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Of matters concerning  
impairment, water rights, and  
wastewater reclamation...

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Bob Barwin

11/29/06

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# What I'll cover today...

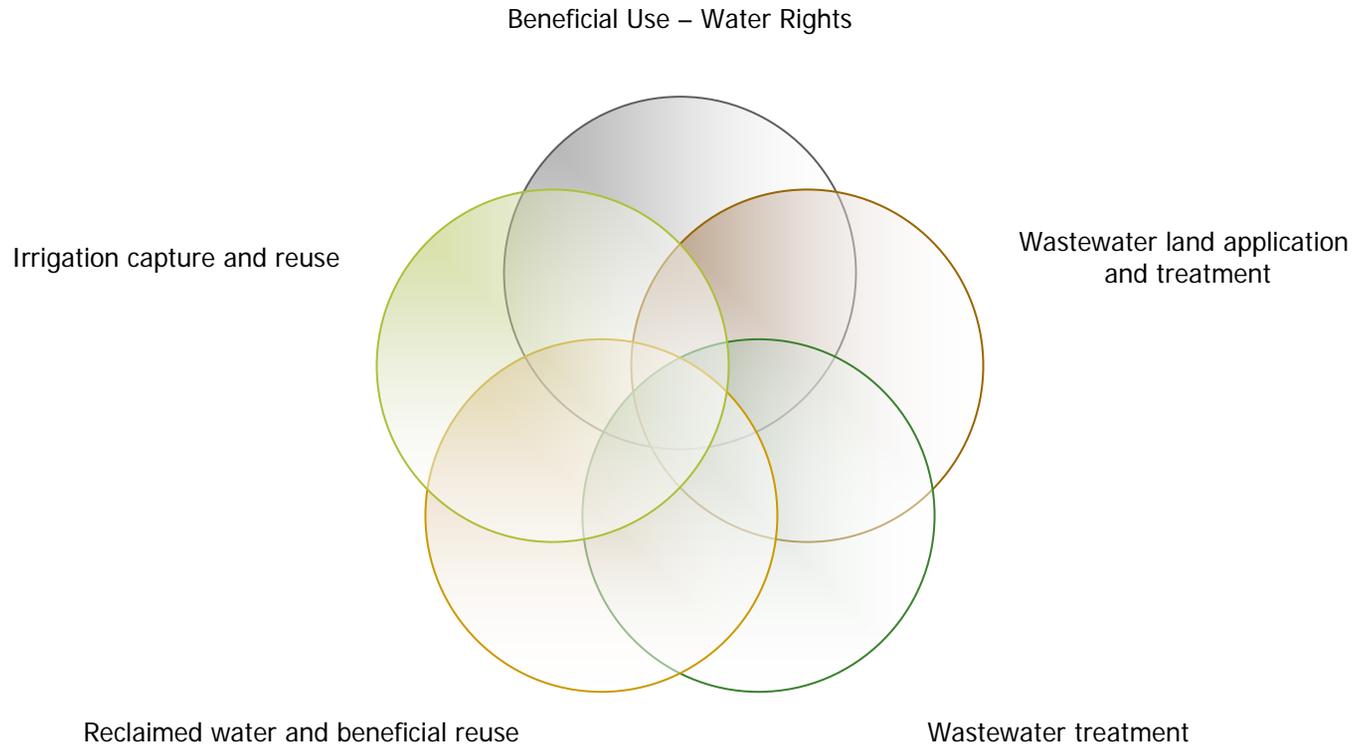
- Several aspects of wastewater treatment, reclamation and reuse, irrigation capture and reuse, and how they relate to water rights
  - How impairment factors into the review process
  - Use examples to illustrate “different standards”
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# Is there a test at the end?

- My goals today are:
    - To improve your awareness of impairment as a concern generally
    - To illustrate when, where, and why impairment reviews are performed
    - To provoke conversation
  - You have the opportunity to help us decide what, if anything, to do about those concerns
  - There will be no test!
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# The more things change...



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# What is impairment?

- A condition caused by someone or something other than a natural condition where a water right holder cannot accomplish the beneficial use(s) for which the right was perfected using reasonable care and diligence.
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# Is impairment a concern?

- Loss of flow to stream
- If available flow in a stream or river doesn't meet the demand, someone goes without
- If a call for water is made, junior rights are curtailed to satisfy the senior right
- The process continues until the “calling” right is satisfied



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# Who decides questions of impairment?

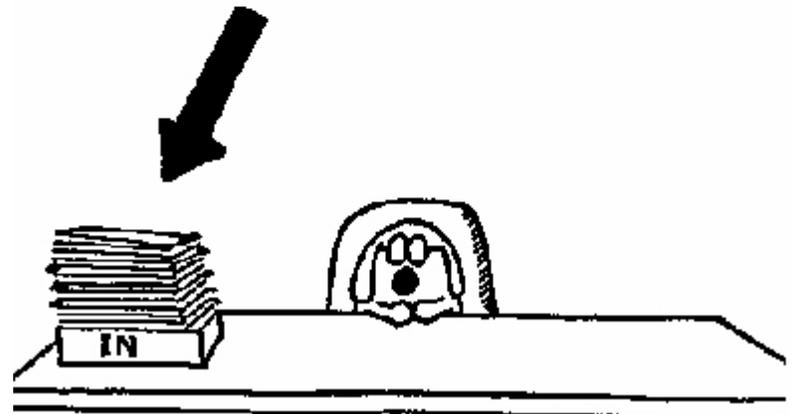
- Some examples are:
    - Ecology, when reviewing a new application for permit or a water right change
    - A watermaster or stream patrolman when a call for water is made on an adjudicated stream
    - A Superior Court judge, when injunctive relief is sought by a water user against someone interfering with his/her use
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# Looking before leaping?

- What is the hydrologic reality?
- What is the legal reality?
- How competitive is it now?
- Will the water supply diminish due to climate change?

IN BASKET:

TOTALLY UNIMPORTANT.  
YOU MAY SAFELY IGNORE  
IT FOREVER.



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# We don't need no stinkin' double standards, or do we?

