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TWO WRONGS DON'T MAKE A WATER RIGHT

WASHINGTON'S WATERS ARE ALREADY OVER-ALLOCATED

USE OF A "VALUES-BASED" IMPAIRMENT STANDARD WOULD CREATE FURTHER PROBLEMS

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INTRODUCTION

"Value-Based" Standard

Water Availability

Washington's salmon resources are critically important to our state's culture and economy. They are in grave danger, largely due to water being removed from streams. Once they are gone, they will be gone for good. Tom Pors' article in *The Water Report* #145 ("*Washington's Water Availability Train Wreck*"), advocating a "values-based" impairment standard for instream flows, is in reality a call to take even more water from our struggling rivers and streams. But a "values-based" standard is inherently subjective and provides no mechanism to ensure that rivers, fish, and other water users are actually protected. To the contrary, this approach would destroy the instream flow regime established by the Legislature, subvert the prior appropriations system, and guarantee that an ever-larger fraction of Washington's water would be dedicated to out-of-stream uses.

As discussed in my original article last month, water in streams goes hand-in-hand with increased fish productivity, and reduced streamflows have demonstrable impacts on fish. The "ecosystem values" or "values-based" approach is merely another name for using "out-of-kind" mitigation to justify appropriating water in violation of instream flow rules, which the Washington Supreme Court (Supreme Court) has repeatedly held is not permissible. There are no doubt problems with water availability in some rural areas. Weakening the protections for our already overburdened streams , however, is no answer. Our salmon runs simply will not recover as long as we continue to dewater streams in the name of development, regardless of what other "mitigation" measures are instituted. We must resist the temptation to withdraw additional water from Washington's streams, and instead make wise use of the water that has already been appropriated. There is ample opportunity to use "science and ingenuity" to address our water issues; in fact, we have no choice but to do so.

DIFFERENT IMPAIRMENT STANDARD FOR INSTREAM FLOW RIGHTS UNWARRANTED

Instream Rights Status

Mr. Pors asserts that instream flow rights are somehow different from water rights for out-of-stream uses, specifically that they are "environmental rights" that may be impaired in ways that other water rights cannot (the suggested "values-based impairment standard"). Mr. Pors goes so far as to suggest that the Legislature might redefine instream flow rights as different. But this basic premise is incorrect. The Washington Supreme Court has repeatedly held that instream flow rights are entitled to the same protections as other water rights, and that they are not to be impaired by subsequent withdrawals of water. *See Foster v. Ecology*, Washington Supreme Court Case No. 90386-7 (2015) (Slip. Op. at *6) (reconsideration denied March 3, 2016); *Swinomish Indian Tribal Comm'ty v. Dept. of Ecology*, 178 Wn.2d 571, 584, 311 P.3d 6 (2013); *Postema v. Pollution Cont. H'rgs Board*, 142 Wn.2d 68, 82 (2000); *see also Hubbard v. Dept. of Ecology*, 86 Wn. App. 119, 124-25 (1997).

"Impairment"

In *Foster*, the Court stressed that the injury when an instream flow is impaired is the loss of water in the stream. *Foster* at *12. No further definition of "impairment" is needed. Consider a simple comparison: no one would seriously suggest that the rights of an irrigator who was entitled to use 100 acre-feet of water, but was delivered only 50, were not "impaired" because he was also given a new fence.

Protection Precedent

Any concept of instream flows as less worthy of protection is simply not compatible with these decisions, and the Washington State Pollution Control Hearings Board (PCHB) cases cited in Pors' "*Train Wreck*" article cannot change this. The *Okanogan Wilderness League v. Ecology* decision (Poll. Cont. Hearings Bd. No. 13-146, July 31, 2014 (Order on Motions For Summary Judgment)) flatly conflicts with Supreme Court decisions and has no value as precedent. *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006) neither provides an example of "evaluation of MIFs and stream closures differently than impairment of out-of-stream water rights" nor suggests a "new regulatory impairment standard." In the *Squaxin Island* case, the PCHB said that withdrawals were not permissible if they "produce *any effects which adversely impact* the values identified in WAC 173-513-020." *Id.* at 43 (emphasis added). But the values referred to in WAC 173-513-020 are "instream flows and levels necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality," which

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are essentially identical to what RCW 90.54.020(3)(a) commands the Washington State Department of Ecology (Ecology) to protect: "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Essentially, *Squaxin Island* stated that withdrawals could not impair instream flows — the same standard as currently applied.

