resulting adjudication may be more comprehensive than necessary to resolve the actual disputes driving the need for the adjudication. It may also lead to a lengthy and costly process.
- (4) The current process does not mandate mediation or other forms of Alternative Dispute Resolution.
- (5) The current process may be too complex for small claimants, especially those that represent themselves. This has been accommodated to some extent in the Yakima Adjudication through the use of informal referee hearings.
- (6) An adjudication can address surface water without addressing hydraulically connected groundwater or address groundwater without addressing adjacent surface water, leaving the potential for a second adjudication at considerable additional complexity and cost.
- (7) The current process has no provision for ongoing updates of adjudicated basins, so the product of an adjudication is only a snapshot of the status of the rights as of the date of the decree. Changes that occur after the decree is entered are not addressed by the court so that, over time, an adjudication can cease to provide the benefits of certainty for the water right holders in the adjudicated basin.
- (8) The historical knowledge and experience developed by courts and court staff in working on an adjudication is lost once the adjudication is completed because the same court does not process all adjudications, just those within the county.

#### **D. Recommendations**

The Task Force determined that general adjudications provide the best means for resolving disputes over historic claims. With that determination made, however, the Task Force believes that the adjudications process can be improved.

- (1) The first way in which the Legislature could improve the system is through the creation of a specialized Water Court.
- (2) The second set of recommendations include four specific improvements or enhancements that could be made to the general adjudications process independent of whether the Legislature creates a Water Court.

## **Recommendation 1: Create a Specialized Water Court**<sup>13</sup>

### **1.1 Attributes of a Water Court.**

The Task Force recommends that a Specialized Water Court be created in the State of Washington.<sup>14</sup> The attributes of this recommended court are described below.

**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>15</sup> A constitutional amendment would be required to create the Specialized Water Court.

**Jurisdiction.** 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, jurisdiction over appeals from PCHB water right decisions,<sup>16</sup> and jurisdiction over Administrative Procedures Act (APA) challenges to instream flow rules.<sup>17</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. To authorize these jurisdictional changes, the constitutional provisions establishing the general jurisdiction of the superior courts would need to be amended. In addition to jurisdiction over general adjudications, appeals from PCHB water right decisions, and APA instream flow rule challenges, the constitutional amendment authorizing the creation of the Specialized Water Court should also authorize the court to maintain and update adjudication decrees and to hear cases involving water quality. However, future action by the Legislature would be necessary to authorize the Specialized Water Court to begin exercising jurisdiction over these latter two categories of activities.

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

**Composition of the Water Court.** A constitutional amendment would authorize the creation of a Water Court comprised of up to four judges appointed by the Governor followed by a retention election.<sup>18</sup> The Legislature would determine how many judge positions should be filled based on a determination regarding court workload. The Supreme Court would be asked to provide recommendations for candidates for each water judge position. Any candidate would

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<sup>13</sup> A subcommittee of the Task Force developed an alternative involving the creation of a state wide pool of experienced special judicial water commissioners to assist superior court judges with general adjudication hearings and other water resources cases but the Task Force did not adopt this approach as a recommendation. See Appendix H for a description of this option.

<sup>14</sup> Water courts have also been created in other states. In particular, the Task Force considered the models offered by the States of Colorado and Montana, although the attributes of the systems in those states are considerably different from the Task Force’s proposal for Washington. See Appendix L, *Federal and Indian Reserved Water Rights, A Report to the Washington State Legislature*, October 2002, pp. 17-25 for more details.

<sup>15</sup> As a branch of the Superior Court, the Water Court would be a court of record.

<sup>16</sup> See PART 3 for a full discussion of Recommended Processes for Water Right Management and Enforcement Disputes.

<sup>17</sup> See PART 4 for a full discussion of Recommended Processes for Instream Flow Disputes.

<sup>18</sup> Some members opposed this process for selecting Water Court judges, advocating election by voters of the Counties in each court of appeal division. These same members recommend that, if Water Court judges are appointed and not elected, the judges should be subject to confirmation by the Senate. Under this counter-proposal, judges would serve from the time nominated, but would vacate the office if not confirmed by the Senate during the legislative session following nomination.

need to meet the minimum qualification of five 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. If court staffing begins with three judge positions, one 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, and position 3 would reside in a county within division 3. Position 4 (when added) would be a “floating” position: the judge appointed to this position could come from any county in the state. If court staffing begins with two judge positions, one of the first two positions would be filled by an individual residing in an eastern Washington county (Division 3) and the other would be filled by an individual residing in a western Washington county (Division 1 or 2).

**Position Terms and Retention Elections.** Except for during the first terms of these positions, each position would serve for four years at a time, with at least one of the positions up for retention election every other year.<sup>19</sup> The Governor would appoint judges to all legislatively-approved positions in the first year. Assuming the first appointments were made in 2005, then in November 2006, positions 1 (and 3 if there is one) would be up for election, and in November 2008, positions 2 (and 4 if there is one) 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. In the case of an initial staffing of the court with only two judges, one from eastern and one from western Washington, the retention election for each position would cover the respective eastern/western Washington geographic area. Whenever a position becomes vacant before the judge’s full term has 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 from a list of recommendations by the Supreme Court followed by a retention election at the next general election. Whenever a position becomes 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 next general election with the judge serving out the remainder of the position’s term.<sup>20</sup>

**Central Court Administrator for the Water Court; Regional Offices.** A Water Court administrator would be appointed and would be centrally located in Thurston County. Assuming initial staffing of at least three judges, there would be three regional offices of the Water Court established, one in each of the divisions. If initial staffing is with two judges, there would be two regional offices. 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

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<sup>19</sup> A retention election is one in which the only name on the ballot is that of the incumbent. The Task Force identified retention elections as a means of allowing Water Court judges to serve long enough to develop the expertise and knowledge necessary to issue rulings in the complex area of water rights law, and to reduce the risk of changing judges in the course of long-running adjudications. Some members opposed using this departure from the usual election process for selecting Washington judges.

