

Understanding Water Law

Water Banking/Exchange Workshop
Washington Dept. of Ecology, Olympia
November 21, 2008

Presented by Brian Walsh
WA Department of Ecology

Water Resources Program Mission

Meet current and future water needs for people, farms and fish



Fundamentals of Water Resource Management

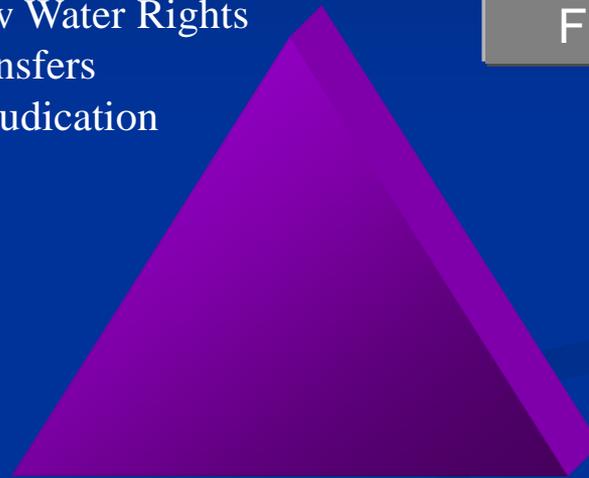
Allocation

- New Water Rights
- Transfers
- Adjudication

Prior Appropriation Doctrine
First in Time, First in Right

Conservation

- Water Use Efficiency
- Water Reuse
- Metering



Protection

- Senior Water Rights
- Reserved Federal Rights
- Instream Flows
- Compliance
- Trust Water Rights

Public Interest

- Watershed Planning
- Land use Planning
- Utility Planning
- ESA Recovery Plans

Science

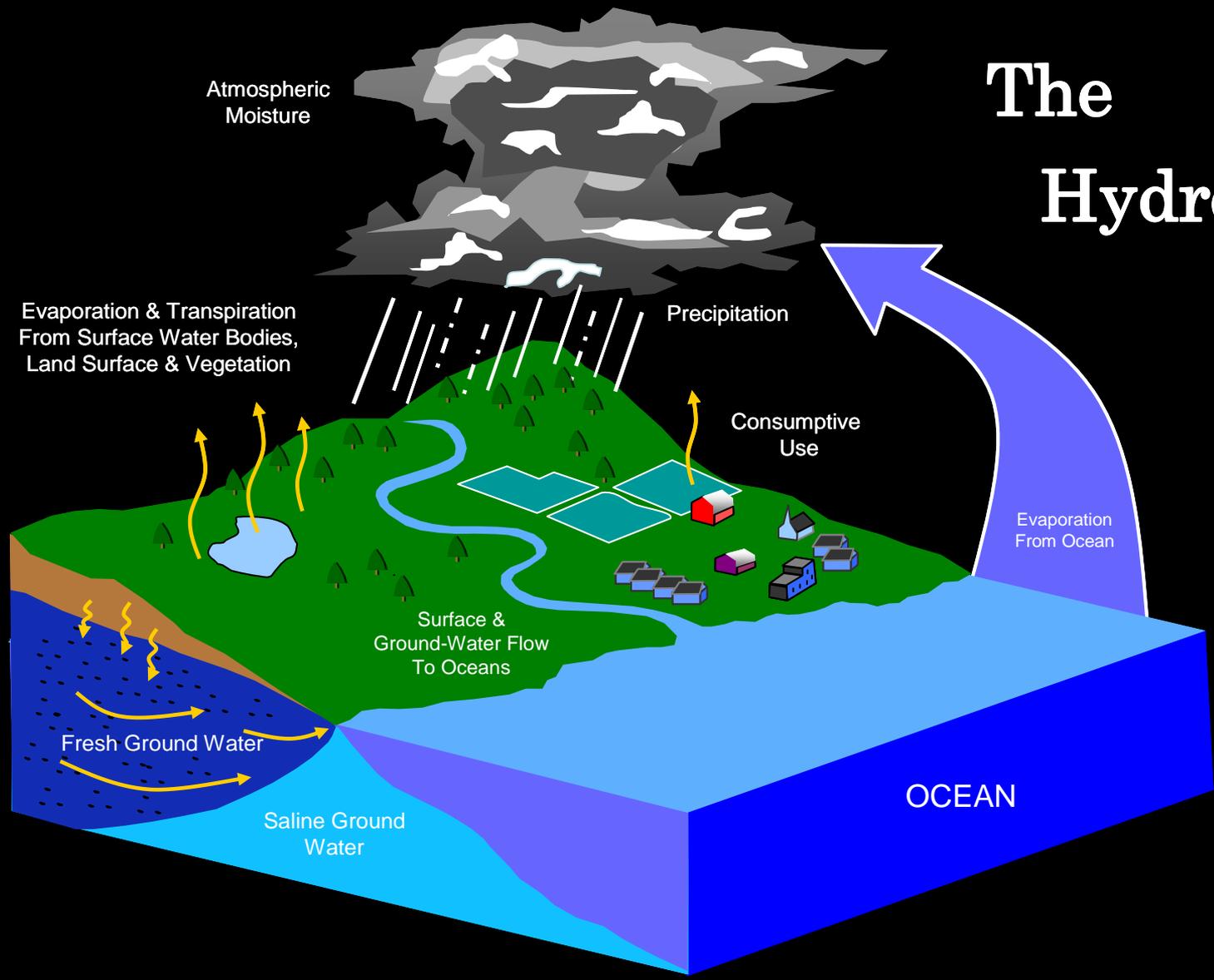
- Fish biology
- Hydrogeology

Water, which is rigidly limited by the geography and climate, is incomparably more important than all other natural resources in the West put together.

