



PRESIDENT'S NOTES

By Allison MacEwan, P.E., AWRA-WA President

Happy New Year! I am honored to be serving as the AWRA-WA President for 2016. Our Section is poised to build upon our accomplishments of 2015 to bring more good things to our AWRA-WA members and sponsors during the coming year.

I would like to thank our 2015 Board members for sharing their time and energy for the benefit of the water resources community. A special thanks goes out to Tyler Jantzen, our outgoing AWRA-WA President. Tyler's leadership was essential to realizing all of our accomplishments in 2015, culminating in our receipt of the 2015 AWRA Outstanding State Section Award! I also want to recognize the contributions of our outgoing Board member, Megan Kogut. During her long tenure with the AWRA-WA Board, Megan has served on in many roles, including President and State Conference Chair. It has been an honor and a great pleasure to collaborate with Megan, and she will be missed on our Board. Many thanks to you Megan! Finally, I want to thank all of our members and our sponsors – your ongoing support has been essential to supporting the mission of AWRA-WA.

We start 2016 by welcoming a new Board member, Shobuz Ikbai. He brings over 25 years of experience working in the world of water, both in the U.S. and overseas. We are excited to collaborate with Shobuz and thank him for joining our team.

We also recently selected our newest student fellowship recipients: Dallin Jensen of Central Washington University and Melanie Thorton of Washington State University. Congratulations to you both! We wish you all the best in your continued studies and ongoing water resources work (and start thinking about your upcoming newsletter articles).

We look forward to working with our two Washington-based AWRA student chapters. Our first student mixer of 2016 was held on January 27th at the University of Washington. We

had the pleasure of learning about the OLYMPLEX ground validation field campaign over the Olympic Peninsula for the Global Precipitation Satellite from Dr. Lynn McMurdie. We are looking forward to our next student mixer event being planned with Central Washington University.

Our next AWRA-WA Dinner Meeting will be held in late

February in Seattle, WA. Attorney Dan Von Seggen will present an update on current and anticipated court decisions that will impact water availability and water quality in Washington. Specific details will be provided in a forthcoming announcement for this event.

We encourage all of our members to become actively involved in AWRA-WA by attending our events, and lending your energies to our organization. We are 100% volunteer-fueled and we welcome your participation. Here are some of the ways in which you can become involved:

- Our Dinner Committee has begun planning events for 2016. Have an idea for a future dinner meeting? Would you like to present or help organize? Contact a board member with your idea.
- Our Conference Committee is in the first phase of planning for our 2016 state conference. This event takes many hands to be successful. Do you want a hand in content planning, interested in chairing a session? See other room for improvement? Come join our conference planning team!
- Our Newsletter Committee produces 5-to-6 publications throughout the year. If you have an idea for a future newsletter article or want to contribute other content, please contact our Editor Eric Buer.
- Our Membership Committee coordinates a mentorship program that pairs students and young professionals with more experienced water resources professionals. If you're interested in mentoring, or are looking for a mentor please contact a member of the board so we can help you get connected.
- Our AWRA-WA Board meetings, typically held on the first Monday of each month, are open to our membership. If you would like to attend a meeting, please just let us know.

If you have interest in these opportunities or would like more information, please feel free to contact me directly at: amacewan@gmail.com.

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AWRA 2016 OUTSTANDING ACHIEVEMENT AWARD

By Stan Miller, AWRA-WA Board Member

Each year the Washington Section recognizes a member of the state's water resource community for their Outstanding Contribution to Washington's Water Resources. In the summer of 2001, retired board member Pete Sturtevant suggested that the state section develop an award program to recognize the water resources protection efforts of individuals and organizations. The Washington State Section Board voted to approve this program immediately.

The First recipient was Jim Esget of the Bureau of Reclamation for his work in developing agreements among fisheries interests, hydropower producers, and irrigators that provide water for all these uses in the Yakima River Basin. Since this first award over a dozen water resources professionals and several organizations have been recognized. In addition to a commemorative plaque for the recipient, WA-AWRA also provides a donation of \$500 to a charity selected by the recipient to promote that group's work on water resources problems around the world.

At this year's conference the section presented two awards for 2015. During this year of extreme low flows in the northwest in general and the Yakima basin in particular, the actions of two individuals made life a lot easier for fish in the Yakima basin.

These awards reflect a career-long effort to bring individuals and organizations with several different priorities for water use together to work in unison to augment stream flow in the Yakima Basin.

The first award was presented to Bob Barwin:

Bob committed his career to water resources problem solving, and driving some of the most remarkable solutions in water resources management during his 33 year tenure with Ecology and prior work with Oregon Department of Water Resources. Bob was central to Ecology instream flow acquisition program, Yakima Water Exchange, Walla Walla instream flow rule and mitigation, Kittitas decision, Dungeness Exchange, Methow Valley Irrigation District, a majority of Central Region's instream flow rule, City of Roslyn, and many other landmark water resources events. Bob retired on October 15 and the Washington Section saw it as a pleasure to honor the career of a great man, friend, and mentor.