<sup>20</sup> A recommendation was offered by one Task Force member that if the Governor appoints a Superior Court judge, that judge should be allowed to take “leave” from their original post until completion of the retention election with the option of returning to their original judgeship to which they were elected if not retained by the electorate as a Water Court judge. This recommendation was offered after the conclusion of the Task Force’s meetings and so is not included as a recommendation of the Task Force.

consistent with Washington Courts General Rule 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. Assuming the court is fully staffed with four judges, 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. If the court is not initially staffed with four judges, the presiding judge should consider geographic origin of each case and workload of each judge when making assignment decisions. 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.<sup>21</sup>

**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, absent agreement of the parties or a compelling reason, 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.

**Anticipated Workload.** As noted above, the initial workload of the Water Court would include general adjudication actions filed by Ecology, appeals from PCHB water right decisions, and Administrative Procedure Act (APA) challenges to instream flow rules. By far, the large majority of the court’s work would be the general adjudication workload.

*General Adjudications Workload.* To manage the general adjudication workload of the Water Court, 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. This ranking could be identified as part of the biennial budget bill for a biennial list, or as part of specific legislation as necessary to set priorities longer than one biennium. The Legislature would also appropriate such funding as necessary to 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 conducting 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.

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<sup>21</sup> Given the large numbers of claimants in many adjudications, it is possible that affidavits of prejudice might be filed against all of the sitting Water Court judges. The Legislature should consider this possibility and evaluate ways to address this problem. One possibility would be to allow Water Court judges to continue to preside over an adjudication in which an affidavit of prejudice has been filed against them by limiting their ability to hear the case only as it relates to the claim for which the affidavit was filed.

*Appeals from PCHB Water Resources Decisions Workload.* Assuming the role of the PCHB is retained,<sup>22</sup> it is projected that approximately ten appeals of PCHB water right decisions would be filed each year, with such appeals governed by the Administrative Procedure Act. The workload estimated to be associated with each of these cases would be at least three court days per case (one for court preparation time, one for court hearing time, and one for decision-making). This might not be sufficient time to resolve the more complex water right appeals. Based upon this conservative estimate, at least 30 court days per year would be devoted to this category of work.

*APA Challenges to Instream Flow Rules.* In recent years, less than one instream flow rule challenge has been filed per year. However, given Ecology's stepped-up efforts to adopt instream flow rules, it is estimated that at least one of these cases will be filed in the Specialized Water Court each year. The workload estimated to be associated with each of these cases is three court days per case (one for court preparation time, one for court hearing time, and one for decision-making). This means approximately three court days per year would be devoted to this category of work. In light of the complexity of instream flow cases, this number could be significantly higher.

*Maintaining and Updating Adjudication Decrees.* The adjudication statutes should be revised to authorize the Specialized Water Court to periodically maintain and update adjudication decrees. From a workload perspective, the tasks of maintaining and updating decrees should be considered secondary to the initial task of the Specialized Water Court to complete adjudications throughout the state. Therefore, it is expected that the Legislature would not include these tasks in its initial schedule or workload for conducting adjudications. As funding allows, however, the Legislature should endeavor to integrate the need for maintaining and updating adjudications into the schedule.<sup>23</sup>

*Cases Involving Water Quality.* Because issues involving water quality and water quantity are often related, in the future, as sufficient funding and capacity for the court becomes available, the specialized Water Court should begin to handle cases involving water quality issues as specified by the Legislature. The Water Court would not address water quality cases until and unless the Legislature specifically authorized them to do so.

**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

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<sup>22</sup> See discussion in PART 3 regarding the possibility of changing the role of the PCHB in water cases. If appellants are given the option of bringing their appeals from Ecology water right decisions straight to the Specialized Water Court, the above workload projections would need to be revised accordingly. The PCHB currently hears approximately 80 water rights related cases per year, and many of the hearings associated with such cases are quite lengthy. See Appendix E.

<sup>23</sup> Some members believe that the task of updating and maintaining adjudications that have already been completed should be planned for and initiated at the outset when creating a new Water Court and strongly urge that the Legislature should not wait upon completion of all adjudications before beginning work on this important task.

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.

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, as well as facilities, training, travel and the related costs of operating a court system.

**Funding.** The costs of establishing a Water Court are substantial. The Task Force heard estimates of Water Court costs ranging from two to four million dollars per year varying based upon the number of judges and commissioners, with higher start-up costs in the first year.<sup>24</sup> The primary cost-driver for the Water Court would be the cost of administering general adjudications. Under the current system of funding for general adjudications,<sup>25</sup> nearly all of these costs would be borne by the state.

In light of these costs, the Task Force recommends that the Water Court be funded by a combination of public funding and fees paid by litigants. Because a court (even a specialized court) is a public entity with services benefiting the public as a whole, the Task Force believes the large majority of the funding should be public and the source of the public funding should be state, not local. A portion of the court's funding should, however, come from litigant fees. The Task Force recommends that a statutory fee schedule be established by the Legislature at a range similar to the current superior court fees of \$250 to initiate a lawsuit (applicable to parties appealing PCHB water decisions and parties filing APA instream flow rule challenges) and \$25 to file a claim (applicable to parties who participate in a general adjudication). 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.