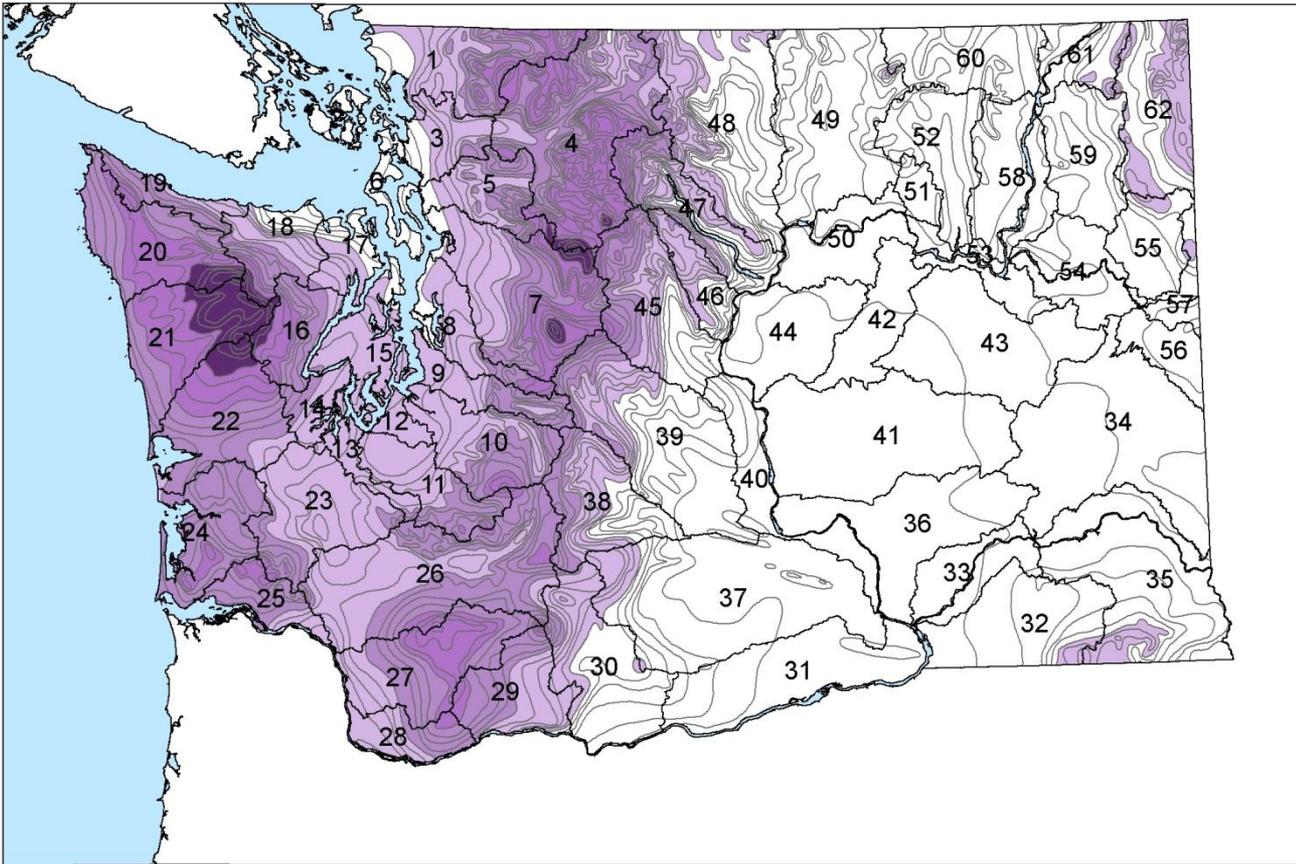


- BERNARD DE VOTO
1897-1955

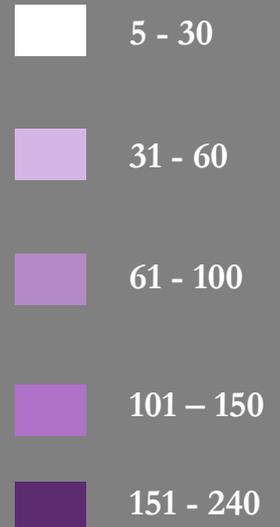
The Hydrologic Cycle



Annual Precipitation in Washington



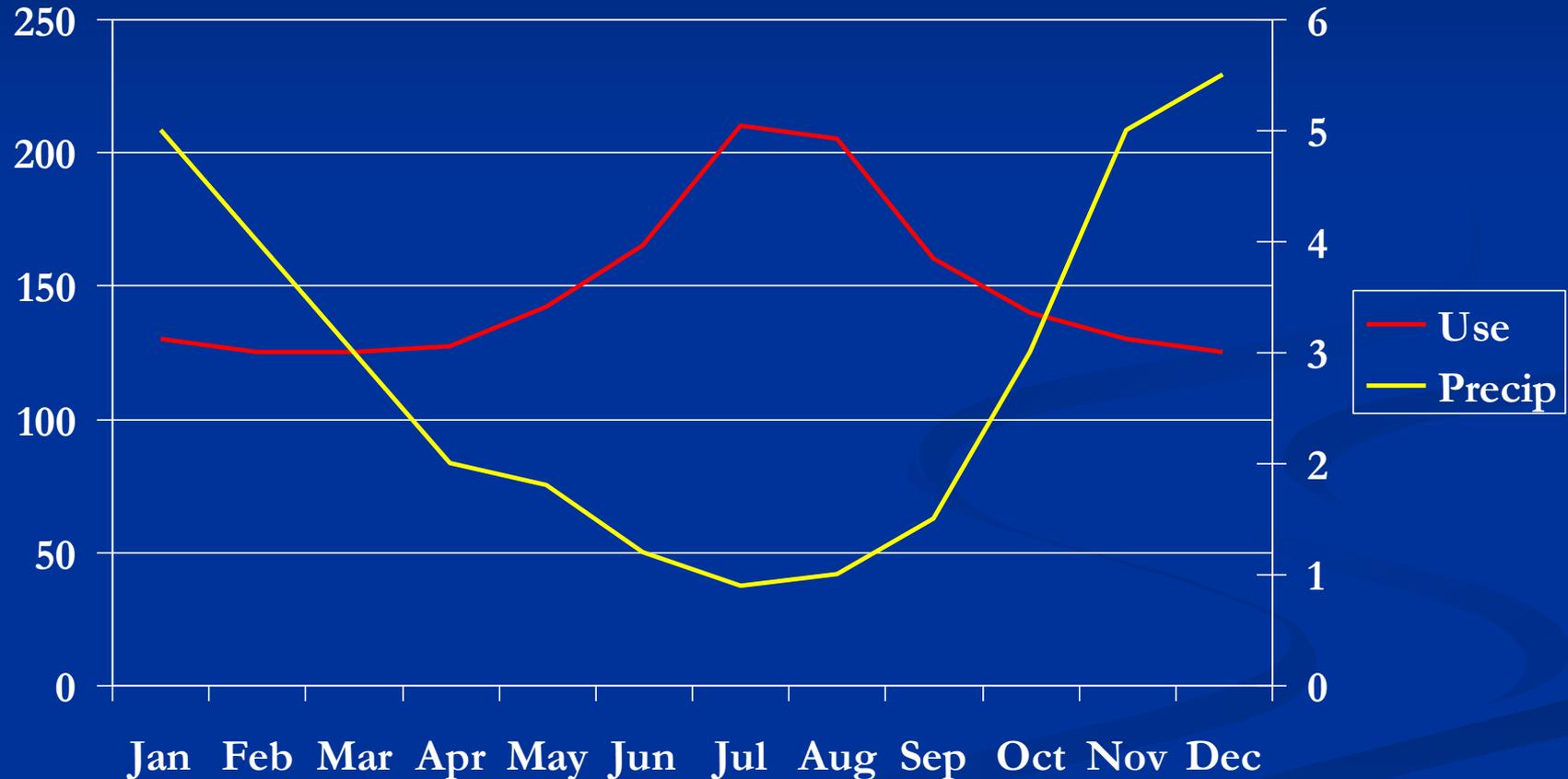
Precipitation
in Inches



Water Use / Precipitation Crunch

Use in gpd

Precip in Inches



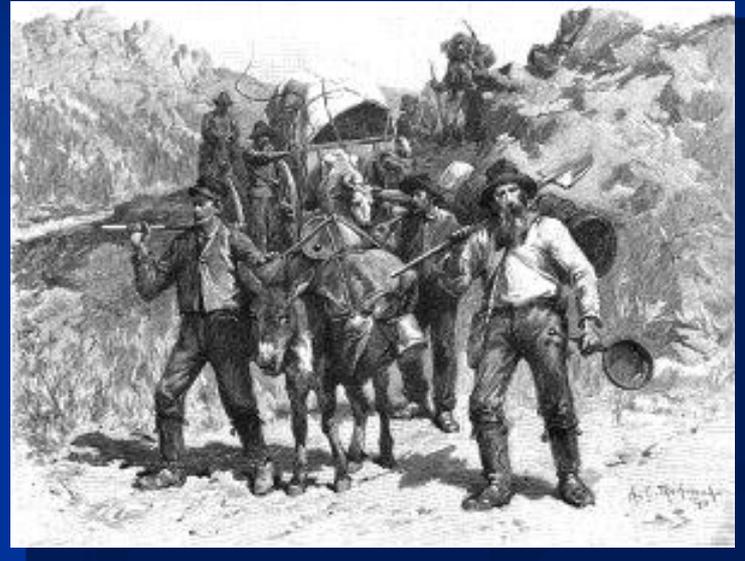
Origins of Washington's Water Law

- Common law
- Statutory law
- Case law
- Regulations



Prior Appropriation Doctrine

- Riparian doctrine did not fit the west well - water scarcity & great distances.
- Origins of prior appropriation doctrine – mining law
- Landmark case decided in 1855 by Supreme Court of California - *Irwin v. Phillips*
- Encourage western settlement & development.
- Other states gradually adopted it as the primary doctrine or the only doctrine.



California Gold Rush

Prior Appropriation Tenets

- First in time is first in right.
- Priority date established by first expression of *intent* to use water.
- Develop with diligence or lose the chance.
- Use it or lose it.



Surface Water Code / Chapter 90.03 RCW

- Enacted in 1917
- Principles of western water law adopted for Washington
- Established “First in time, first in right” principle
- Waters of the state are public
- New uses of water need a permit
- Existing water rights protected



Grande Ronde River

Water Rights Permits – 4 Tests to be Satisfied Under State Water Law

Ecology examines water rights
and determines if:

- Water is available
- Proposed use doesn't impair existing rights
- Proposed use not detrimental to the public interest
- Proposed use is beneficial



Stages of a Water Right

Stage	Purpose
Application	Establishes intent to appropriate
Permit	Authorization to develop
Proof of Appropriation	Water put to beneficial use
Certificate	Perfection of water right

Ground Water Code / Chapter 90.44 RCW

- Enacted in 1945 - supplemental to 1917 Water Code (prior appropriation doctrine)
- New uses of ground water need a permit
- Existing users could make declarations and receive certificates
- Small water uses exempted from permitting process