The second award went to Urban Eberhardt:

Urban is a dedicated Kittitas County farmer and representative of Kittitas Reclamation District (KRD) for the Yakima Integrated Plan. As a high school student at Kittitas High School he interned with Bureau of Reclamation's Yakima River Basin Water Enhancement Program.

He has been committed to water resources through his career. In 2015 he championed KRD's prompt response to drought. That action provided instream flow augmentation to seven tributaries in the upper Yakima basin. This remarkable and historic effort qualify Urban's efforts as being worthy of a share of the 2015 award.

GROWTH VERSUS RIVERS: NEW DEVELOPMENTS IN WATER LAW

By Jaqui Brown Miller, Cascade Pacific Law Group

Use of OCPI to Authorize Appropriations to Support Municipal and Rural Water Development

On October 8, 2015, the Supreme Court issued a 6-3 decision in *Foster v. Ecology*, limiting how the Washington Department of Ecology ("Ecology") may use available legal tools to accommodate water needs for municipal and rural development while also protecting Minimum Instream Flows ("MIFs"). This is a decision that will have statewide implications.

Underlying the *Foster* case was Ecology's approval of a new water right for the City of Yelm and an appeal by a small farmer in Yelm who challenged the legality of Ecology's approval, asserting that Ecology failed to adequately protect river flows in the Deschutes and Nisqually basins. The black letter law that the Supreme Court established in *Foster* is:

1. MIF water rights no longer may be used as the source of water to support population growth. Growth and development pressures are common and not the type of extraordinary circumstance that can justify Ecology's use of the Overriding Considerations of Public Interest ("OCPI") exception in RCW 90.54.020(3)(a), the law prohibiting impairment to MIFs.
2. Out-of-stream mitigation for MIF impacts is no longer lawful—only water-for-water or in-kind mitigation.
3. Where OCPI could be used to impair MIF water rights, Ecology may authorize only temporary, not permanent, impairments.

Foster builds on two Washington Supreme Court decisions. In 2013, the Supreme Court for the first time limited Ecology's use of the OCPI tool in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*. The *Swinomish* decision built upon principles set forth in *Postema, et al. v. Washington Pollution Control Hearings Board*, which was issued in 2000.

This update will first review *Swinomish*, in which the Washington Supreme Court applied the same rationale that it later used in *Foster*. Next, this article will discuss the significance of *Foster*, Ecology made the decision at issue while *Swinomish* was on appeal and without the benefit of the Court's rationale in *Swinomish*.

The Swinomish Case

Background

Swinomish involved Ecology's promulgation of an in-stream flow rule for the Skagit River System and the aftermath of this rule promulgation. The Skagit River is a huge river system—the largest in the western US—with over 3,000 contributing tributaries, and the only river in the lower 48 states supporting all six species of Pacific salmon.

In 2001, Ecology promulgated the "Skagit River Basin Instream Flow Rule" ("MIF Rule") that established regulations and MIF requirements for the Skagit River basin. Ecology did this under the authority granted to it

Continued on Page 7: MIF

ICICLE WORK GROUP : AN ALTERNATIVE VIEW

By Rachel Osborn. Senior Policy Advisor, Center for Environmental Law and Policy

Introduction

Washington AWRA members were introduced to the Icicle Creek work group process at the October 2015 dinner meeting and in a follow-up newsletter article. Chelan County Natural Resources Director Mike Kaputa presented on the process that various government agencies, water users, tribes, and environmental groups are undertaking with the ultimate goal of diverting more water out of the already over-appropriated Icicle Creek watershed. This article offers a different viewpoint of the Icicle Work Group's process and goals.

The Icicle Work Group or IWG was established and funded by the Department of Ecology's Office of the Columbia River (OCR) in December 2012 as a "collaborative process." The IWG spent a year developing operating procedures based on consensus decision making, along with substantive goals that focused on environmental improvements and developing new water supply while adhering to state and federal laws.

The IWG process targets an already over-appropriated water system. Icicle Creek drains a portion of the Alpine Lakes Wilderness Area and discharges into the Wenatchee River near downtown Leavenworth. Four entities divert about 150 cfs from the Icicle upstream of the Leavenworth Fish Hatchery; two-thirds of that water is removed completely from the Icicle watershed to serve orchards in the Wenatchee Valley. Flows in some reaches of Icicle Creek are inadequate to support Endangered Species Act (ESA) listed bull trout and steelhead.

Editor's Note:

Water resources management has always brought with it differences in opinion and priorities between user groups, particularly in the west where water scarcity is an ongoing and increasingly severe problem. So when Rachael Osborn approached AWRA-WA about writing a piece providing an alternative perspective on the Icicle Work Group after our dinner meeting summary article in December we said "yes!" Rachael Paschal Osborn is a public interest lawyer in Spokane. She teaches water law at Gonzaga Law School, and serves as senior policy advisor to the Center for Environmental Law & Policy. A version of this article, with links and documents, is posted on her blog at naiads.wordpress.com.

Reach 4 Flow Recommendation

? - Maximum habitat

steelhead spawning flows are way below actual Q in historic channel.