## **1.2 Reasons Supporting Water Court Recommendation**

General adjudications appear to provide the best means for resolving disputes involving historical claims. Given the large number of unadjudicated claims in the state, and the length of time that it will take to adjudicate those claims using the existing system,<sup>26</sup> the Task Force believes that a Water Court system will provide the best means for completing general adjudications statewide in a meaningful timeframe. While the Task Force believes that completing adjudications statewide is a worthy goal, the cost of creating a Water Court will not be insignificant.<sup>27</sup> The Task Force defers to the Legislature on how to balance the need for the creation of a Water Court against other state budget priorities. From a process standpoint,

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<sup>24</sup> See Appendix I for an estimate of Water Court costs.

<sup>25</sup> Prior to 1979, the costs of a general adjudication were paid by the parties to the litigation.

<sup>26</sup> There are currently 170,000 unadjudicated water right claims on file with the state. Ecology estimates the amount of time it will take to fully adjudicate all basins in the state to be in the range of decades, based upon streamlining measures and the creation of a Water Court, to centuries if we retain current law and funding levels. See Appendix K.

<sup>27</sup> See Appendix I.

however, a Water Court offers the following advantages over a system involving multiple tribunals with overlapping jurisdiction:

- Specialized judges and court appointed commissioners, referees, and other Water Court staff can render decisions on the complex legal and technical issues that arise in water rights disputes more efficiently and consistently, with a resultant reduction in the cost and time of litigation.
- The expertise developed by the specialized judges in water rights disputes will be able to be drawn upon in future water rights disputes, again reducing the time and cost of litigation.
- A common system for managing court action involving water rights disputes will be easier to administer, will be more understandable and predictable, and will result in less cost and reduced time in litigation for all parties.
- By sitting in each of the three regions of the state, the Water Court judges and proceedings will be considerably more accessible to the localities where the water rights disputes arise.<sup>28</sup>
- Finally, by creating a Water Court with multiple judges and referees, the Legislature will provide a system capable of completing the adjudication of pending water right claims within a reasonable time frame, thus fostering greater certainty for all water interests sooner.

### **1.3 Implementation Issues & Limitations**

The creation of a Specialized Water Court will require a state constitutional amendment and a significant public resource investment. However, for the reasons explained above in 1.C, the Task Force believes the Specialized Water Court to be the best mechanism available to address water resource process issues in Washington State.

On state-wide budget issues, the Task Force defers to the Legislature regarding how the need for a Water Court is weighed against other state priorities. In any event, 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. Under the current system of adjudications (i.e., no Water Court and no additional funding), the cost of these responsibilities and lack of personnel to handle them could make such an expensive and complex undertaking difficult.

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<sup>28</sup> Relevant to this issue, the Task Force notes that some concerns were raised regarding whether the PCHB is sufficiently fair or sensitive to local concerns. The Task Force has not, however, reached any conclusions with regard to this perception and does not intend to suggest this conclusion through noting this potential strength of our Water Court recommendation.

## **Recommendation 2: Ecology Develops Comprehensive Background Information Early in the Process and Submits a Report to the Court at Outset of the General Adjudication**

### **2.1 Description of This Recommendation**

Under this recommendation, Ecology would develop comprehensive background information to share with all claimants at the outset of a general adjudication. Claimants would have an opportunity to provide additional information to Ecology. Ecology would then compile this information into a report to the court. This report would identify those claims Ecology believes are supported by sufficient documentation, thereby supporting expedited preliminary confirmation of their validity by the court. Those claims that appeared to Ecology to lack sufficient supporting documentation would be the subject of an evidentiary hearing by the court unless the claimant chose to withdraw his/her claim.

As part of this recommendation, the Task Force suggests that early in the court process, water right claimants be required to make a prima facie showing of the evidence supporting their claims. This would facilitate early “weeding out” by the court of unsupported claims. Ecology would not participate in this effort as a “fact finding” entity, but Ecology’s report to the court could assist the court with this process.

### **2.2 Reasons Supporting Recommendation**

This recommendation is aimed at reducing court time associated with adjudicating claims. Developing comprehensive background information before the general adjudication begins will assist many claimants in establishing their claims and in determining whether to withdraw invalid claims. It will also facilitate early determinations by the court. In addition, once comprehensive information is available, the strengths and weaknesses of particular claimants’ cases are likely to become apparent early on, eliminating the need for second and third repeat evidentiary hearings and enhancing the possibility of early settlement efforts. This recommendation does not depend upon the creation of a Water Court and should be pursued independent of whether such a Court is created.

### **2.3 Implementation Issues & Limitations**

This recommendation would require significant upfront funding. However, this may not translate into an overall increase in expenditures associated with an adjudication as the increase in funding at the outset is expected to be offset by an overall savings in court and participants’ time and resources.

The Task Force does not recommend that the court give any special deference to the conclusions in Ecology’s Report to the court. Under this circumstance, not all claims will be resolved through the upfront process. Only those claims for which there is no dispute regarding the sufficiency of supporting evidence could be resolved early. In other words, this recommendation will not reduce court time required to resolve actual disputes (where one party believes there is sufficient documentation to support a claim and another party believes the evidence is lacking).

### **Recommendation 3: Authorize Limited Special Adjudications**

#### **3.1 Description of This Recommendation**

This recommendation would authorize adjudication of rights among a limited number of claimants and for stream reaches or limited ground water areas, rather than entire basins. This recommendation does not mandate that a court conduct a limited special adjudication but it makes clear that the court may elect to do so and that nothing in existing statute or caselaw prohibits such adjudications. Where federal reserved rights are among the rights potentially impacted by the adjudication, the state (the Department of Ecology and Attorney General's Office) should determine at the outset whether the decision to conduct a limited special adjudication will preclude state jurisdiction over the federal rights in light of the McCarran Amendment.<sup>29</sup> As part of this determination, the state should weigh whether risking the state's ability to adjudicate federal rights negates the benefits of adjudicating a more limited area.