- Well, yes, there are double standards.
  - Why?
    - Presumed potential for harm to other water rights
    - Potential for enlargement of right
  - Impairment and enlargement concerns stem from basic elements of the prior appropriation doctrine
  - Like any rules of thumb, they can make life easier (or not).
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# We don't need no stinkin' double standards, or do we?

- For irrigation capture and reuse, the right is either implied or inherent; no change in use or additional use is allowed
  - For wastewater reclamation and reuse, the right is explicit, granted by statute, and new and different beneficial uses were intended (e.g. “uses that would not otherwise occur”)
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# Should a utility reclaiming its wastewater care about impairment?

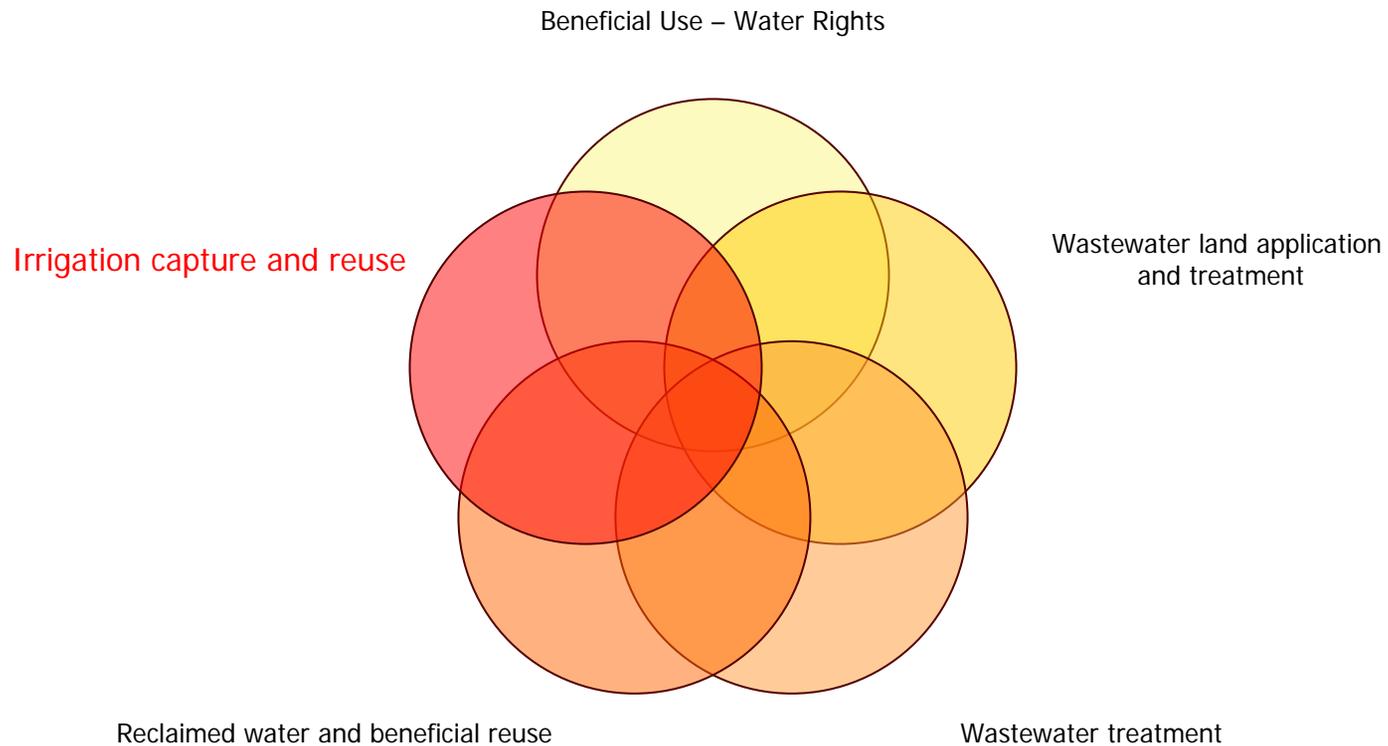
- Permit conditions or claims for injunctive relief:
    - Could threaten the use of expensive capital facilities
    - Could reduce the ROI for capital investments
    - Could result in civil litigation between the reclaiming utility and one or more water right holders
  - Do you want to know the risks at project conception or find out later?
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# What if there's no state review?

- Water users can still successfully prosecute an impairment claim when they:
  - Are short of water they are entitled to; and,
  - Can identify an unnatural cause for their shortage