Idea: Supplement hatchery channel flows during the spring with excess Q? Just don't go below 250 cfs.

Month	Gage Q	+ Snow Cr	W/D (-)	Focal Species & Life Stage WUA	Reach Q	Flow Rule (cfs)	Q Deficit	Recommended Flow
April	661	24	127	Steelhead Rearing 250 cfs	558		No	?
May	1,690	56	152		1,594		No	
June	1,890	30	155		1,765		No	
July	874	44	170	Fluvial Bull Trout Passage; 1.0-ft depth requirement 180 cfs	748		No	250 cfs
Aug	264	37	170		131	400	(-) 119 cfs	
Sept	161	43	141		63	275	(-) 187 cfs	
Oct	235	33	59		209	267	(-) 41 cfs	

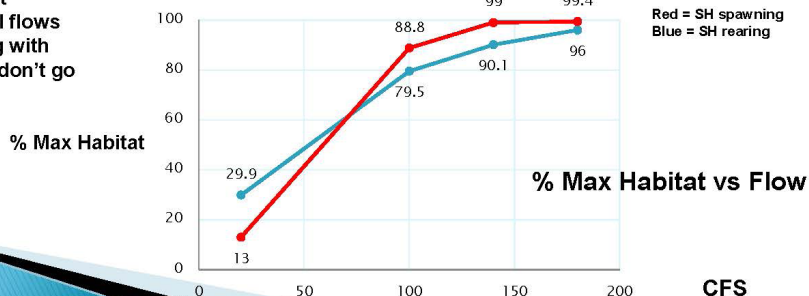


Figure 1: Flow versus weighted usable area for Icicle Stream Reach 4, adjacent to the Leavenworth Fish Hatchery (Instream Flow Technical Subcommittee, Icicle Work Group 2014).

Before launching into particulars, a disclosure is appropriate. On behalf of the Center for Environmental Law & Policy, I was invited to serve on the IWG and did so (along with CELP colleagues) from the outset. At the first meeting of the IWG I voiced CELP's objection to a central element of the IWG's strategy: artificially increased water storage in the Enchantment Lakes, in the Alpine Lakes Wilderness Area. In February 2015, concerned that the public was not being apprised of IWG proposals, I published articles about the Alpine Lakes project at www.naiads.wordpress.com ("New Dams & Diversions in the Alpine Lakes Wilderness?"). In June, the IWG proposed to alter its decision process from consensus to majority vote, and adopt a rule that members must screen their opinions with the IWG before publicly airing them. CELP resigned from the IWG when these procedures were adopted in July 2015.

Background Conflicts

As with many water resource problems, there is a long back story to water management in Icicle Creek. Four different conflicts inform the work of the Icicle Work Group.

This first conflict begins with the building of Grand Coulee dam without fish passage, an egregious injustice to tribes and the public that has yet to be rectified. To partially mitigate the dam's impact, the U.S. Bureau of Reclamation in 1938 built the Leavenworth Na-

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Page 3: Icicle

tional Fish Hatchery. The Bureau still owns and funds the Hatchery, which is operated by the U.S. Fish and Wildlife Service to produce chinook and coho salmon to meet federal trust obligations to the Confederated Colville Tribes and Yakama Nation. The Leavenworth Hatchery is a dilapidated facility suffering from decades of deferred maintenance, including relating to its water supply system. The Hatchery also blocks passage of ESA-listed steelhead and bull trout to the upper area of Icicle Creek – no small irony given that the USFWS is one of two federal agencies in charge of recovering endangered species.

In addition to its physical infrastructure problems, the Hatchery operates without proper permits and conditions. Wild Fish Conservancy and CELP have brought a number of lawsuits against the Hatchery, including three ongoing cases relating to ESA and state and federal Clean Water Act violations.

A second background issue involves a lawsuit between the City of Leavenworth and the Department of Ecology. In sum, in processing a water right change application in 1995, Ecology assigned an annual quantity to one of Leavenworth's older water rights. Leavenworth did not appeal that quantification at the time, but recently sued Ecology to increase the annual quantity. A Chelan County judge ruled that Ecology's 1995 quantification was a "tentative determination" that can be re-visited by the courts. The case is on hold in the Court of Appeals, a stay being obtained in 2012 based on Ecology's promise to establish the Icicle Work Group and find more water for the City. The conflict boils down to 800 acre-feet annually, and Ecology is looking to provide that water via new appropriations out of the Alpine Lakes Wilderness area.

This relates to the third background issue – the water rights of Icicle Peshastin Irrigation District (IPID) (technically IPID is made up of two districts that share a single manager). IPID holds rights to store and take water from several of the Enchantment Lakes – these rights were grandfathered when the Alpine Lakes Wilderness Area was established in 1976. IPID has installed various structures that control water flow from these lakes ("control" meaning that someone hikes up into the Wilderness in July to turn on the water, and then hikes back up in October to turn it off). When Ecology decided it would rather settle than fight the City's lawsuit, it began to look at IPID's wilderness water system as a source for the elusive 800 acre-feet. One of IPID's rights is to store water at Eightmile Lake, which formerly had a dam structure, but it collapsed so long ago no one remembers when it happened. If IPID could re-build the dam, and increase the water level of the lake, and if that extra water could be re-allocated to the City – well then, case dismissed, and the Chelan County "tentative deter-

mination" order vacated.