#### **3.2 Reasons Supporting Recommendation**

This recommendation is aimed at reducing the time and resources associated with conducting an adjudication by allowing a court to define the scope of an adjudication as narrowly as possible. Presumably, the smaller the geographic scope of the case, the fewer the number of claimants, and the more quickly the case can be resolved.

When a dispute involves only a small set of water users, this recommendation will facilitate expeditious resolution of the dispute.

#### **3.3 Implementation Issues & Limitations**

If a court defines the scope of an adjudication too narrowly and the particular watershed is the subject of federal reserved water right claims, the McCarran Amendment may preclude state court jurisdiction over the federal claimants because the adjudication is not sufficiently comprehensive. This issue should be dealt with before a limited special adjudication is filed by requiring the state to consider whether significant federal claims to water in the subject area exist, thereby justifying a larger-scale adjudication.

### **Recommendation 4: Expand the Use of Mediation**

#### **4.1 Description of This Recommendation**

This recommendation does not mandate the use of mediation, but creates incentives to encourage and systems that facilitate the use of mediation. This recommendation makes clear that the court is authorized to appoint a mediation-trained commissioner or referee to assist with mediation as well as to allow the parties to select an independent mediator to assist their efforts. This recommendation also authorizes a court to postpone judicial decisions on issues while parties make progress in mediation. One example of an incentive that might be used to encourage participation in mediation is to establish a fee schedule that requires claimants to support the cost of the adjudication and provide a reduced fee or complete fee waiver for participants who resolve their claims either early in the process or without a formal adversarial court proceeding. Other examples of incentives include providing state funding for mediator

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<sup>29</sup> The McCarran Amendment, codified at 43 U.S.C. § 666(a), is a federal law in which the United States has waived sovereign immunity, both in its own capacity and as trustee for Indian Tribes, in order to allow federal reserved rights to be adjudicated in state courts. The United States has not, however, waived its sovereign immunity for water rights disputes involving fewer than all of the claimants to a given stream.

services and giving priority for use of state funds for water storage, delivery, conservation or other projects to facilitate settlements with those who resolve their issues through mediation.

#### **4.2 Reasons Supporting Recommendation**

Experience has shown that the use of mediation in an adjudication can expedite final resolution of the entire case. In addition, participants may be able to secure results through mediation that they would be unable to secure in a court decision. For instance, settlements of the water right claims of large claimants sometimes involve the state or federal government assisting in the development of new or updated water distribution systems, providing a benefit to claimants not likely to be obtained if the parties look to the court for resolution of their issues.

#### **4.3 Implementation Issues & Limitations**

If this recommendation includes the ability to make the commissioner or referee available to assist in mediation, a process would need to be in place to screen the officer who acted as a mediator from other participation in the case. This would be possible with the creation of the Specialized Water Court because the court is comprised of multiple judicial officers and the court conducts multiple adjudications at the same time so a judicial officer hearing one adjudication could serve as a mediator in a different adjudication.

The overlay of a court case, with all of its associated processes including schedules for hearings and court decisions, frequently motivates parties to engage in settlement discussions. Therefore, this recommendation does not do away with the adjudication, it simply builds incentives and resources into the adjudication process to facilitate settlement efforts.

### **Recommendation 5: Authorize Pre-Filed Written Testimony**

#### **5.1 Description of This Recommendation**

In the Yakima adjudication the court has, at times, authorized specific claimants to pre-file testimony because of witness availability concerns. There are no express provisions in the water code authorizing the use of this process on a larger scale and outside of the context of taking and preserving deposition testimony.

This recommendation would authorize a court conducting a general adjudication to develop a system whereby certain categories of testimony are submitted in written form on a pre-filed basis. For example, a court could require that all direct testimony supporting claims of water rights in a particular subbasin be submitted in the form of pre-filed written direct testimony thirty days in advance of the scheduled hearing. Notice of an intention to cross-examine a person who had submitted pre-filed direct testimony would be required in advance of the scheduled hearing (e.g., 15 days). If no party indicated an intent to cross-examine a particular witness, the court would accept the pre-filed testimony without requiring the person to appear in court. The scope of the hearing (for those rights that did not involve cross-examination testimony) would be limited to legal argument addressing whether the direct testimony was sufficient to establish a right.

#### **5.2 Reasons Supporting Recommendation**

This recommendation would save court time and resources by eliminating unnecessary live testimony thereby resulting in shorter evidentiary hearings.

This recommendation could also enhance participation by claimants, especially those that are not represented by counsel, if model direct testimony is developed that shows claimants the categories of information required to support a claim of a water right.

### **5.3 Implementation Issues & Limitations**

It is difficult to quantify the time and resources this recommendation would save. Savings would depend on how many individuals took advantage of the pre-filed testimony option and the degree to which other litigants choose to cross-examine these witnesses.

In order that this recommendation actually makes the process easier for pro se parties, it will be important to ensure that those parties will have access to the assistance necessary to ensure that they collect and present the appropriate information to the Court in their pre-filed testimony. In addition, this recommendation should be offered as an option so that the process accommodates judges and other participants who prefer to hear the entirety of a witness' testimony in court rather than bifurcating it into a two step process of reading pre-filed testimony in advance of the hearing and then reacquainting themselves with the witness during cross-examination.

## **PART 2: FEDERAL AND INDIAN WATER RIGHTS DISPUTES**

### **A. Background**

Federal and Indian reserved water rights are rights based on the legal principle first recognized in *Winters v. U.S.*, 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. For additional details, see *Federal and Indian Reserved Water Rights, A Report to the Washington State Legislature*, October 2002 (hereafter AGO Reserved Rights Report), at pages 9-17, attached as Appendix L.