# Capture and reuse



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# Capture and Reuse

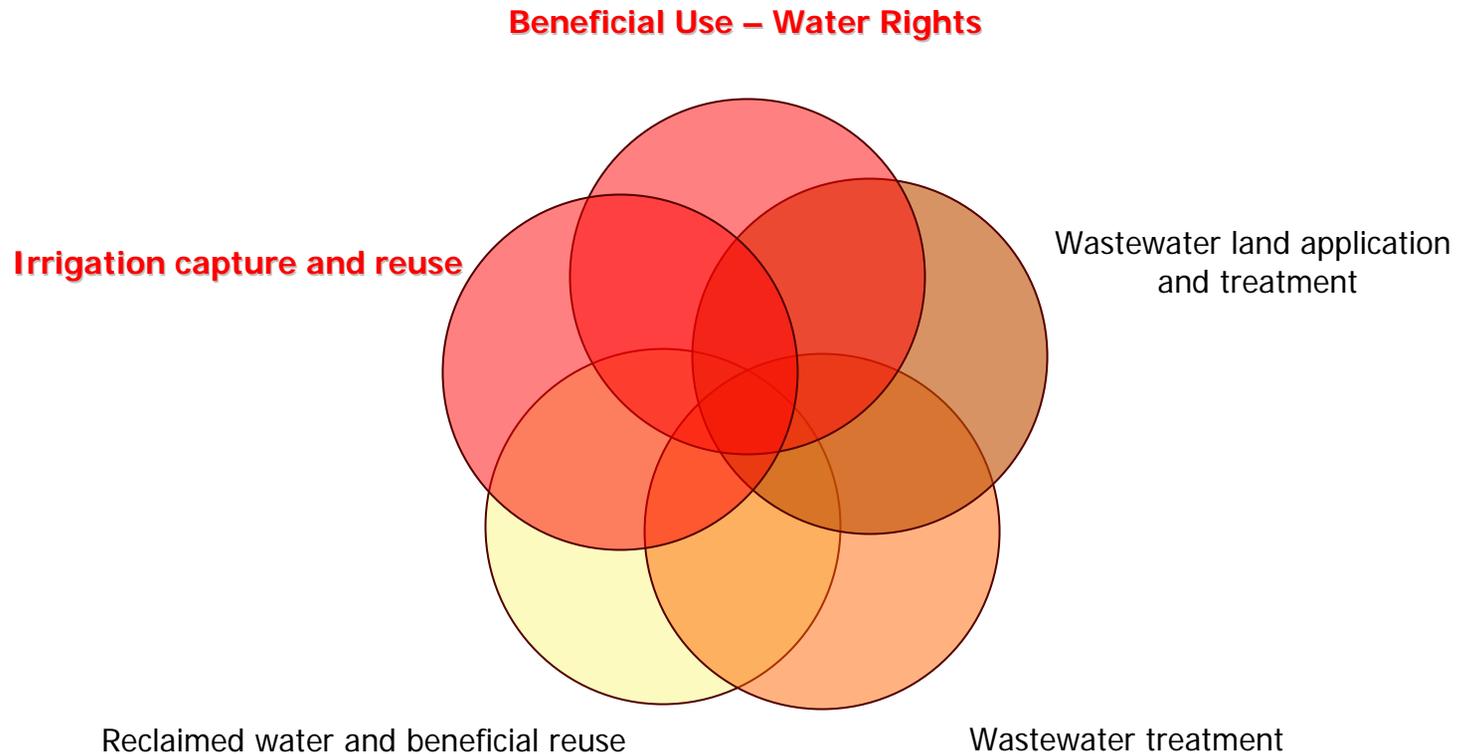
- Water must be captured prior to release to a public water way
  - Water must only be used for the same purpose as the origin water right
  - Does not add to the water right of origin – reasonable use doctrine applies
  - Case law from many western states, including Washington
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# Capture and reuse