A final issue involves the Wenatchee River instream flow rule, first adopted in 1983. In 2005, Ecology amended the rule to update instream flows and add reserves to support new water rights in the Wenatchee Valley. These reserves would impair the instream flow established by rule, and are based on "overriding considerations of the public interest" or OCPI. Alert readers will recall that OCPI reserves are no longer valid following the Supreme Court's 2013 decision in *Swinomish Indian Tribal Community v. Department of Ecology*. This effectively squelched the County's efforts to obtain issuance of new water rights, and has led to (thus far unsuccessful) attempts in the Legislature to revive the Wenatchee reserves.

As an aside, the Wenatchee River and Icicle Creek routinely do not meet the Wenatchee rule's instream flow targets during

summer months. This fact nicely illustrates the Supreme Court's concerns about reserves impinging on the statutory mandate to preserve flows that support fish, wildlife, recreation, and other instream values.

The Icicle Work Group Goals & Projects

With all this in mind, the Icicle Work Group was founded in 2012 as a consensus decision work group. The IWG adopted eight goals that seek both environmental improvements and new out-of-stream water allocations. In 2013, the OCR granted \$885,000 to Chelan County to staff IWG with consultants and Ecology, WDFW, and Chelan County employees.

The IWG also pays \$25,000 per year to IPID to fund its manager's participation. Substantial legislative appropriations were made to support the IWG in the 2015-2017 biennium.

In 2014, the Work Group began to develop "metrics" to meet its goals. Identifying instream flow quantities necessary to meet fisheries needs in Icicle Creek, especially the de-watered reach adjacent to the Leavenworth Hatchery, was one consideration. IWG appointed a technical subcommittee of biologists, which recommended that 250 cfs was needed in order to maintain 100% of habitat for steelhead and bull trout life stages (see Figure 1).

However, certain Work Group members found these quantities unacceptable. The 250 cfs number was "negotiated" down to 100 cfs in good years, and 60 cfs in drought years. This would make 80% or less of potential habitat available for ESA-listed fish, a problematic goal by state and federal standards. Some biologists have expressed doubt about the scientific foundations of this compromise, but when questions were raised, the IWG was informed that the decision could not be re-visited.

This process raises fundamental questions about the propriety of agency

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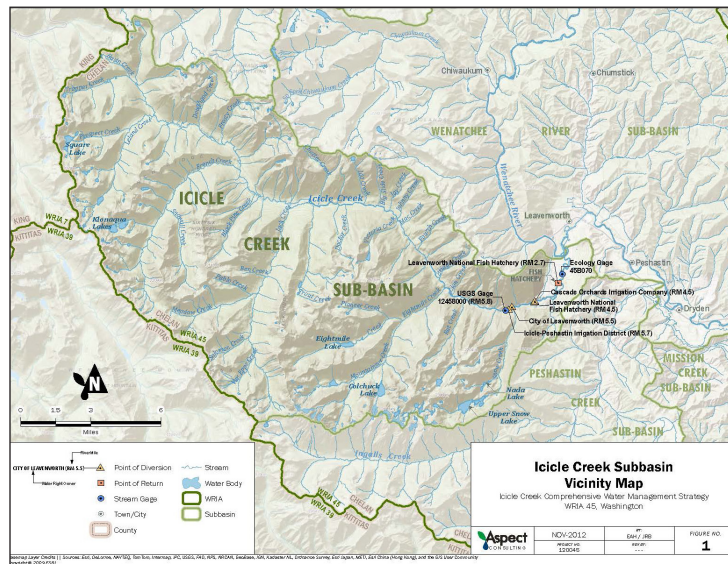


Figure 2. Icicle Creek Subbasin Vicinity Map (Aspect Consulting 2012)

DECEMBER DINNER MEETING REVIEW: LOST RIVERS AND A TALK WITH BOB CAREY

By Eric Buer, AWRA-WA Newsletter Editor

For the final AWRA-WA meeting of 2015 around 30 people gathered at Naked City Brewery and Taphouse to vote for the 2016 AWRA-WA Board of Directors, throw back a few pints, and watch a presentation of Lost Rivers, a documentary about the sometimes conflicted relationship between cities and their waterways.

The film visited a number of locations but focused on two primary urban river stories: the Cheonggyecheon Stream restoration project in downtown Seoul, South Korea and daylighting of the Saw Mill River in Yonkers, New York. Both stories shared a number of key elements. For both cities the river was once an attraction that was gradually transformed into a nuisance as development encroached onto the surrounding floodplain and the waterway became progressively more biologically compromised, choked with sewage, and other waste.