The federal government asserts rights to water based on reservation purposes in many contexts. For example, 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.

In addition to water rights connected directly to a federal reservation, 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.

### **B. Existing Processes in Washington**

As described in more detail in Section 1.A. above, general adjudications of water rights in Washington are conducted according to procedures provided in the Water Code and 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, 43 U.S.C. § 666(a), the United States and Tribes may be named as defendants in a state court general adjudication. See Appendix L, AGO Reserved Rights Report, particularly at 15 (chart depicting differences between state-based water rights and federal

reserved water rights). For this reason, the extent, validity and priority of federal and Indian reserved rights can be resolved, either through litigation or a negotiated settlement, in the context of state general adjudications.

An action may also be initiated in federal court to address issues involving federal or Indian reserved water rights. While the federal processes are beyond the scope of this report, settlement of federal and Indian reserved water rights can occur within the context of federal litigation and may involve the state.

One way to reduce the need or incentives for parties to litigate over the extent, validity and priority of federal and Indian reserved water rights are for the state or federal government to pursue “indirect processes” that do not involve litigating or negotiating in the context of water rights law. Such indirect processes might include watershed planning efforts or actions under federal authorities such as the Clean Water Act or the ESA which have the result of ensuring that sufficient water is left instream to satisfy federal or Tribal needs.

### **C. Evaluation of the Current Process**

General adjudications have the benefits identified in Section 1.C. above including certainty among water users. It is this specific attribute of adjudications that makes adjudications an attractive option for addressing federal and Indian reserved water rights. The existence of unquantified federal and Indian reserved water rights creates uncertainty in many basins for water rights holders because it may be extremely difficult, absent an adjudication, to know the extent or priority of those rights and the impact that a full exercise of these rights would have on water availability in that basin. Also, this certainty with regard to quantities and priority make it easier for the state to administer a system of water rights management and enforcement. Finally, with respect to federal and Indian reserved water rights, a state court general adjudication provides the only state forum with clear authority to address those rights under the McCarran Amendment.

Although, state court general adjudications have clear benefits to the state, there are other processes that can prove more efficient. Voluntary, ad hoc negotiations among state water right holders and the federal government or Tribes frequently provide a successful means of resolving disputes. Successful resolutions are often reached in these cases due to the funding that the federal government can make available to craft innovative solutions such as water efficiency, conservation or storage programs. Additionally, a federal court action involving a more limited number of parties may allow for a more timely resolution of disputes. To the extent that a federal court action involves more significant numbers of parties, there may not be any significant efficiency gains, but such actions may offer the benefit of shifting the burden of funding the disputes resolution process from the state to the federal government, or at least present an opportunity for sharing those costs.

Finally, indirect processes such as actions taken under the authority of the federal Endangered Species Act or the Clean Water Act, may result in the maintenance of sufficient water in a basin to satisfy the needs of the federal or Tribal governments holding reserved rights. Actions taken by the state under its authority to manage and enforce water rights may have the same effect. With their needs addressed, the federal or tribal governments may not seek to exercise those rights.

The problems associated with the current system present a number of ongoing challenges. The weaknesses of our current adjudication system are identified in Section 1.C. above, with time and cost presenting the paramount considerations. The other processes, however, including settlements, federal court actions and indirect processes are not comprehensive and may not provide sufficient certainty.

#### **D. Recommendation**

The Task Force believes that the state should initiate discussions with the federal agencies and Tribal governments holding federal reserved water rights to learn their views on what would make a system for resolving disputes involving the rights they hold more effective. Holding such discussions will accord the respect to these sovereigns to which they are entitled, and may result in the development of a process in which they are fully pledged to cooperate. It is through a spirit of cooperation that provides the greatest potential for an efficient and fair resolution of disputes involving federal and Indian reserved water rights.

In any such discussions, the Task Force recommends that the state propose for discussion the following recommendations for improving the current system and ask the Tribes to propose additional recommendations.

#### **Recommendation 1: Create Incentives to Encourage the Settlement of Federal and Indian Reserved Water Rights**

One incentive for parties to a dispute involving federal and Indian reserved water rights would be to provide free or inexpensive mediation services to the parties as a way to explore settlement before mitigating litigation or narrowing the issues to be litigated. In addition, the state could set aside funds to be used for water storage, conservation, delivery and other projects that might make a settlement among the parties easier to reach. Through outreach to the federal and Tribal governments in the development of this recommendation, the state may be able to obtain commitments from those governments regarding their willingness to participate in making funds available for these purposes.

#### **Recommendation 2: Endorse Recommendations for Improving the Adjudications Process (See Part 1, Recommendations 2 through 5 above)**

The recommendations identified above for improving the adjudications process should be attractive to federal and Tribal governments. One of these options, providing clear authority to the courts to perform special, more limited adjudications, runs a real legal risk of not satisfying the McCarran Amendment and therefore of a state court not having jurisdiction over the federal and Tribal claimants. Such a special or limited adjudication, however, may hold some benefit to federal or Tribal governments by avoiding a full-blown adjudication, where all or most of the disputes can be resolved in a more limited proceeding.

#### **Recommendation 3: Create a State Compact Commission**

While settlements among private claimants and federal or Tribal governors may resolve many disputes involving federal and Indian reserved water rights, the State may need to initiate sovereign to sovereign negotiations in order to bring the federal and Tribal governments to the table. The best means for making this possible is through the formation of a compact commission

like that in Montana.<sup>30</sup> The Montana Compact Commission is composed to represent both the executive and legislative branches of state government and is designed to deal both with issues of state policy as well as with legal or technical issues. Any compact negotiated by the commission is subject to ratification by the state legislature, Congress and, where applicable, the Tribal legislative body. More details on the Montana Compact Commission can be found in the Appendix L, AGO Reserved Rights Report, at pages 26-27, and Appendix 1 to that report.