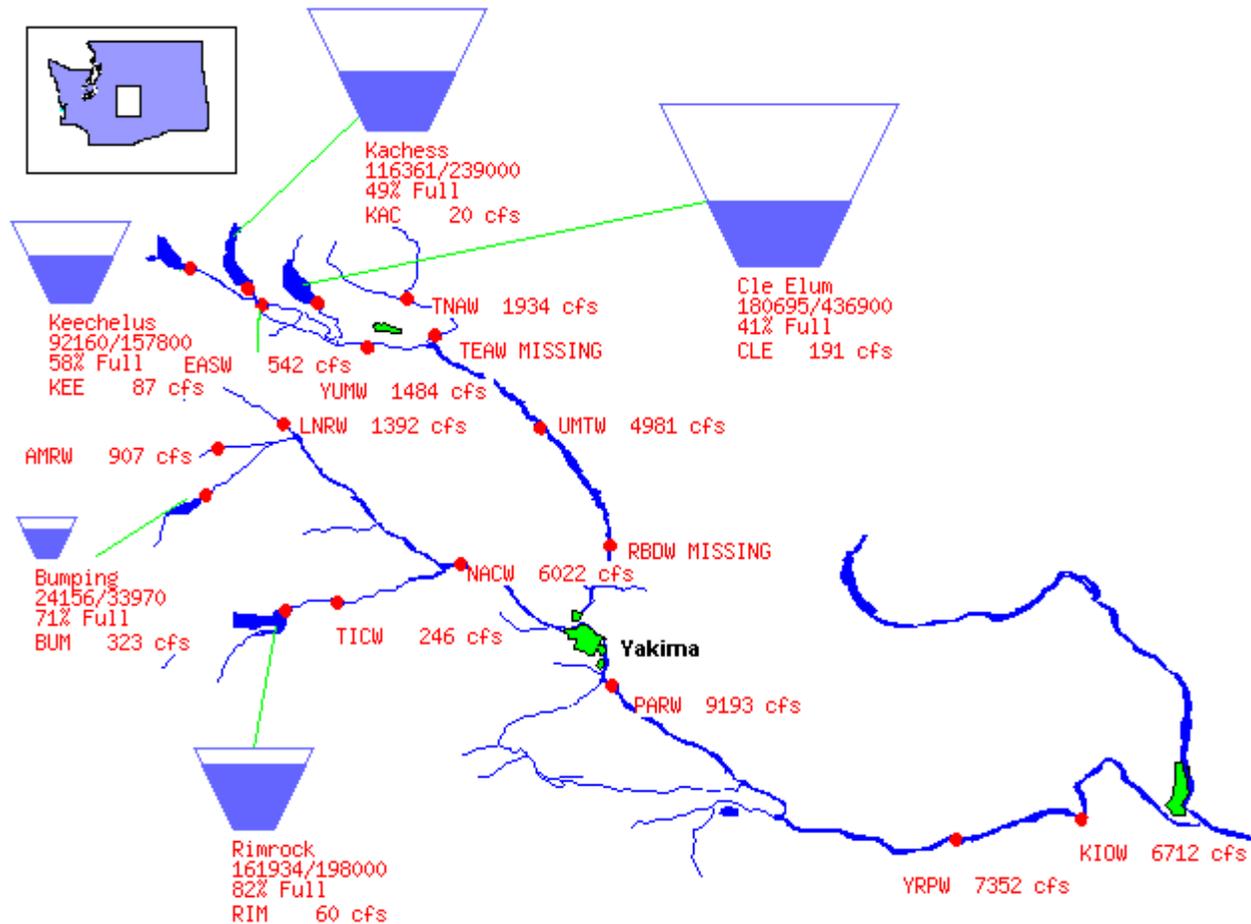
- It's not complicated, but it also doesn't address real-world complexities about the origin of the return flow.
    - Is it local to the watershed?
    - Is it foreign to the watershed?
    - Is the captured water your own, or another water right holder's?
  - In practice, the capture and reuse of water is not easily administered.
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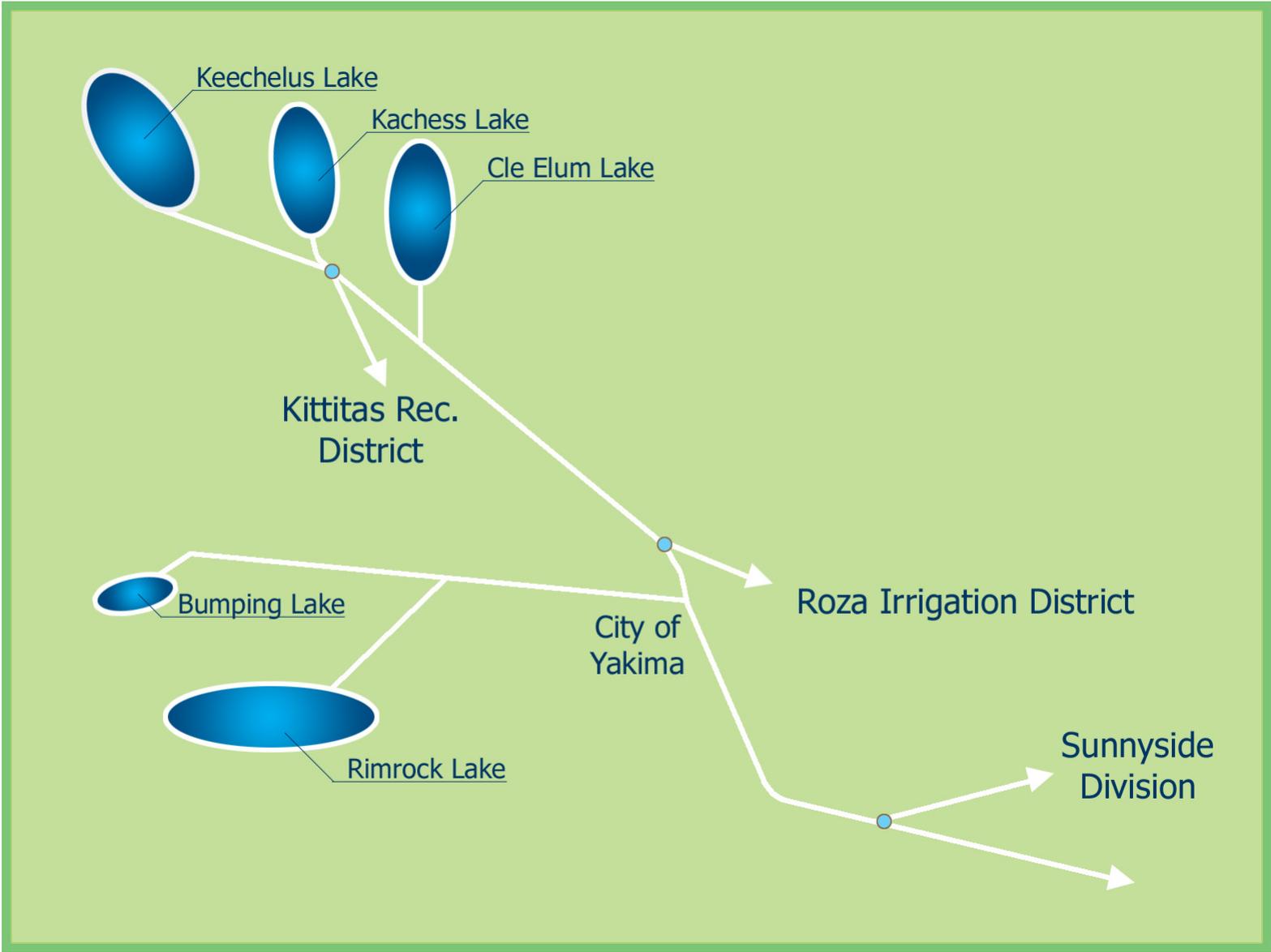
# Now, a variation...