"VALUES-BASED" IMPAIRMENT STANDARD RESULT: INSTREAM FLOWS UNENFORCEABLE AND SENIOR WATER USERS HARMED

No Objective Standard for Protection of Instream Resources

Flow Certainty

Instream flows are defined, measurable values. While it may not be met in all years, an instream flow provides an enforceable limit on how much habitat may be lost through water diversion or groundwater withdrawals and at least some certainty of protection for fish and other instream values. The vague "values-based" approach provides no such certainty and no enforceable limit on water use. Even assuming that out-of-kind mitigation could truly compensate for the effects of reduced streamflow, evaluating the mitigation proposed for a particular project is inherently subjective and particularly susceptible to political and economic pressure. As the Supreme Court noted in *Swinomish*, when any particular situation is viewed through a balancing test, "the need for potable water for rural homes is virtually assured of prevailing over environmental values." *Swinomish*, 178 Wn.2d at 587. Allowing water withdrawals that reduce streamflows to be allowed by out-of-kind mitigation schemes is a recipe for the continued ratcheting down of streamflows, degradation of the resource, and harm to fish populations.

Balancing Test Problems

"Values-Based" Approach Will Harm Both Streamflows and Existing Water Users

Seniority System

The prior appropriations system protects senior water users and instream flows alike from impairment by later water withdrawals. In low flow years, a water user (whether agricultural, domestic, or municipal) with a relatively junior priority date may have its water use curtailed to protect senior uses. Users who have priority dates later than the instream flow may be required to curtail their use when the flow is not met. Allowing new water uses (likely permit-exempt wells for domestic use) under out-of-kind mitigation schemes would allow the most junior water users to take water that should be part of the instream flow. By reducing instream flows, these newest uses would increase the possibility that older water users would be curtailed to protect the instream flow. Worse yet, a de minimus exception for domestic use (essentially, pretending that these withdrawals do not exist) would effectively let domestic users jump ahead of all other users.

De Minimus Exception

This is more than a theoretical concern. In 2015, users of Teanaway River water with priority dates as far back as 1873 were curtailed in order to protect the Yakama Nation's senior right to water in the stream for fish and aquatic life. *See* http://ecologywa.blogspot.com/2015/07/pre-statehood-water-rights-curtailed-in.html (last viewed March 17, 2016). Allowing new water uses to reduce streamflows through a "values-based" impairment standard would make this outcome more likely. As climate change reduces summer streamflows, such conflicts between users will become more frequent and accommodating all users will be even more difficult. Mr. Pors appears to understand this problem, as he states that a de minimus exception might not be applicable in the Yakima Basin "to protect adjudicated senior water rights, which could also be impaired by new groundwater uses." If this logic applies to the Yakima Basin, it surely also applies to other watersheds with very senior, even time-immemorial tribal rights (the fact that an adjudication has to date happened only in the Yakima does not change the principle involved or the priority of tribal rights in other basins).

Senior Rights Impacted

Collision with Native American treaty rights

The correlation between instream flow protection and protection of tribal treaty fishing rights is not merely "perceived," but is very real. Water in streams directly correlates to fish production, which implicates tribal treaty rights to fish. Mr. Pors claims that the Tribes' treaty water rights would not be affected by use of a "values-based" impairment standard (as they would still have senior water rights). This assertion is technically correct but misses the point. On paper, the Tribes would retain some of the most senior rights to water (often with a priority date of time immemorial). But in practice, either setting streamflows at levels too low to support fish or allowing new withdrawals of water without mitigation for the loss of streamflow would greatly impact the fishery resource and impinge on tribal fishing rights. Tribal rights would only be meaningfully protected if junior users, including permit-exempt domestic users, were curtailed to protect the streamflow. To the author's knowledge, Ecology has never curtailed use of permit-exempt wells and doing so will be politically very sensitive.

Practical Impacts

Enforcement Lack

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No Guarantees

Here, too, the proposed "ecosystem values" scheme provides no alternative protection for these resources and no guarantee that any out-of-kind mitigation measures would actually preserve fish production. The fact that salmon and steelhead are endangered or threatened in most of Washington state shows that our obligation to preserve the resource is not being met even now. More water appropriations will make this situation worse and increase chances of a conflict.

LIMITING PROTECTION TO FLOWS CONSISTENTLY MET WOULD MAKE EVERY YEAR A DROUGHT YEAR

Flow Levels

Mr. Pors suggests that it is "absurd" to protect instream flows at levels that are not met in some or even most years, and that this results in what he claims are "accidental" closures of some basins. There are three fundamental problems with this argument.

First, far from being "absurd," protection of the instream flow at levels that are not always met is essential to protect instream resources. In order to allow new uninterruptible uses of water (such as domestic wells) the instream flow would have to be set so low that it is met every year. Consider the practical effect of setting such a low instream flow. By definition, a flow that is met in all years is no higher than the flow in a drought year (such as 2015). Setting the instream flow at drought levels would mean that water withdrawals, both permitted and permit-exempt, could continue until the stream flow was never higher than in a drought year. Experience suggests that this is exactly what would happen in areas with high demand for water. The experience of 2015 shows the disastrous effect of such low river flows: high stream temperatures cause fish mortality, and salmon are unable to move upstream due to low water. Fish and other instream resources that could not survive a succession of artificially created drought years would be irreversibly lost. Destruction of the fisheries would cause great economic losses to the state, including thousands of jobs, and guarantee that Washington fails to meet its treaty obligations to Native American tribes.