Both rivers were eventually buried in flumes, and in both cases their burials were hailed as marvels of engineering and modern progress by their host cities. However, containment and burial of the waterways had many subsequent side effects that included increased flooding downstream and significant ecologic impacts. Over time both cities eventually revisited the decision to bury their rivers

Lost Rivers used the Cheonggyecheon restoration as a case narrative for the current struggles of the Saw Mill River. Restoration of the Cheonggyecheon commenced in 2003 as part of a movement to re-introduce nature to the city. While merchants and commercial interests in the city initially opposed the project citing reduced traffic-carrying capacity (a 16-lane freeway was removed), the resulting loss of business, and ultimately gentrification of the area.

However, after opening in 2005 the restored Cheonggyecheon was ultimately recognized as a major success that brought a clean and natural environment to the cityscape while also renewing the urban economy. The restored stream, which is augmented with water pumped from the Han River, reduces the ambient air temperature in the surrounding area by up to 5 °F. Air quality has improved with the resulting reduction in car volume.

Creating a bit of dramatic tension, Lost Rivers follows the struggle of local activists to first daylight, and then restore Saw Mill River in 2010. Similar to the story with the Cheonggyecheon opposition arose in the form of lost business, lost parking, and the high cost of the project. But by the end of the movie ground was broken and the Saw Mill was on its way to daylight for the first time since the 1920s. The daylighting was ultimately completed as an open air parkway that has since spurred new real estate investment in the area with new apartment complexes, renovated historic buildings, and a new public library.

After the film I spoke with Bob Carey of the Nature Conservancy, who has been actively working on the Floodplains by Design initiative in Washington State, to find out what sort of parallels he saw between

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Page 4: Workgroup participation in “collaborative” groups. With consensus, all parties have the ability to veto. But IWG rules now require participants to support the metrics and project list. Agency commitment to outcomes in advance of public and environmental review is troubling, especially for regulatory agencies such as Ecology, WDFW, the U.S. Forest Service, and NOAA.

Also problematic is the approach to meeting these compromise flows. The current project list identifies only 22 cfs of “guaranteed” instream flow water – the rest would be interruptible. In a bad year, like the summer of 2015, Icicle Creek flows would plummet and temperatures skyrocket, while human users get the water they need.

Proposals to manipulate storage at Eightmile and other Enchantment Lakes, where IPID insists it has the “right” to expand its wilderness water system, are of great concern to the environmental community. The Alpine Lakes Wilderness is a crown jewel of the federal wilderness system and Eightmile Lake is one of its most popular trails. While the IWG has done some outreach, conservation community responses have had zero impact on development of the project list.

Beyond the failure to address public concerns, neither Ecology nor IPID has easements to flood wilderness surrounding the lakes, nor can the U.S. Forest Service give away public lands. Yet expanded storage in the Alpine Lakes is the IWG’s linchpin project – so important that it changed its rules in order to outvote CELP’s viewpoint. Indeed, CELP was directed to stop asking questions about these issues at IWG meetings.

The most expedient way to put 100 cfs into Icicle Creek is to move IPID’s diversion five miles downstream, from the Icicle-Snow Creek confluence to the Wenatchee River. However, IPID’s board voted to prohibit the IWG from considering this option. These actions raise interesting questions about the scope of water entitlements. Is a water user guaranteed their means of diversion, in this case miles of gravity-powered conveyance, that cause substantial environmental impacts?

Prior to resigning, CELP proposed that the project list should focus on rigorous conservation rather than new storage. An informal tour of the Leavenworth area in June 2015 produced a photo album of conservation opportunities, including IPID canal-side phreatophytes (deep rooted plants), orchard over-irrigation, and excessive residential lawn watering. Municipal demand has declined, and the City does not project significant need for future customers. Indeed, the City recently approved selling water to the Leavenworth Ski Hill for snow-making in 2016. While the current IWG project list includes

Page 5: Carey the stories in Lost Rivers and projects or problems here in the Puget Sound Basin. Were there opportunities for restoration and renewal in Washington like those seen in the film?

Bob replied that there were a potentially unlimited number of opportunities to improve both our urban environment and our ecologic one. After so many streams were buried, and so many large rivers were leveed and dammed in the course of the twentieth century there are a huge number of development projects that offer us opportunity to restore some of the natural functions that have been lost.

Better still, in many cases people and programs are seizing

some conservation, IWG water users resist adopting meaningful measures.

Upcoming IWG Process

Chelan County’s IWG website does not reveal when or how the IWG plans to move forward. The IWG was on track to begin SEPA scoping in autumn 2015, but when the legislature allocated IWG another \$1-2 million for the 2015-2017 biennium, the process slowed. These funds will easily support the IWG battalion of consultants and agency staff for at least two more years.

State and federal coordination over environmental review (SEPA and NEPA) has also been difficult. One of the consequences of “integrated planning,” i.e., the lumping together of varied projects, is that affected agencies spend large amounts of publicly funded time to iron out procedures, turf conflicts, and other issues.

A few concluding observations.

First, as a matter of law and of biology, instream flows in Icicle Creek must be returned to more normative, historic levels. It is wrong to use legally required flows as a trading chit to obtain new out-of-stream water rights. This is particularly so given that the target sources are the Enchantment Lakes in the Alpine Lakes Wilderness.