# Yakima Project Teacup Diagram

04/30/2006



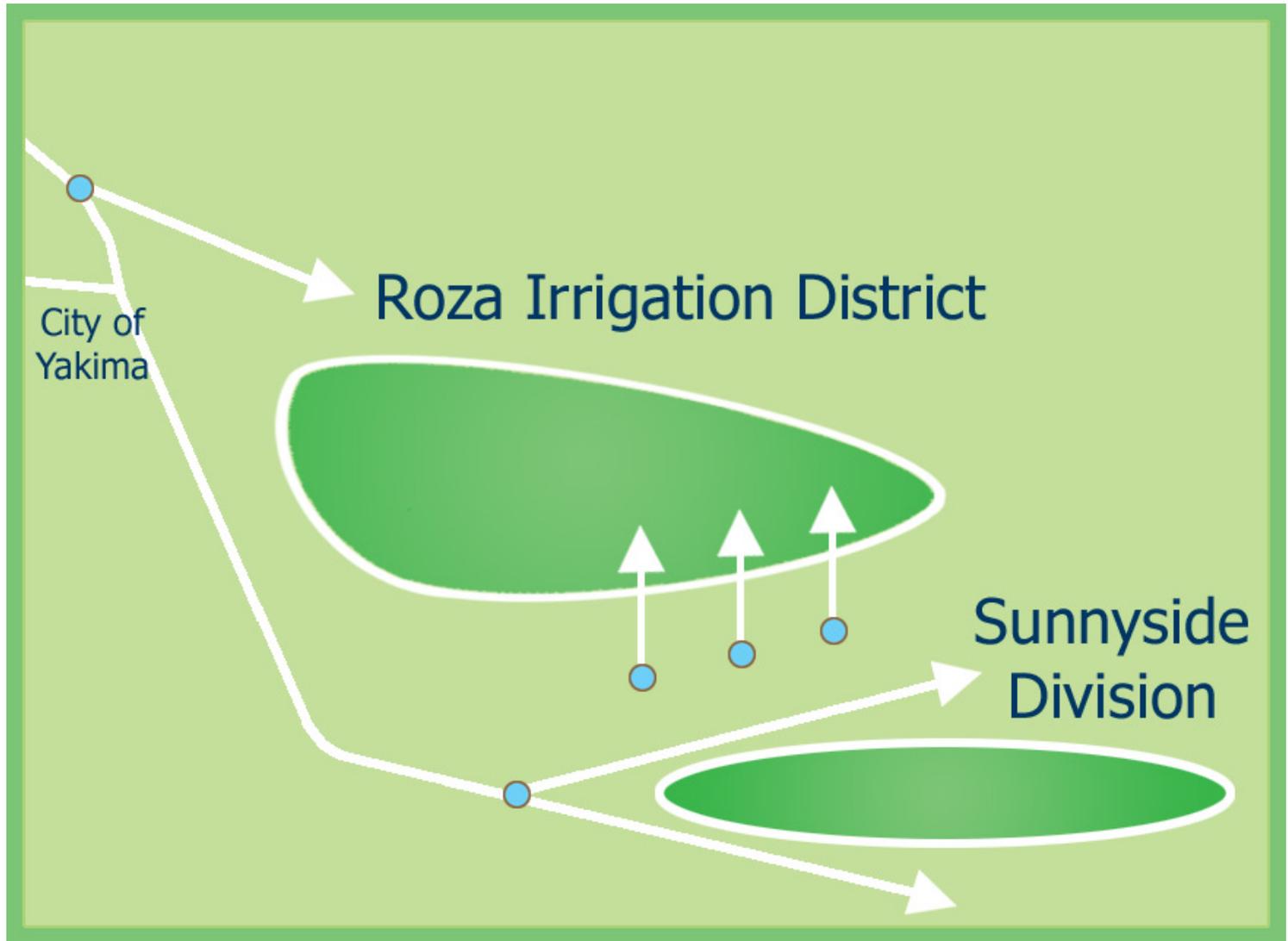


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# A hypothetical Roza ID capture and reuse example

- Roza ID captures tail water near Sunnyside Division canal
  - Install pumps and pipes to move water back to Roza turnouts for reuse within its boundaries
  - Tail water is reduced, lower Yakima River flows are reduced by an equal amount
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## A hypothetical Roza ID capture and reuse example



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# A hypothetical Roza ID capture and reuse example

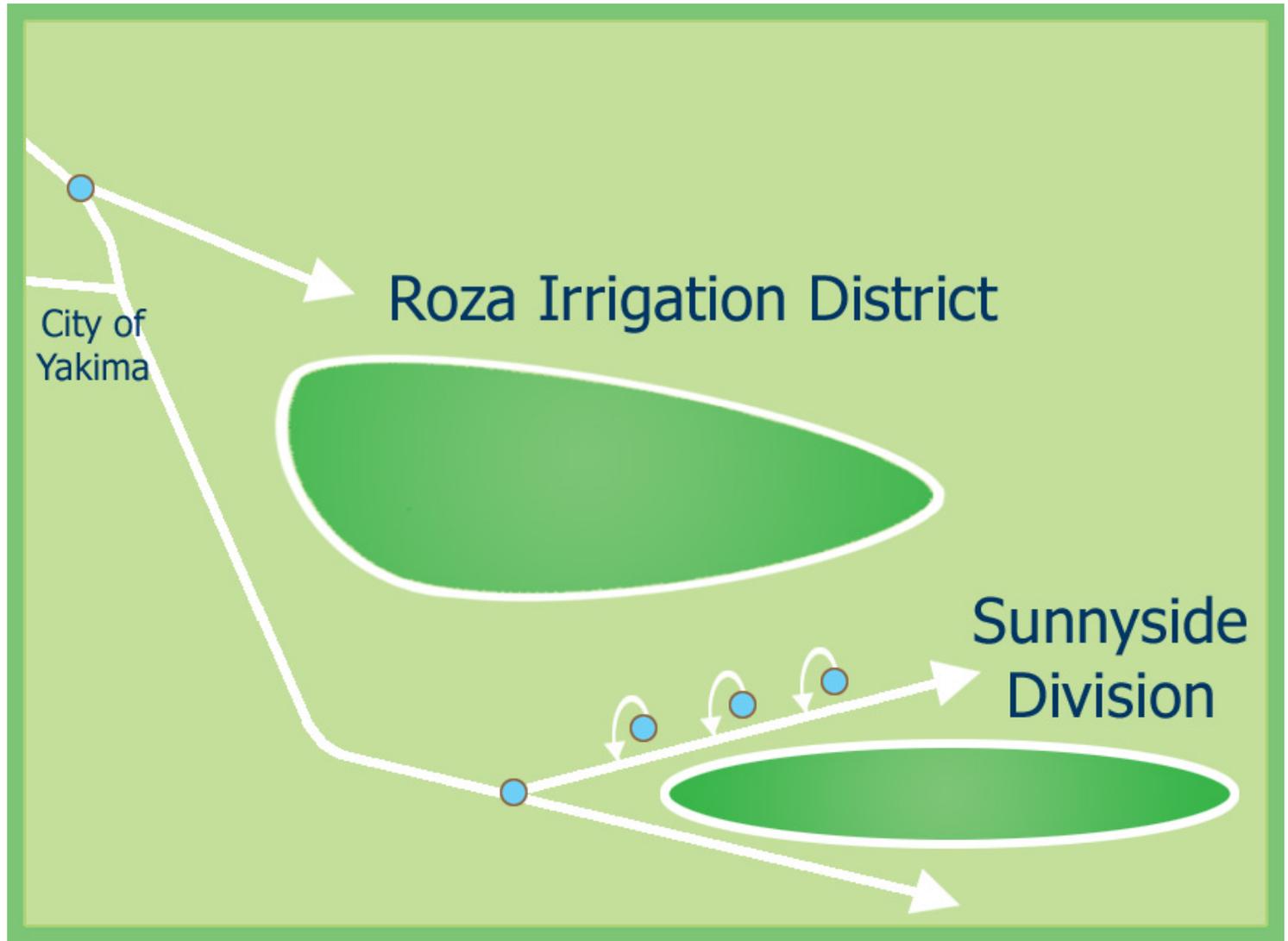
- Potential for impairment to Yakama Nation's treaty right to flow for fish
  - No permission is required, therefore, no impairment review is required
  - If YN or Reclamation, as trustee, objects, review would be in Superior Court or federal District Court
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# Sunnyside/Roza ID pump-back/transfer example