Ground Water Science and Early Water Law

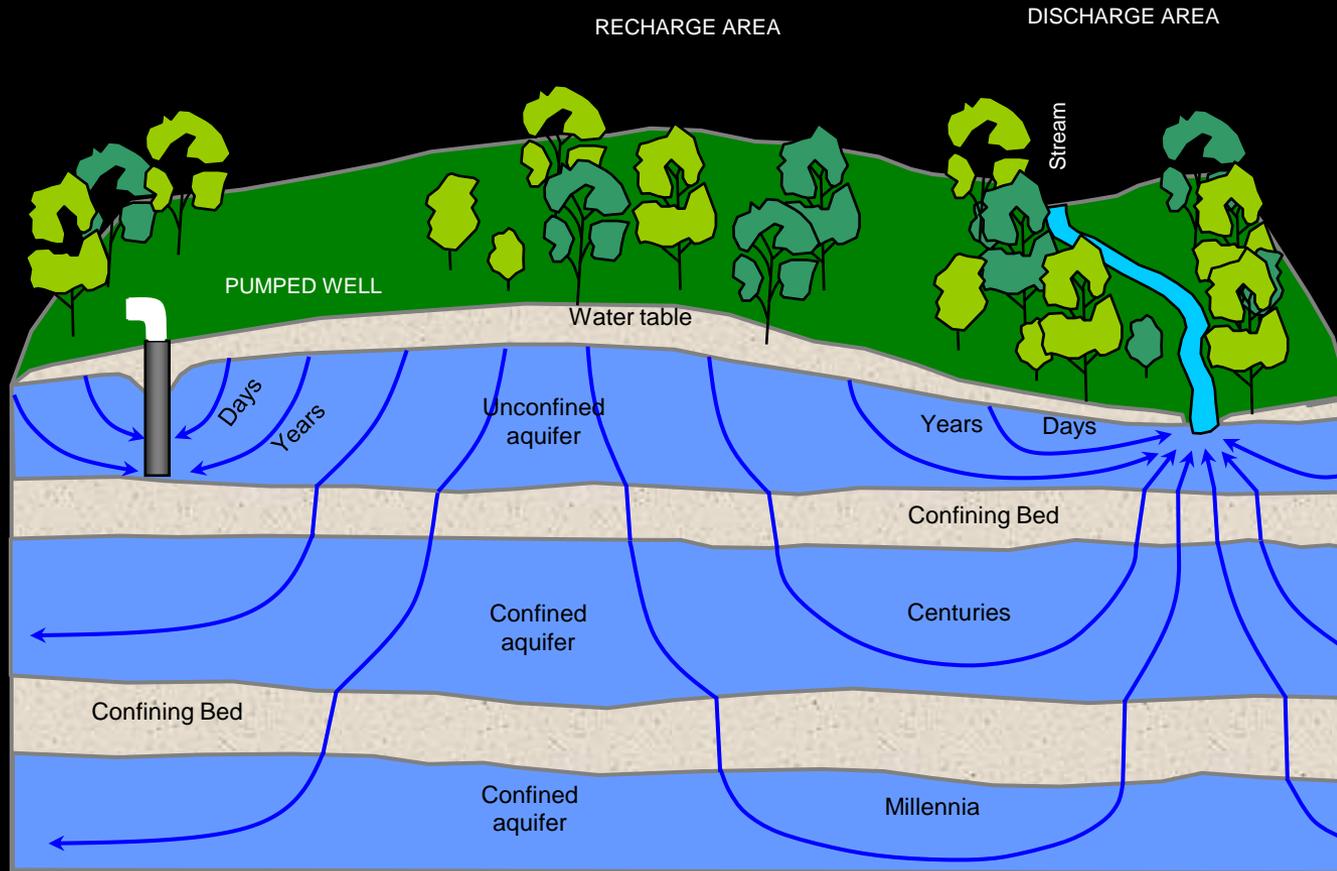
The principles that control the movement of ground water are so secret, occult, and concealed that an attempt to administer any set of legal rules would result in hopeless uncertainty, and would, therefore, be practically impossible.

- Texas Supreme Court (1904)