Second, the IWG is not a collaborative process. The inability of the Work Group to contend with dissent – and its change in operating procedures to silence particular viewpoints – seriously undermines its legitimacy. Skepticism should be the response when the IWG extols the virtuosity of its group-think process.

Finally, public expenditures for the IWG and its projects should be re-evaluated. Ecology could purchase or condemn 800 acre feet of water for far less than the \$64 million dollar tab that the IWG is about to drop on the public.

It is the responsibility of the Bureau of Reclamation and USFWS to bring Leavenworth Hatchery into compliance with state and federal laws. It is the duty of the four Icicle Creek water right holders to ensure they do not harm endangered salmonids, and to employ 21st century water efficiency practices. It is the mandate of the regulatory agencies to secure this compliance, not negotiate it away.

Ultimately, if an accurate picture is presented, the public will not pay for the sins and omissions of Icicle Creek diverters. Why are we spending millions to get that picture?

those opportunities with both hands; this is in fact exactly what Floodplains by Design is doing right now. The Program has been working to reclaim and revitalize the human-river relationship by promoting projects that meet multiple objectives, including flood control, water quality, aesthetics, recreation, and ecologic function all at the same time.

Bob pointed out many cases including rivers in Denver, Reno, Cincinnati, Chicago, and Yakima, where incorporating a few degrees of natural freedom into development projects has resulted smaller investments in infrastructure and maintenance, while also delivering a more attractive and livable environment to the community.

Page 2: MIF by the state water code, Chapter 90.54 RCW, to set MIFs to protect fish, game, birds or other wildlife resource, as well as recreational and aesthetic values. The MIF Rule did not allocate noninterruptible water for new uses; rather, water for new uses was subject to being shut off when stream flows fell to or below the MIFs.

In opposition to the rule, Skagit County argued the rule would effectively prevent new development that requires noninterruptible water year-round. The County sued and five years later, in 2006, the parties settled with Ecology. The settlement resulted in amendments to the MIF Rule ("Amended MIF Rule").

The Amended MIF Rule established reservations of water for specified uses: 27 reservations for domestic, municipal, commercial/industrial, agricultural irrigation, and stock watering out-of-stream uses. The reserved water for the new uses would not be subject to shut off, even during periods when the minimum flows established in the 2001 MIF Rule were not met.

The legal difficulty with this approach is that the water code directs Ecology to retain base flows (which the Supreme Court in *Postema* equated with MIFs) sufficient for preservation of fish, wildlife, scenic, aesthetic and other environmental values, and navigation.

Ecology believed the water code provided a way around this difficulty. A withdrawal of water that conflicts with base flows may occur "where it is clear that overriding considerations of the public interest will be served." This has come to be known as the "Overriding Considerations of Public Interest" or "OCPI" exception. In promulgating the Amended MIF Rule, Ecology relied on this exception for authority to allow future reserved water withdrawals to impair MIF.

To determine if the reservations qualified for the OCPI exception, Ecology devised a three-part economic balancing test. First, Ecology found the reservations would significantly benefit important economic public interests by allowing new withdrawals for domestic, municipal, industrial, agricultural, and stock watering to go uninterrupted when stream flows fall below MIFs. Second, Ecology found that the impact of this on aquatic and recreational uses would be insignificant, with small economic impacts to fisheries. Finally, Ecology concluded that public economic benefits "clearly override" the latter potential harms.

The Swinomish Indian Tribal Community appealed the 2006 Amended MIF Rule and the rule was upheld by the Thurston County Superior Court. This decision was appealed to the Supreme Court, which overruled the trial court, holding that Ecology exceeded its statutory authority and erroneously interpreted the OCPI exception, such that the Amended MIF Rule was invalid under the Administrative Procedure Act, chapter 34.05 RCW.

Supreme Court's Swinomish Analysis

In striking down the rule, the Supreme Court held that the OCPI exception is "a narrow exception, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses."

Ecology argued that use of the OCPI exception was justified

in the context of "a water management rule for a particular watershed as a whole," as opposed to individual water right applications. But the Court found "no meaningful difference between water reservations that reserve water for future individual applicants to obtain the right to put the water to those beneficial uses and individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows is concerned. In both instances, the result is a water right held by an individual to the detriment of the existing minimum flow water right."

The Supreme Court continued, saying that using a balancing test to weigh certain societal interests against others does not create an "overriding" consideration, writing:

There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971...explicitly contemplates the value of instream resources for future populations: "Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time instream resources and values must be preserved and protected so that future generations can continue to enjoy them. RCW 90.54.010(1)(a) (emphasis added)."

The Supreme Court also identified a second difficulty with Ecology's use of the OCPI exception for the Skagit River Basin reserved water rights — it conflicted with the prior appropriation doctrine that applies to MIFs established by rule under *Postema v. Pollution Control Hearings Board*.

The Court in *Postema* established or affirmed several principles that come into play in *Swinomish*. First, when Ecology evaluates whether to issue a permit for the appropriation of groundwater, it must consider the interrelationship of the groundwater with surface waters, and determine whether surface water rights would be impaired or affected by groundwater withdrawals.