- Sunnyside captures Roza's
  - Sunnyside pumps it into their canal
  - Roza pays the power bill
  - Sunnyside transfers an equal amount of water upstream to divert at Roza's headgate
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## Sunnyside/Roza ID pump-back/transfer example

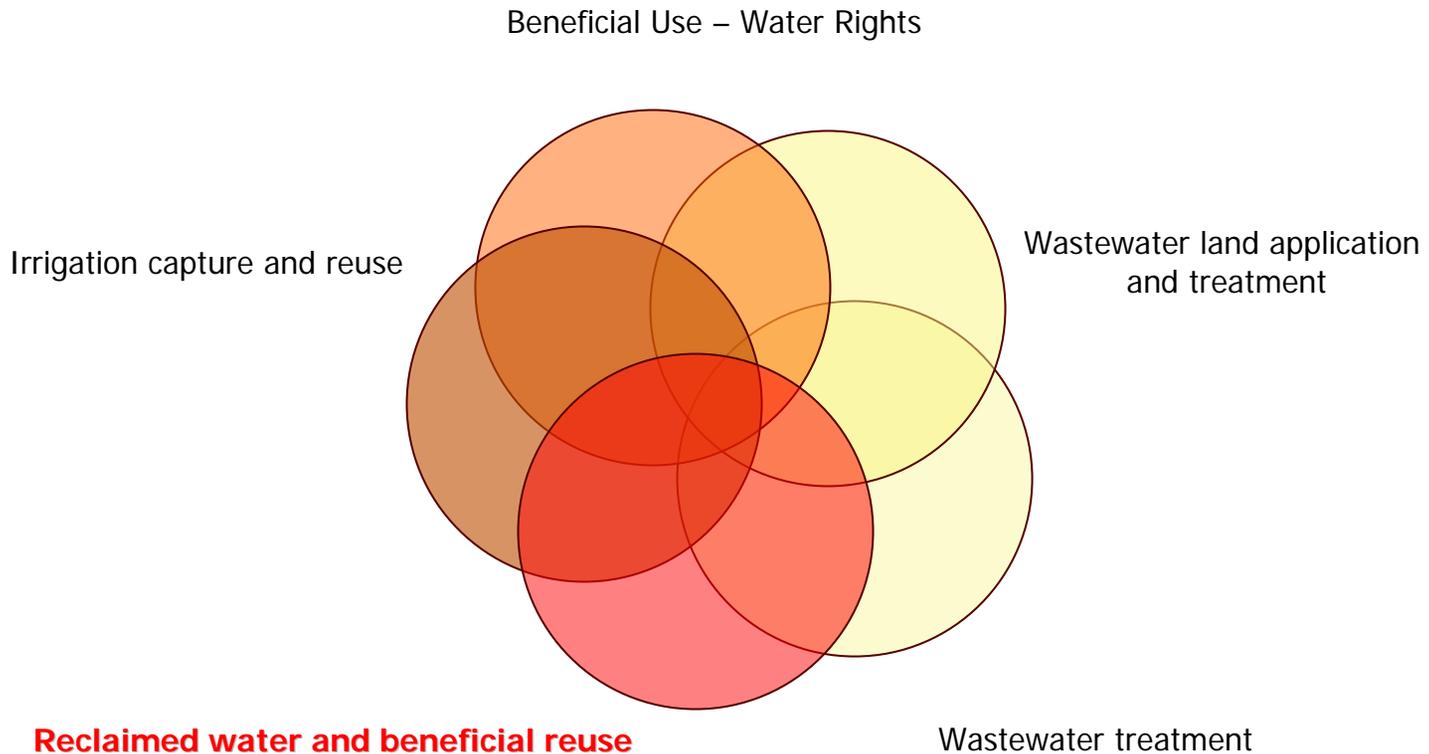


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# Sunnyside/Roza ID pump-back/transfer example

- Adds water to TWSA, potential for net benefit to all water users above Parker
  - However, the priority of Sunnyside's transferred water right determines who should benefit
  - The flow reduction to the lower Yakima River is identical to Roza's capture and reuse example
  - Approval of a change of point of diversion and place of use required, with an impairment review
  - Why? New place and new use (Roza ID, not Sunnyside)
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# Wastewater reclamation



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# Hypothetical City of Yakima example

- Reclaim 20 cfs to deliver to 5 new golf courses at Black Rock resort
  - 300 cfs target flow reduced to 280 cfs
  - Reclamation releases additional 20 cfs from storage to meet Parker target
  - Post-1905 use off, May 10, 1905 rights cut by 20 cfs (.6%)
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# Hypothetical City of Yakima example