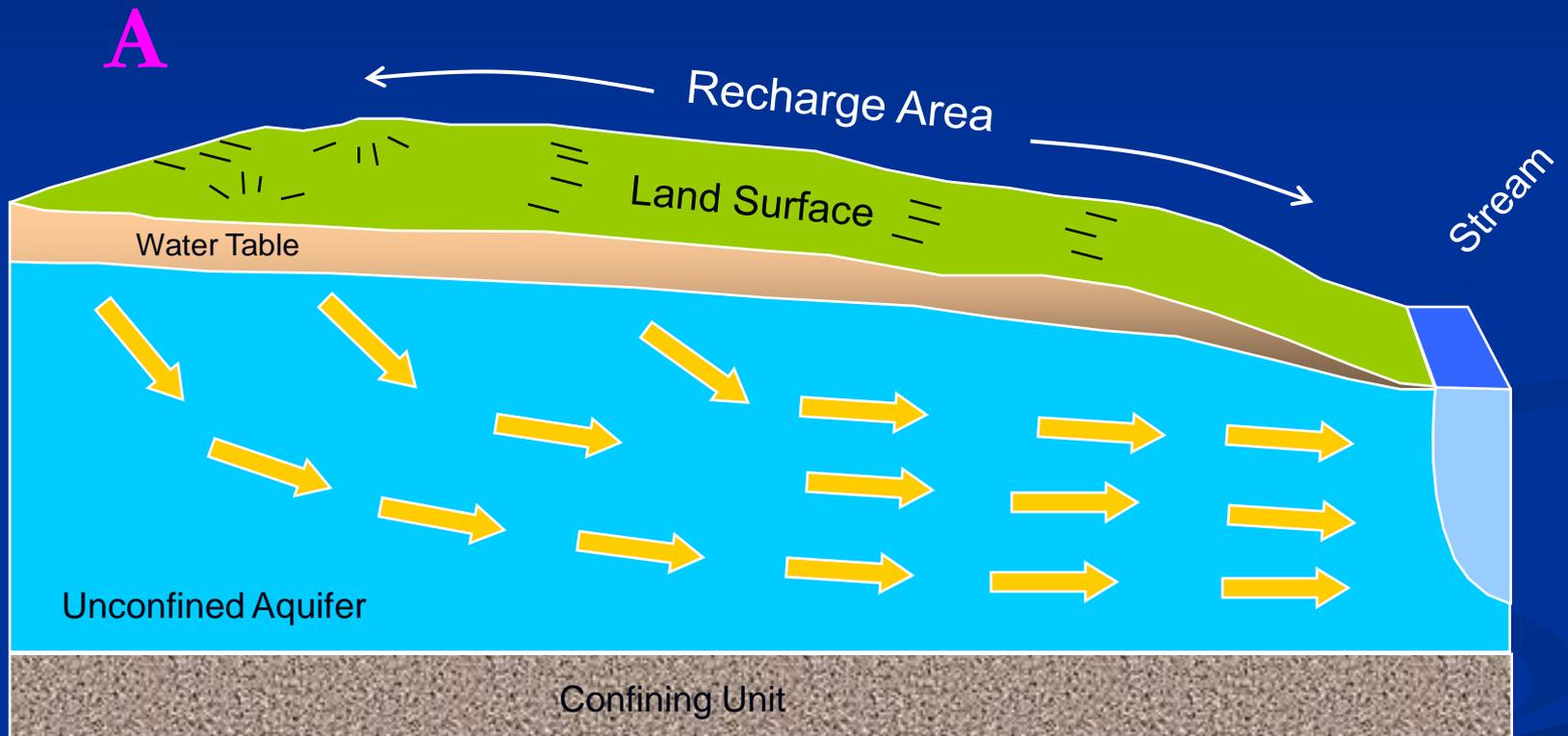
Capitol, Austin TX

Ground-Water Flow Paths



Ground-water flow paths vary greatly in length, depth, and traveltime from points of recharge to points of discharge in the ground-water system

How Do Wells Capture Surface Water?

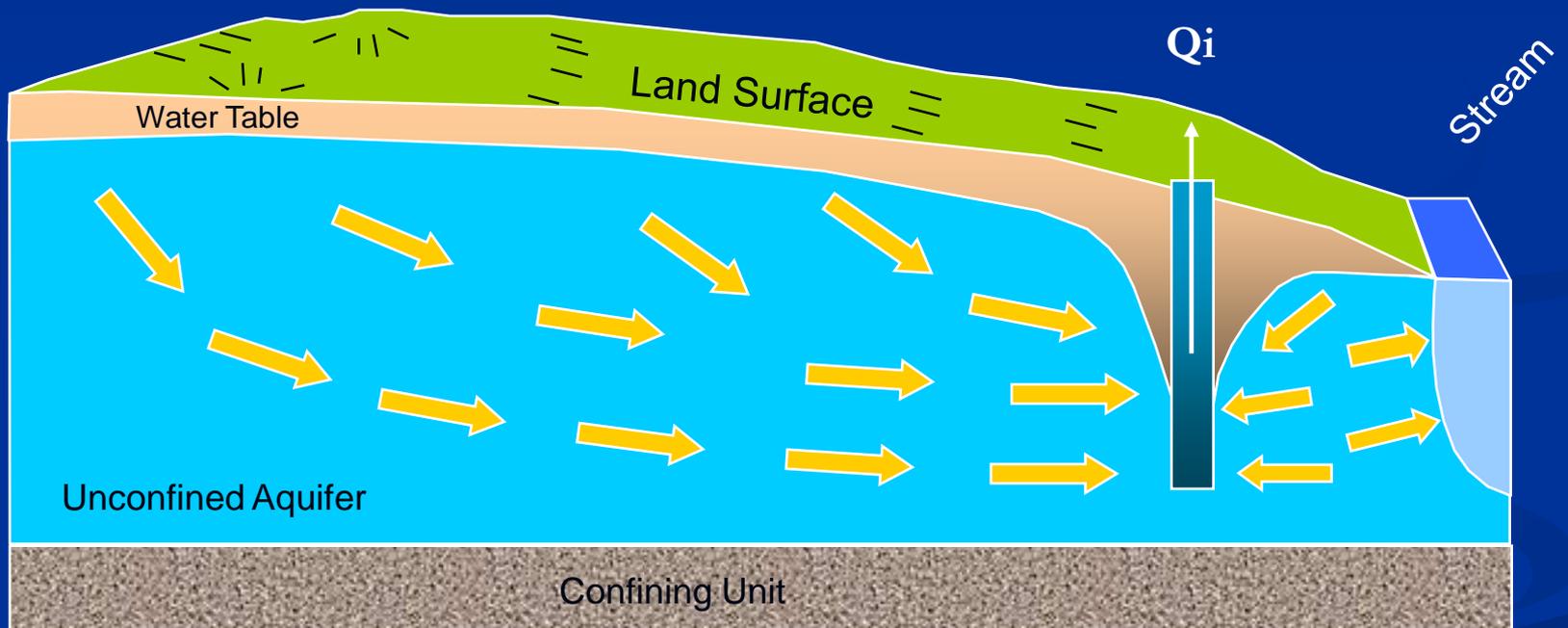


Natural Conditions

USGS C1186

How Do Wells Capture Surface Water?