### **PART 3: WATER RIGHT MANAGEMENT/ENFORCEMENT DISPUTES**

#### **A. Background**

A significant category of water disputes result from appeals filed by persons challenging Department of Ecology water rights related decisions. The Department's major challenged decisions include the following categories: (1) Approving or denying applications for new water rights or for changes to existing water rights. Challenges to these decisions may include a challenge to conditions included in Ecology's decision; (2) Canceling water right permits that have not been developed using due diligence or according to permit terms; (3) Finding that water rights have been relinquished based on non-use; (4) Issuing enforcement orders and penalties 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); and (5) Reducing diversions by junior water right holders during periods of water shortages in adjudicated basins to ensure availability of water for senior right holders. Ecology lacks authority to issue similar orders in basins that have not been adjudicated. *Rettkowski v. Ecology* ("Sinking Creek"), 122 Wn.2d 219, 858 P.2d 232 (1993).

#### **B. Existing Processes in Washington**

Under current law, all of these Ecology "water right management and enforcement" decisions are subject to appeal to the Pollution Control Hearings Board (PCHB).<sup>31</sup> The PCHB is made up of three members who are appointed by the Governor with the advice and consent of the Senate. One of the members must be an attorney and no more than two may be from the same political party.

The PCHB process is *de novo*. This means that the PCHB conducts a full evidentiary hearing with each party given an opportunity to present testimony and evidence supporting their 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. The appellants have the burden of proof in other cases.

A party who is not satisfied with the decision of the PCHB may appeal the PCHB decision to the superior court or appellate courts pursuant to the Administrative Procedures Act (APA), RCW ch. 34.05. 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 *de novo* basis.

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<sup>30</sup> Some members of the Task Force did not believe the Task Force should recommend the creation of a compact commission. These members believe that the present adjudication process is functional and is the only means of providing certainty related to federal reserved water rights and state based rights. They further believe that negotiations between the state and Tribes accomplish some objectives, but certainty in the area of water rights is not one of these objectives.

<sup>31</sup> See Appendix E for more detailed information regarding cases heard by the PCHB.

### C. Evaluation of the Current Processes

The Task Force considered the following benefits of the current process (*de novo* proceedings) before the PCHB followed by APA appeals to the courts:

- The PCHB has developed expertise in the area of water rights and applies this expertise to nearly all water cases, with the exception of adjudications, that are brought in Washington, thereby facilitating consistency in case decisions.
- Decisions of the PCHB are indexed and most are available electronically. This is helpful to attorneys and parties with access to the internet.
- No filing fee is required to initiate a PCHB appeal, mediation services are provided free of charge, and procedural assistance, especially beneficial to pro se parties, is also available free of charge.
- In order to assist unrepresented parties, the PCHB has the ability to waive procedural requirements except those related to jurisdiction.
- 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.
- The PCHB has a goal to resolve cases within six months of filing. Evidence indicates that this goal is met in a majority of cases and that this is much quicker than *de novo* resolution by a court would be.
- 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.
- The PCHB is independent from Ecology.
- A large percentage of PCHB cases settle before hearing.

The Task Force considered the following weaknesses of the existing “PCHB followed by APA court review” process:

- PCHB proceedings are quasi-judicial. This formal, court-like setting (e.g., with deadlines and motion practice) can be intimidating 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.
- Some view the PCHB as not sufficiently fair or sensitive to local concerns, in part due to its location in Olympia. Especially given budget constraints, this may become more of an issue as travel for hearings is restricted.
- Parties may be discouraged from bringing appeals to the PCHB because they may view it as just another state agency, not sufficiently separate or independent from Ecology, that will rubber stamp Ecology decisions.
- Due to review standards applicable under state statute, the superior court does not conduct a *de novo* review of factual issues and instead simply reviews the PCHB record, with some limited exceptions. Some litigants may desire an evidentiary hearing in front of their local superior court.

## **D. Recommendations**

### **Recommendation 1: Retain the Current PCHB Process and Standards and Enhance Mediation Authority**

While recognizing that “the PCHB followed by the APA court review” process may not be perfect, the Task Force felt that, on balance, this process offers an effective mechanism for resolving appeals from Ecology decisions efficiently and fairly and recommends that the Legislature keep this process intact. The data considered by the Task Force indicates that the PCHB serves several valuable functions in processing water right cases. Most notably, from the list above, the PCHB provides statewide consistency and expertise and provides procedural and mediation assistance free of charge to litigants. A large percentage of PCHB water right cases settle before hearing and only ten percent of PCHB water right cases are appealed to the courts. Although concerns about the PCHB were raised (e.g., that the PCHB is too removed from the locality of the dispute and that PCHB decisions may not be sufficiently fair or sensitive to local concerns), the data examined by the Task Force did not allow it to confirm the validity of these concerns.<sup>32</sup> Generally, the Task Force finds that the PCHB process is more cost-effective, efficient and “user-friendly” than the Superior Court as the first step in the appeal of an Ecology decision. Further, shifting the PCHB’s workload to the Superior Courts would require substantial additional resources. As a result, the Task Force recommends that the PCHB’s role in water right appeals be retained.<sup>33</sup>

The Task Force did, however, find that the PCHB might be able to resolve a larger number of cases without holding a hearing through the use of mandatory mediation. The Task Force does not believe that mandatory mediation is always appropriate but that it should apply to certain categories of cases, such as appeals from enforcement and penalty orders.