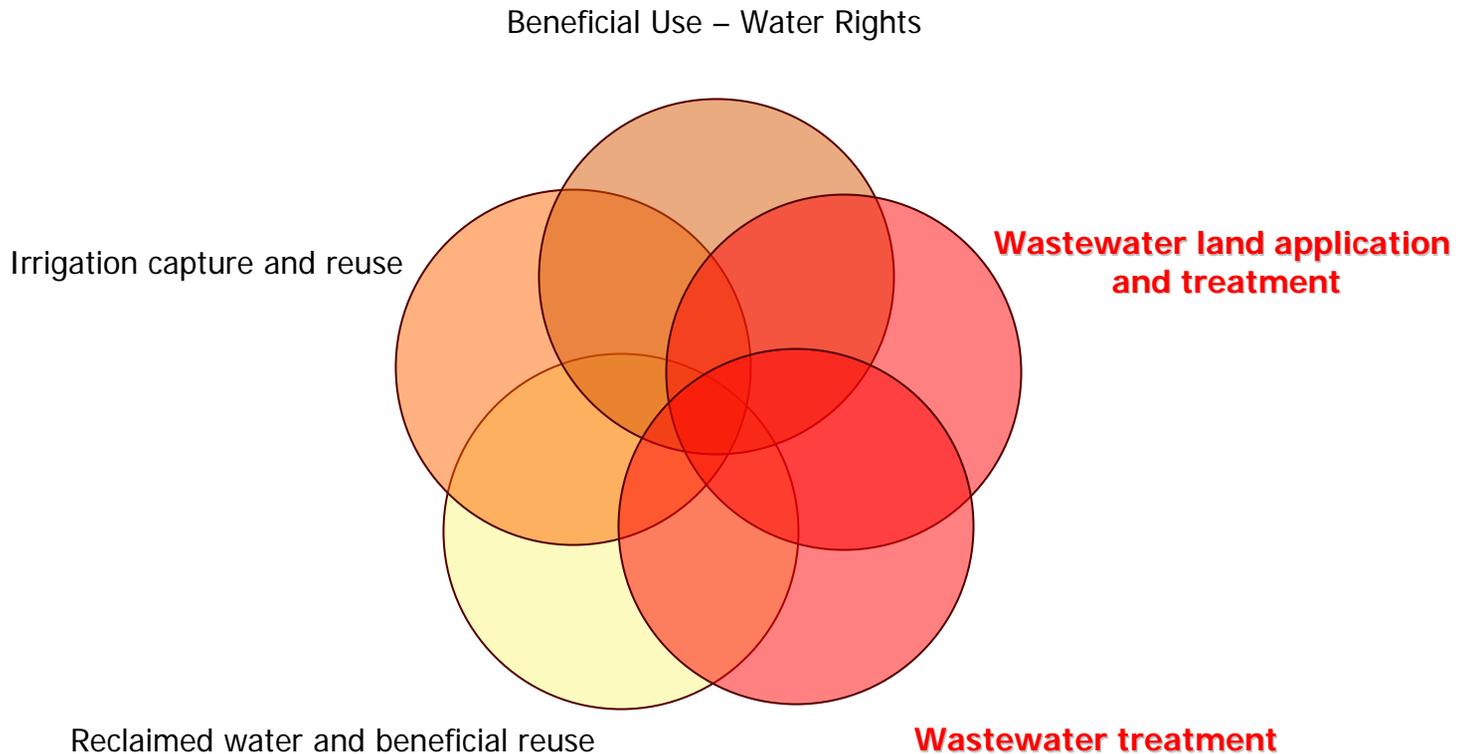
- Wait, that might cause impairment!
  - Answer #1: “So what, we have the exclusive right to reclaim our wastewater. The legislature said so.”
  - Answer #2: “We’re capturing and reusing our return flow.”
    - What about I/I?
    - Local or foreign return flow.
    - Return flow from proratable or post-1905 water use?
    - Uh oh, the resort is a new use.
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# Any risk?

- Neither answer #1 or #2 resolves the fundamental question of harm to the senior fisheries water right nor to the proratable users who are curtailed as a result of the 5 new golf courses.
  - The consequences of reclaiming 20 cfs are transferred to someone else.
  - Will it be tolerated? Is it fair?
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# Wastewater treatment and disposal



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# Land treatment and disposal of wastewater

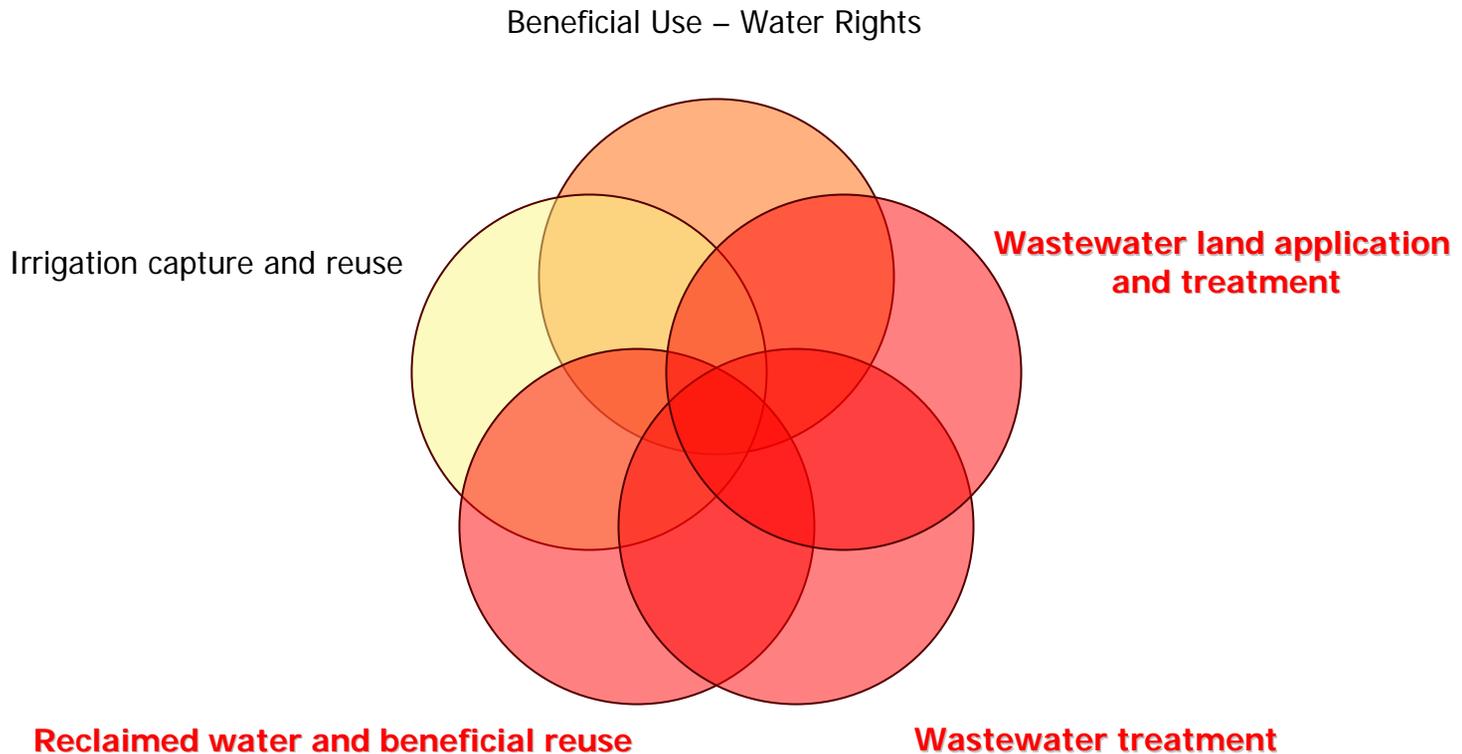
- NPDES permittee decides to remove outfall and land treat its wastewater
  - Crop is part of the treatment system
  - No beneficial use of the water
  - Reduced flow in receiving water
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# Land treatment and disposal of wastewater