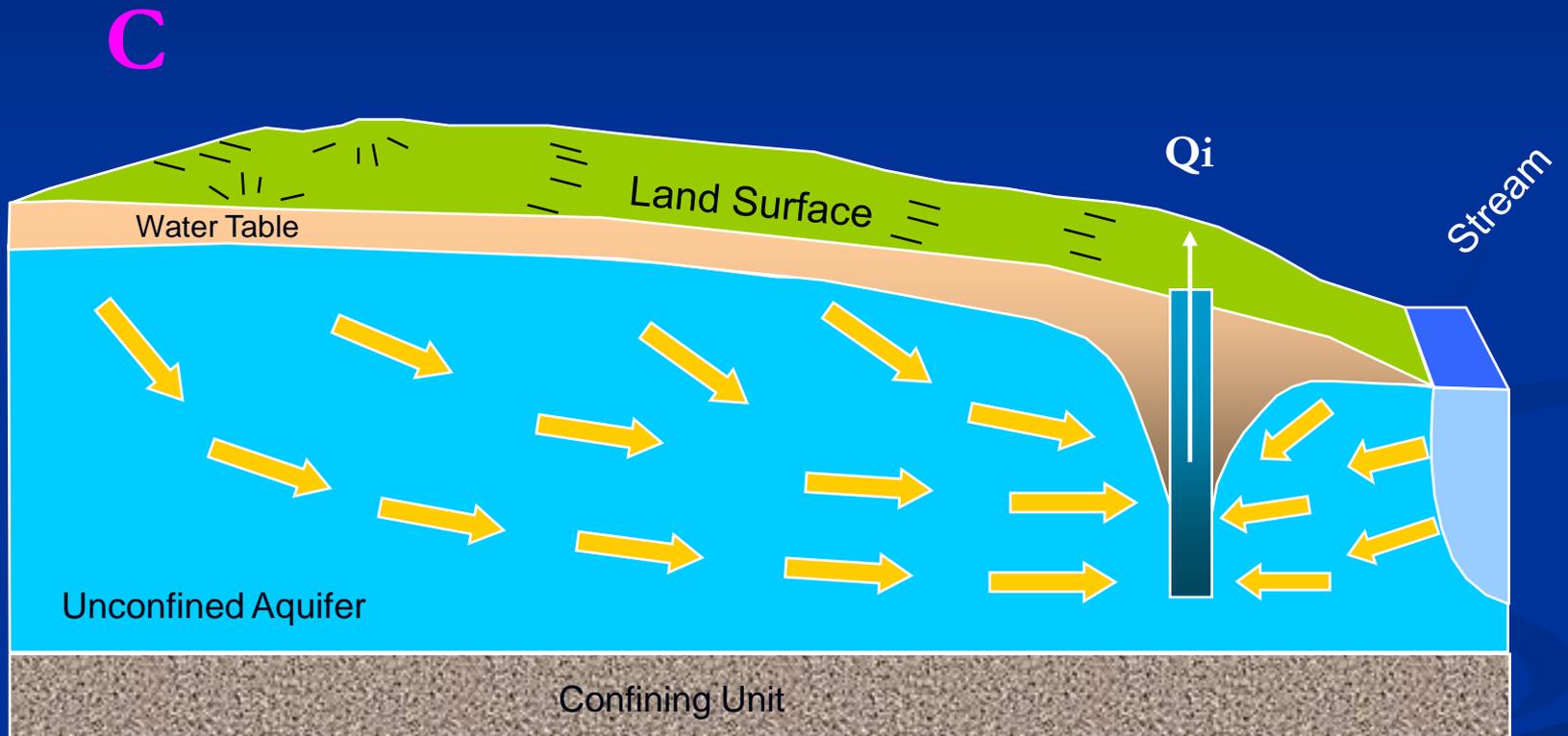
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Pumping 1

USGS C1186

How Do Wells Capture Surface Water?



Ground Water Permit Exemption

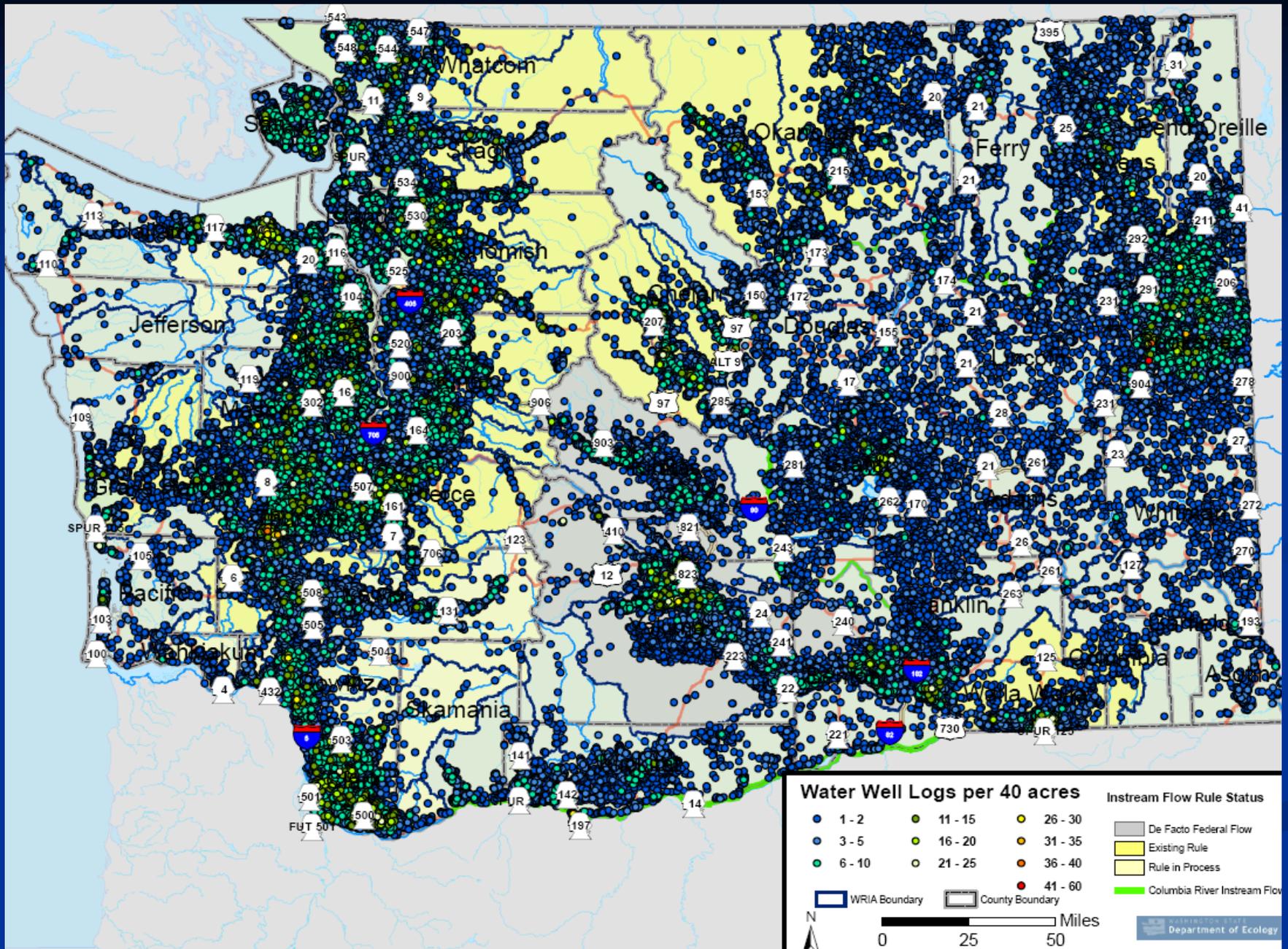
- Chapter 90.44.050 RCW reads as follows:

“After June 6, 1945, no withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW [90.44.052](#), or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter ...”

Ground Water Permit Exemption

Uses	Quantity Limit	Acreage Limit
Stock-watering	None*	None
Lawn-watering/ Non-commercial Garden	None	1/2 acre
Domestic	5,000 gpd	None
Industrial (includes commercial agriculture)	5,000 gpd	None

* Not tested in court, but based upon Attorney General Office formal opinion



Kim v. PCHB & Ecology

- The issue in the case was whether the Kims' water use for their commercial nursery operation was for an industrial purpose
- Before the PCHB and the Superior Court, the state successfully argued that the Kims' use was not industrial and that industrial uses were intended to cover the narrow category of uses associated with activities like manufacturing.
- In 2003, the Court of Appeals reversed the PCHB's decision.
- The Court simply concluded that since other state statutes, regulations and cases refer to the "agricultural industry," the term "industrial" as used in the permit exemption statute encompassed agricultural activities.
- Industrial use permit limit is 5,000 gpd

Watershed Planning Act / Chapter 90.82 RCW

- In 1998 the Washington Legislature enacted the Watershed Planning Act (ESHB 2514)
- The purpose of the act was to integrate water supply, water quality and habitat planning, including developing options for meeting current and future supply needs
- Since then 45 of the 62 watersheds or Water Resource Inventory Areas (WRIA's) voluntarily initiated watershed planning processes
- Local watershed planning groups were formed consisting of representatives from county, city, tribal and state governments, as well as local stakeholders

Elements of the Watershed Plan

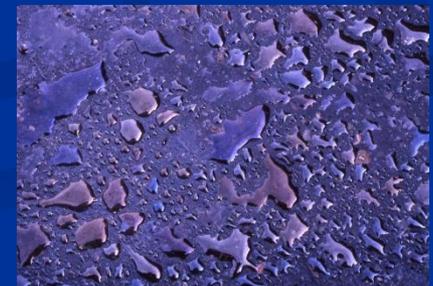
Required

- Water Quantity



Optional

- Water Quality
- Habitat
- Instream Flows



What is an instream flow rule?

- Ecology is authorized under state law (RCW 90.22, RCW 90.54 and RCW 90.82) to establish state water-management rules that protect and preserve:
 - ✓ Fish
 - ✓ Wildlife
 - ✓ Recreation
 - ✓ Navigation
 - ✓ Aesthetics
 - ✓ Water quality
 - ✓ Livestock watering



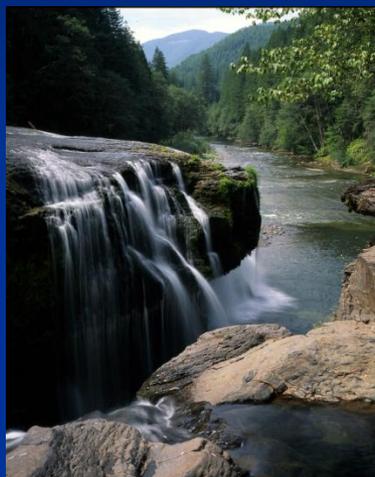
Authorizing Legislation

RCW 90.22 – *Minimum Water Flows and Levels*

RCW 90.54 – *Water Resources Act of 1971*

RCW 90.82 – *Watershed Planning*

Ecology is authorized under state law to establish state water-management rules that protect and preserve:



Aesthetics



Livestock Watering



Recreation



Navigation



Water Quality

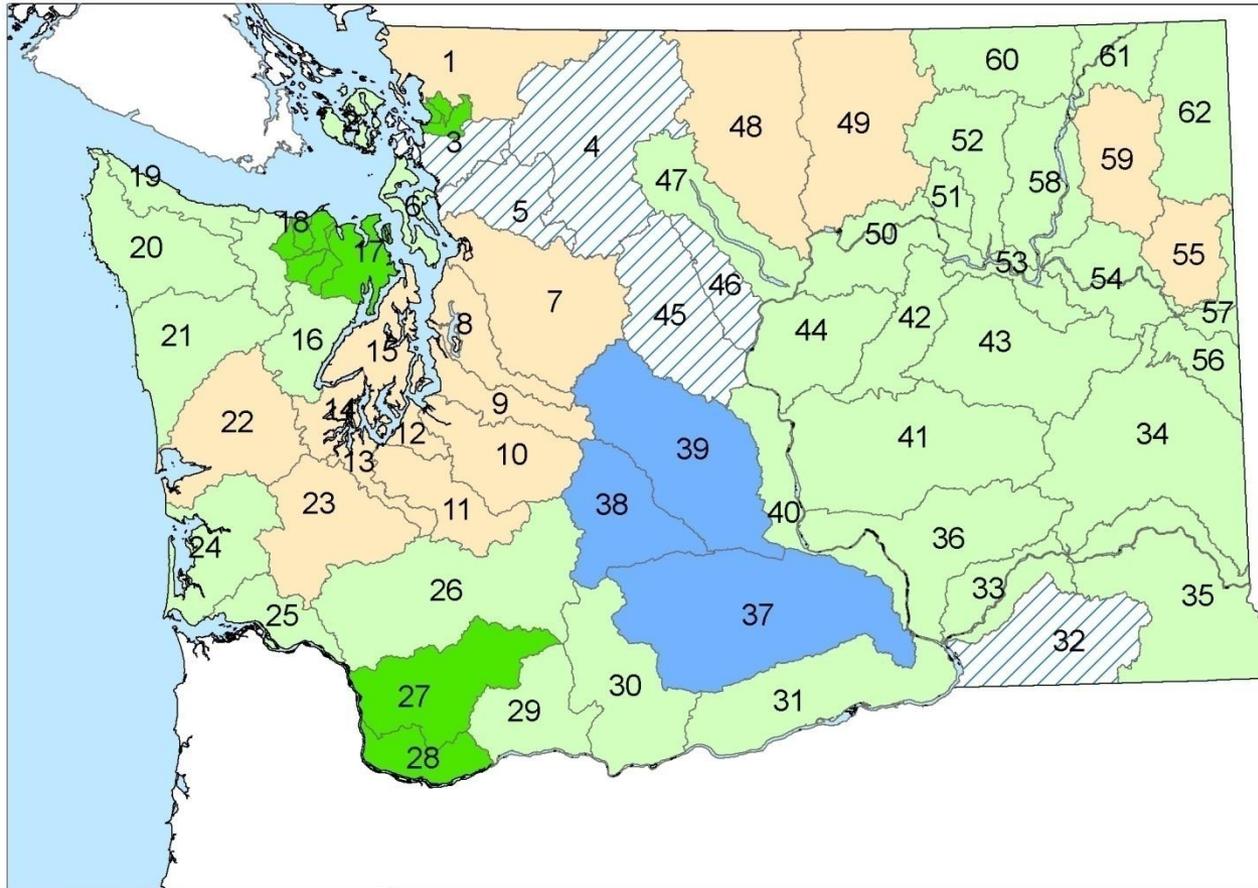


Wildlife



Fish

Established Instream Flows and Schedule for New Rules



Instream Flows Set

- Established Instream Flow Rules
- Rules Adopted 2005 -07

Yakima Adjudication

- De facto Federal Flow

Instream Flow Rules Scheduled

- Current Rulemaking
- Future Rulemaking

Recent Water Rights Legal Cases

Case	Decision
<i>Acquavella III</i> / 1997 (Ecology v. Acquavella)	Instantaneous and annual water use are limited to what is reasonably necessary to accomplish actual beneficial use
<i>Elkhorn</i> / 1993 (Ecology v. Jefferson County PUD)	Ecology has the authority under Section 401 of the Clean Water Act to include a minimum streamflow requirement as a condition
<i>Grimes</i> / 1993 (Ecology v. Grimes)	No right exists beyond the extent that a beneficial use has actually and legally been made

Recent Water Rights Legal Cases - 2

Case	Decision
<p>Hillis / 1997 (Hillis v. Ecology)</p>	<p>Ecology must adopt rules to implement a watershed or any other approach to water right processing that would vary from “first in time” as applied on a statewide basis</p>
<p>Hubbard/ 1997 (Hubbard v. Ecology)</p>	<p>Rights of a surface water appropriator are superior to subsequent rights to tributary ground water that may affect the surface water</p>
<p>Merrill / 1999 (R.D. Merrill v. PCHB)</p>	<p>The exemption from relinquishment for legal proceedings is limited to instances when those proceedings actually prevent use of water</p> <p>A determined future development must be prosecuted with due diligence</p>

Recent Water Rights Legal Cases - 3

Case	Decision
<p>Postema / 2000 (Postema v. PCHB)</p>	<p>“No impairment” is the legal standard for review of impairment; a de minimis impairment is not authorized by statute</p> <p>Ecology may use methods such as modeling to determine hydraulic continuity and effects on surface water</p>
<p>Schuh / 1983 (Schuh v. Ecology)</p>	<p>A change to an existing water right may not impair pending applicants for new water rights filed prior to the change</p>
<p>Rettkowski (Sinking Creek)/ 1998 (Rettkowski v. Ecology)</p>	<p>Ecology lacks the authority to determine the validity of an existing right for the purposes of enforcement</p> <p>Ecology can make “tentative determinations” however for the purpose of issuing new water rights</p>

Recent Water Rights Legal Cases - 4

Case	Decision
<p><i>Theodoratus</i> / 1998 (Ecology v. Theodoratus)</p>	<p>No right exists beyond the extent that a beneficial use has actually and legally been made</p> <p>State statutory and common law does not allow for a final certificate of water right to be issued based upon system capacity</p>
<p><i>Twisp</i> / 1997 (Okanogan Wilderness v. Twisp)</p>	<p>Surface water must be put to actual beneficial use before a change can be authorized</p>

Contact Information

Brian Walsh

WA Department of Ecology

Water Resources Program

Policy & Planning Section Manager

bwal461@ecy.wa.gov

360/407-6647



WASHINGTON STATE

Department of Ecology

<http://www.ecy.wa.gov/ecyhome.html>

Solduc Falls