### **Recommendation 2: Authorize a Specialized Water Court to Hear Appeals of PCHB Decisions**

As discussed above, in section 1.D., the Task Force recommends that a specialized Water Court be created with, among other things, jurisdiction over appeals from PCHB decisions regarding disputes over water rights management and enforcement decisions by Ecology. The Water Court would perform the same function as superior courts do now in reviewing Ecology’s water rights decisions.

In the alternative, if the Legislature finds that the concerns about the PCHB referenced above are valid, the following alternative approach to water right appeals could be used: persons appealing from an Ecology decision would be given the option of filing their appeal at either the PCHB or the Water Court for a *de novo* evidentiary hearing of their claims.<sup>34</sup> If filed at the

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<sup>32</sup> Appendix F is a survey of parties appearing before the PCHB with regard to their perspective on the fairness and efficiency of the PCHB.

<sup>33</sup> Some members of the Task Force do not agree with this recommendation but instead believe that all appeals of Ecology management and enforcement decisions should be to a Water Court as described in Recommendation 3 below.

<sup>34</sup> The PCHB members who participated on the Task Force do not support this option. The PCHB, they note, is rarely overturned on appeal, and provides for a uniform, independent review of Ecology decisions. Offering the option of appealing Ecology decisions to a Water Court, they assert, will result in a loss of consistency and efficiency. These members believe that the primary focus of a Water Court should be on reducing the backlog of adjudications and suggest that the Water Court will be distracted from this primary goal if required to hear direct appeals of Ecology decisions.

Water Court, the judge would have the discretion to remand the case to the PCHB.<sup>35</sup> Whether or not a water right case started at the PCHB or was heard by the PCHB after remand from the Specialized Water Court, decisions of the PCHB could be appealed to the Specialized Water Court which would review the PCHB's decision using the deferential standard set out in the APA judicial review provisions.

If the Legislature follows this alternative approach, the Task Force suggests the following non-exclusive set of factors for use by a Water Court in making the decision whether to retain a case filed directly with the court or send it to the PCHB for an original hearing:

- 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.

### **Recommendation 3: Superior Court (or Water Court) Decisions Should be Given Deference by the Appellate Courts**

Currently, if a case is appealed from the PCHB to superior court for APA review, and later is appealed to the court of appeals or state supreme court, the appellate courts look solely to the findings and conclusions of the PCHB, and do not grant any deference to the superior court's decision. Therefore, for those cases that are appealed up through an appellate court, the superior court process can be viewed as superfluous and a waste of time and resources. For these reasons, whether the Legislature adopts the Task Force's recommendation to create a Water Court or not, the Task Force recommends that the Legislature change the law to require that an appellate court reviewing a PCHB decision that has already been reviewed by a superior court or Water Court give some appropriate level of deference to the decision of the superior court, or Water Court if one is created.

## **PART 4: INSTREAM FLOW DISPUTES**

### **A. Background**

The term "instream flows" generally refers to that quantity of water that is needed in a river for the benefit of the river as an ecosystem, with the protection of fish habitat being the most commonly described purpose for protecting an instream flow. Disputes over instream flows may involve issues surrounding (a) determining whether to establish or update instream flows and, if so, at what levels, (b) challenging those instream flows once they are established, and (c) protecting those instream flows from impairment by the holders of junior water rights.

Disputes surrounding the need to establish an instream flow and the quantity of flow necessary to support instream values, are typically highly technical, involving a scientific debate

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<sup>35</sup> The members of the Task Force who object to the recommendation to keep the current PCHB appeals process and jurisdiction do not agree that the Water Court should be able to remand cases to the PCHB. If there is to be a choice of two forums for appeals of Ecology decisions, these Task Force members believe that the choice of whether to appeal to the PCHB should be left solely with the person appealing the Ecology decision.

over the often complex physical, biological and chemical attributes of river systems. These debates are also often highly political, usually involving a clash of values among interested parties. For these reasons, the Task Force did not feel that addressing the current systems for deciding when and where to establish instream flows or for what amount were within the Task Force's expertise or mandate. Instead, the Task Force focused on the processes for resolving disputes involving challenges to and protection of instream flows once 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. Pursuant to several water statutes, Ecology is charged with establishing instream flows by regulation. See 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.

Instream flow provisions may also be included in individual water right decision 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.

Another way that the Department of Ecology may provide for an instream flow is through the purchase or lease of a senior water right for the purposes of putting that water right into a water "trust." In such a case, the water right placed into trust has the priority date of the original owner of that right and, in basins that have been adjudicated, may be protected by Ecology through enforcement actions against any junior water right holders who attempt to use the water associated with that water right. In basins that have not been adjudicated, however, the Department's authority to protect the water placed into trust is not as clear. See *Rettkowski* ("Sinking Creek"), 122 Wn.2d 219 (1993).

Instream flow rights may also be found to exist when a Tribal treaty to take fish from a particular water body is recognized as including a right to a sufficient flow of water to support a fishery resource. 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.

The final mechanisms for ensuring that water remains instream relate to the application of federal law. For instance, under the federal Clean Water Act, Section 401, the state can impose bypass flow requirements on hydroelectric projects licensed by the federal government in order to protect water quality. As another example, instream flows can be protected through the application of the federal government's authority under the Endangered Species Act.

## **B. Existing Processes in Washington**

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 that: 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. RCW 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. 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.

With regard to instream flows protected through Department of Ecology decisions establishing a permit-specific flow conditions, those conditions can be challenged in an appeal to the Pollution Control Hearings Board. Similarly, disputes over Ecology decisions under the federal Clean Water Act, Section 401, are resolved by appeals to the PCHB. Recommendations to the processes for resolving these kinds of disputes could be addressed through the alternative processes described in Section 3 of this report.