- Water rights may be negatively affected
  - No state water right permit or impairment review
  - Water right holders alleging impairment must seek remedy at Superior Court
  - SEPA review may result in imposition of mitigation measures for environmental impacts (e.g. Goldendale)
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# Treatment, disposal, reclamation and reuse



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# Treatment, disposal, reclamation and reuse

- Is there a difference between a WWTP land treating wastewater and reclaiming it?
    - Is there a beneficial use of water?
    - Is management and operation of the land treatment system exclusively for wastewater treatment?
    - If there is a beneficial use, is there a water right for the farming or commercial activity?
    - Is there a sale of water to the farmer?
    - What is the quality of the water sold to the farmer?
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# Treatment, disposal, reclamation and reuse

<i>Land treatment</i>	<i>Irrigation with wastewater</i>	<i>Class D reclamation</i>
No beneficial use	Beneficial use (blend of irrigation water and wastewater)	Beneficial use
<ul style="list-style-type: none"><li>❖ SEPA review</li><li>❖ SWD permit</li></ul>	<ul style="list-style-type: none"><li>❖ SEPA</li><li>❖ SWD permit</li><li>❖ Water right claim, permit, or cert from source of public water</li></ul>	<ul style="list-style-type: none"><li>❖ Reclaimed water permit</li><li>❖ SEPA</li></ul>
No right	Somewhere in the priority system, unless foreign return flow	Exclusive right

# A flow chart to show it all...

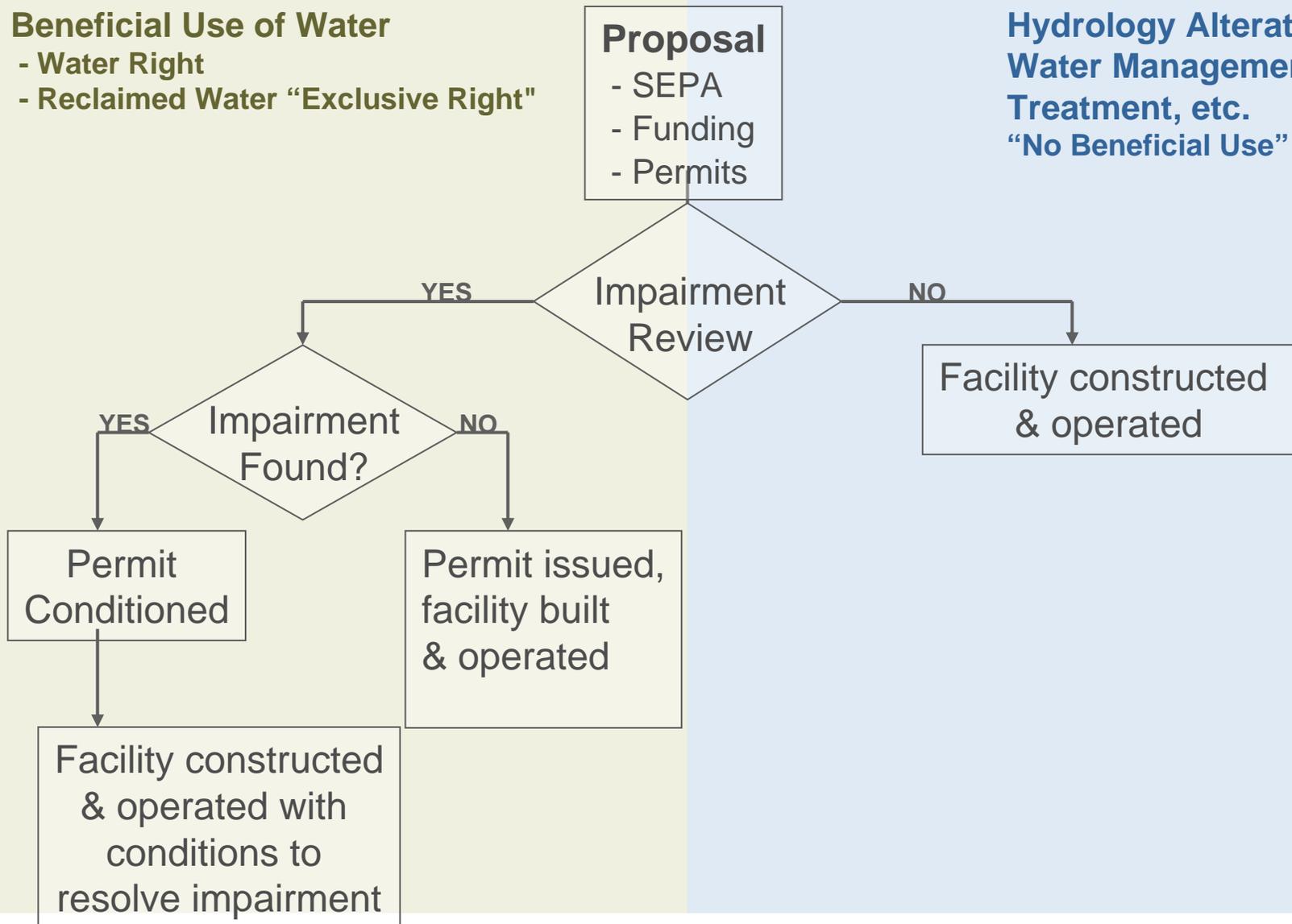
## Beneficial Use of Water

- Water Right
- Reclaimed Water "Exclusive Right"

## Proposal

- SEPA
- Funding
- Permits

Hydrology Alteration,  
Water Management,  
Treatment, etc.  
"No Beneficial Use"





### Reservation of Rights to Seek Additional Curtailment or Other Remedies

As noted in the table, the proposed Revised Order expressly reserves rights of all parties to seek further curtailment on proof of impairment and to seek enforcement and implementation of rights. While these rights are inherent in western water law, the parties felt it was important to expressly restate them in the context of the Revised Order.