Second, once a MIF rule is established, "the minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow." MIFs are not "limited." Rather, they "are appropriations which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired."

Third, RCW 90.03.290 does not differentiate between a de minimis or significant impairment. No impairment is allowed. If an appropriation would impair existing rights, the application must be denied. "[A] proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water."

Based on *Postema*, the Swinomish Court held that the Skagit MIF Rule is an appropriation of water with a priority date of 2001, and that reserving for future uses the very water necessary to meet MIFs would be an impairment of an existing water right, contrary to

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Washington's prior appropriation doctrine. Thus, the reservations of water under RCW 90.54.050 must meet the same permitting requirements as any appropriation: "Ecology must affirmatively find [under RCW 90.03.290(3)] (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare." Without the ability to find that the reservations will not impair existing rights, the reservations cannot be created.

The Foster Case**Background**

While the Swinomish case was making its way through the Courts, Ecology made a decision on a 1994 water right application submitted by the City of Yelm for a groundwater appropriation to provide municipal water supply believed necessary to meet forecasted population growth. A groundwater model was developed to predict the impact to surface water bodies from Yelm's pumping at the new proposed well. The model indicated that Yelm's new water right, if approved, would impair MIFs.

Yelm's water right application has a long and nuanced history, with the Cities of Olympia and Lacey joining forces with Yelm to develop a regional approach to manage and mitigate impacts to water resources, including identified MIFs impairments across affected basins. The municipalities developed a comprehensive mitigation proposal, which included instream (water-for-water or in-kind mitigation) to cover most MIF impairments. However, even after the in-kind mitigation, "small, but modeled depletions of water in the Nisqually River watershed, as well as the depletion of water for parts of the year in the Deschutes River, and Woodland Creek, [were] not mitigated with in-kind water." Having exhausted their ability to find in-kind mitigation water, the municipalities created out-of-stream (out-of-kind) mitigation to address the predicted MIF impairments.

The need to mitigate these MIF impairments with out-of-kind mitigation is what led Ecology to employ the OCPI test to determine if Yelm's water right should be allowed. In order to authorize the MIF impairments, Ecology relied on the OCPI exception. Ecology applied the same three-part economic balancing test that it used to allow MIF impairments in the Skagit River Basin through water reservations, which were ultimately at issue in Swinomish. After performing its three-part balancing test, Ecology approved Yelm's water right permit on the condition that the proposed mitigation be implemented.

Sarah Foster appealed Ecology's decision to the Pollution Control Hearings Board. In approving Ecology's use of the OCPI exception, the Pollution Control Hearings Board found "the out-of-kind mitigation provided a permanent and net ecological benefit to the affected streams, and was more than sufficient to offset the minor depletion of water." Sarah Foster appealed again.

Supreme Court's Foster Analysis

In Foster, the Supreme Court found the relevant facts to be similar to those in Swinomish: Ecology applied the same balancing test to conclude that the benefits of Yelm meeting future potable water demands due to population growth outweighed the impacts associated with MIF impairment.

The Court rejected Ecology's use of OCPI to justify the Yelm MIF impairment for two reasons.

The Court basically said, "see Swinomish." First, the Court reiterated that RCW 90.03.290(3) allows approval of a permit application only if the proposed appropriation does "not impair existing rights," writing:

Minimum flows are established by administrative rule have a priority date as of the rule's adoption. These flows are not a limited water right; the function in most respects as any other water appropriation. As such, they are generally subject to our State's long-established "prior appropriation" and "first in time, first in right" approach to water law, which does not permit any impairment, even a de minimus impairment, of a senior water right. Minimum flows, do differ from other water appropriations in one respect: "withdrawals of water" that would impair a minimum flow are permitted, but only under the narrow OCPI exception.

Thus, the Court held, unless the OCPI exception has been met, Yelm's permit application must be denied.

In rejecting Ecology's use of the OCPI exception, the Court reapplied its Swinomish analysis:

[In Swinomish,] we reasoned that Ecology's balancing analysis would nearly always treat beneficial uses as "overriding consideration[s] of public interest" so long as the benefits outweighed the harm resulting from impairing the minimum flows.... This conflicts with the principle that statutory exemptions are construed narrowly in order to give effect to the legislative intent underlying the general provisions. Moreover, we emphasize that the OCPI exception is "not a device for wide-ranging reweighing or reallocation of water." Ecology's use of the exception was an end-run around the normal appropriation process, conflicting with both the prior appropriation doctrine and Washington's comprehensive water statutes."

The Court's second reason for rejecting Ecology's reading of the OCPI rule has to do with how the water code defines "withdrawals" and "appropriations" of water. Because the OCPI exception prohibits "withdrawals" of water that would conflict with MIFs, and the water code's use of "withdraw" implies something temporary, the Court held that Ecology may not use the OCPI exception to authorize permanent "appropriations" of water.