Under federal law, 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. Disputes over Tribal treaty rights may also be resolved through one of the mechanisms discussed in Section 2 of this report such as settlement as part of a state adjudication or federal action, or through negotiations with a state compact commission. Unlike the option of proceeding in state court to address disputes over federal or Indian reserved rights, disputes over flows established under the authority of the Endangered Species Act would most likely be resolved through appeals to the federal courts and so are not addressed in this report.

### **C. Evaluation of Current Processes**

The strengths and weaknesses of several of the processes described above in Section 4.2, are discussed in other parts of this report. The strengths and weaknesses of the general adjudication process are discussed in Section 1.C; and the strength and weaknesses of the process for resolving Ecology management and enforcement decisions are discussed in Section 3.C.

With regard to the watershed planning process, this program is expected to provide a significant number of instream flow recommendations, with as many as eighteen basins expected to have proposed instream flows between now and 2005. The Task Force believes that this relatively new process, with its focus on inclusion of interested parties, should be given an opportunity to succeed.

With regard to the process for challenging Ecology's instream flow rules, the Task Force had only a few examples to draw upon as only a few instream flows have been set, and even fewer challenged in court. Drawing from the experience of Task Force members with APA rule challenges generally, the Task Force considered the following strengths and weaknesses of this system for resolving disputes over rules, once adopted.

One of the benefits of rule challenges filed under the APA is that they are filed in superior court, offering challengers the option of choosing a local court forum. In addition, APA rule challenges are made on the record developed by the Department of Ecology so that the Department's decision receives some deference allowing for relatively prompt decisions. On the other hand, because APA rulemaking challenges generally do not allow for the taking of new evidence or taking live testimony, this process before the superior courts may not provide the level of review that some parties would like. Further, superior courts may be viewed as lacking sufficient expertise to address the highly complex issues involved in reviewing instream flow rules.

## **D. Recommendations**

### **Recommendation 1: Retain APA Rule-Challenge Process for Resolving Disputes over Instream Flow Rules**

With the above evaluation in mind, the Task Force recommends that the existing structure governing challenges to instream flows adopted by agency rule should be retained. If a Specialized Water Court is created, the instream flow rule challenge should be filed in the Water Court as recommended in Section 1.D.

The Task Force suggests that the Legislature consider whether, in an instream flow rule challenge case, to authorize the court to take additional new evidence beyond what is currently allowed under RCW 34.05.562.<sup>36 37</sup> Such a step would have the benefit of allowing those parties challenging a rule to bring in evidence not considered by the Department of Ecology. Changing the scope and standard of review would, however, significantly impact the time and cost of the court's review, for both the court and the parties.<sup>38</sup>

### **Recommendation 2: Authorize the Department of Ecology to Enforce Instream Senior Trust Rights**

In order to ensure the fair and effective application of the Department of Ecology's efforts to protect instream flows through putting water rights into trust, the Legislature should clarify that the Department has the authority to petition the superior court (or the Water Court if one is created) for an order protecting an instream flow based on a senior trust right in an unadjudicated basin.

## **PART 5: MISCELLANEOUS RECOMMENDATIONS**

### **A. Examine the Feasibility of an Administrative Title System**

One idea briefly explored by the Task Force that appeared to hold promise was the concept of an administrative title system under which an agency would both validate water rights before or independent of an adjudication as well as maintain an up-to-date record of water rights after an adjudication has been completed. The Task Force did not have the opportunity to study the options for achieving this ambitious goal in sufficient detail to support any particular approach. The Task Force does, however, suggest that the following be considered: (1) a process that could "validate" a water right short of an adjudication to provide some increased level of certainty for water right holders; (2) a process to enhance the record-keeping required to keep track of the large number of water rights in existence; and (3) a title insurance type of

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<sup>36</sup> Some members felt it would be more appropriate for the Legislature to clearly describe the information that Ecology is required to consider in setting instream flows so that this information is fully considered by Ecology and subject to public review and comment.

<sup>37</sup> Also related to the scope and standard of review, it was suggested, although not addressed by the Task Force, that the level of deference given to Ecology's instream flow decisions should be greater when Ecology's decisions are based upon the recommendation of a watershed planning group provided under the state's watershed planning law. This suggestion was raised after the conclusion of the Task Force's meetings and so is not addressed in this Report.

<sup>38</sup> A question was raised by a Task Force member regarding whether the Legislature ought to clarify that persons with interests in the tributaries or groundwater connected to the mainstem of the waterbody which is the subject of the instream flow rule are included among those who have standing to challenge instream flow rules. This question was raised after the conclusion of the Task Force's meetings and so is not addressed in this Report.

system for tracking and reviewing water rights. Washington's Torrens Act, Chapter 65.13 RCW, applicable to real property, may offer some useful information with regard to how a similar approach has, or has not, worked in the context of real property (land).

**B. Interstate and International Water Rights Disputes**

While the Task Force was unable to address the processes associated with interstate or international water rights disputes during the time available to develop this report, the Task Force members did think that this was an important area of water rights disputes to address and recommends that the state engage in continued dialogue with its counterparts in adjacent states and Canada.

**CONCLUSION**

The Task Force believes that the recommendations in this report, if adopted by the Legislature, will result in a more effective, balanced and efficient system for resolving the majority of significant water rights disputes in Washington. Many of these recommendations will likely require the Legislature to devote additional resources in order to be successful. Determining the priority associated with the job of resolving water disputes is, of course, the Legislature's prerogative and unquestionably a difficult task in the current state budget climate. The Task Force would simply note that the differences among the state citizens with an interest in the state's allocation and management of its water resources are deep and resolving those differences through a fair process will require a significant commitment of resources. If the State, however, fails to find better ways to resolve water rights disputes, we will continue to incur the significant cost, frustration, and uncertainty associated with expensive and often unnecessary litigation.