In differentiating between the water code's use of "withdraw" and "appropriate," the Court cited and analyzed RCW 90.03.010, RCW 90.03.550, RCW 90.03.383(3), RCW 90.03.370(4), RCW 43.83B.410(1)(a), RCW 43.83B.410(1)(a)(iii), and RCW 43.83B.410(1)(b). The court wrote:

We hold that the OCPI exception does not allow for the permanent impairment of minimum flows. If the legislature had intended to allow Ecology to approve permanent impairment of minimum flows, it would have used the term "appropriations" in the OCPI exception. It did not. The term "withdrawals of water," however, shows a legislative intent that any impairment of minimum flows must be temporary. The plain language of the exception does not authorize Ecology to approve Yelm's permit, which, like the reservations in Swinomish, are permanent legal water rights that will impair established minimum flows indefinitely.

The Court also cast aside the

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elaborate mitigation plan designed to address MIF impacts. While the plan would mitigate MIF impairment by creating a net ecological benefit, wrote the Court, the plan does not prevent the net loss of water resources. Although the plan may mitigate the ecological injury, it does not mitigate the legal injury (or impairment) to the senior MIF water rights. The Court ruled the mitigation plan does not present the sort of “extraordinary circumstances” that Swinomish held are required to apply the OCPI exception. Rather, the municipal water needs that underlie the mitigation are common and likely to occur frequently as strains on limited water resources increase throughout Washington.

Implications for the Future

On the micro scale, the City of Yelm can probably salvage its water right application by reducing the amount of water it is requesting under its permit application. The development proposals that drove Yelm’s water-demand forecasts fell through when the economy crashed in the late 2000’s. It is not likely that predicted growth will occur in the timeframe originally thought. The MIF impacts from the volume of water that Yelm requested, after accounting for all of the proposed mitigation, were fairly limited. Therefore, it is probably possible to eliminate them by reducing volume of water associated with the requested water right.

On the macro scale, solutions will certainly be more difficult and complex.

It appears that when promulgating MIF rules, many in the 1980s, Ecology may not have foreseen that MIF rules someday would be used to preclude diversions of groundwater in hydraulic connectivity with surface water. This may have been, in part, because hydraulic connectivity was not well understood and because Ecology could not anticipate the Postema decision.

Yet, under Postema, any demonstration of impairment to MIFs, even a thimble full, must foreclose the ability of groundwater for appropriation. Moreover, with advances in groundwater science and the adoption of the “steady-state” principle (that any pumped well eventually will reach a steady-state condition wherein 100% of the pumped water is captured from stream flow, regardless of whether this process happens in one day or over many years), more groundwater is considered to be in hydraulic connectivity with surface water, leaving municipal and rural growth to scramble for other sources of available water.

Water is a finite resource. Climate change is impacting the hydraulic cycle, including snowpack, rainfall, the ground’s ability to store water, and the general thirstiness of vegetation, crops, livestock, and people. Population in Washington steadily continues to grow. Most residential water consumers, and even many industrial water consumers, take for granted that affordable and clean water will be available to them, and they possess little understanding of the behind-the-scenes costs of accomplishing this feat.

As surely as these things are true, water predictably will become ever scarcer and water conflicts will become more pitched. Ecology has, and will continue to be, relied upon to help find water for municipal and rural growth. In response to this pressure and to the limitations on allowing impairments

to MIF water rights established in Postema, Ecology uses the OCPI exception as a pressure-release valve to accommodate municipal and rural development with what it believes to be relatively small MIF impacts. Ecology acknowledges this on its web site: “Ecology uses OCPI as a tool to approve water right permits when water availability is limited, but it appears the public benefits of approval outweigh any impacts on stream flows.”

The Supreme Court apparently does not, however, believe that the pressure to inflict relatively small MIF impacts will ever stop, and that the rivers and the resources that depend on them could eventually die a death of a thousand cuts. Water is life. And with the OCPI pressure-release valve now being less frequently available to Ecology, it is unclear how the agency will exercise leadership on efforts to stretch Washington’s water resources to meet the needs and demands of everyone and everything for water supply.

For several years now, Ecology has convened a stakeholder workgroup dedicated to identifying rural water supply strategies. Ideas discussed on Ecology’s web site include:

- Continue to establish reserves of water for domestic users in new or amended instream flow rules without making an OCPI determination.
- Establish mitigation banks.
- Require use of cisterns or other storage devices to satisfy closure periods.
- Use of conservation of existing users to make water available for new users.
- Broaden mitigation options to consider the full hydrologic cycle and benefits to instream resources.
- Rely on local governments to integrate land use planning and protecting water resources.
- Statutory changes.

Some of these ideas may now be foreclosed in view of Foster’s apparent limitation on out-of-kind mitigation and permanent appropriations in association with OCPI and MIFs.

However, in-kind mitigation options that would avoid impairment by eliminating or offsetting impacts from new appropriations still seem workable in view of Foster. These would include pumping additional waters to streams at appropriate places and times, groundwater infiltration, storage projects, relinquishment of existing water rights, water trusts for in stream flows, and purchases or transfers of water rights.

Stay tuned ‘til the last drop.

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