Basin Closures

Second, closure of basins is not "accidental." If streams are closed to new appropriations, it is to protect instream flows that are not being consistently met. In most cases the closures are explicitly set out in the instream flow rules, which also give Ecology's reasons for closing a particular stream or groundwater basin. *See*, for example, WAC 173-503-030; -060 (explaining the basis for Skagit River instream flows and closure of groundwater in hydraulic continuity); WAC 173-511-040 (closing certain streams in the Nisqually basin specifically to protect anadromous fish); WAC 173-517-100 (closing surface streams and groundwater in Quilcene-Snow basin); and WAC 173-539A-010 (explicitly withdrawing all unappropriated groundwater in Upper Kittitas Valley).

Conditional Uses

Finally, setting an instream flow does not prevent all use of water. An instream flow that is unmet bars the use of water for uninterruptible uses (unless the use is mitigated). Other types of uses, though, may be accommodated. Ecology can —and in fact does — issue permits for water use that are conditioned on the instream flow. In any year where the instream flow is exceeded, the holder of such a permit may use water. Water use that does not affect streamflows, or is mitigated so that the streamflow is not impaired, is also generally allowed. As one example, the Dungeness River instream flow rule (WAC 173-518) closes surface streams and groundwater in hydraulic continuity with streams to unmitigated withdrawals. A water banking system is in place to provide mitigation. By helping to reallocate water that has already been appropriated, the water bank allows new users to obtain water without further depleting streamflows. As of this writing, there have been 119 mitigation permits issued in the Dungeness Basin for domestic use and one for stockwatering. (Amanda Cronin, Washington Water Trust, personal communication, March 14, 2016).

Water Banking

UNREGULATED USE OF PUBLIC WATER RESOURCES: ECONOMICALLY INEFFICIENT & NET BENEFITS TO SOCIETY REDUCED

Regulation of Groundwater Use is Not a "Taking"

"Taking?"

Mr. Pors suggests water regulations that prevent rural landowners from withdrawing groundwater might constitute a "taking" of private property. This, along with the argument regarding "discrimination against rural landowners," appears to start from the presumption that there is a right to use water that is appurtenant to land ownership and the view that any restriction on that presumed right is "discrimination."

Appurtenancy

However, the simple fact that one owns land does not confer a right to use water on that land. Our Legislature has abolished "correlative" or "riparian-like" rights to appropriate groundwater. RCW 90.44.040 (groundwater is subject to appropriation "under the terms of this chapter and not otherwise"). And nothing in the permit-exempt well statute provides such an absolute right (in fact, the Groundwater

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Human Right

Code specifically provides that groundwater belongs to the public). RCW 90.44.040. The concept of water as a "fundamental human right" is also misapplied here. Whether or not water is a "basic human right" in the abstract (and no one seriously disputes that Washington residents do have access to water generally), there is clearly no "fundamental human right" to withdraw water wherever and whenever you want, at no cost and without regard to the effect on the environment. Similarly, there is no constitutional right to do so. Regulations that govern withdrawal of water are simply not a "taking" of property, any more than any other land use regulation is. *See Peterson v. Ecology*, 92 Wn.2d 306, 316, 596 P.2d 285 (1979) (groundwater permit requirement is a reasonable exercise of the state's police power and not a taking).

Societal v. Individual

Public Resource Users Should Bear the Cost

The statement by Pors that "it is unethical to transfer the cost of closing the [water] resource to those who lack access to it" attempts to answer the wrong question. What should be asked is whether it is ethical to transfer the cost of water use by the few to society in general (the many). In fact, requiring water users to bear the cost of their resource use — in this case, through mitigation — is the economically efficient approach.

"Externality"

Economists define an "externality" as an unintentional side effect of an activity, which affects people other than those directly involved in the activity. *See* http://enviroliteracy.org/environment-society/economics/externalities/ (last viewed March 11, 2016). Where water use impacts an instream flow, the cost of water use by a few (depletion of a public resource, and loss of fish populations) is borne by the public in general (a "negative" externality). In economic terms this is considered a "market failure," and the resource is not allocated efficiently. Too much of the good in question (here, water for rural development) is produced while the overall benefits to society are reduced (in other words, "maximum net benefits" are not obtained). *See* www.economicsonline.co.uk/Market_failures/Externalities.html (last visited March 17, 2016). Put another way, not requiring that water users "pay their own way" invites a classic example of the tragedy of the commons: where a resource is seen as freely available at no cost, it is virtually guaranteed to be over-exploited and destroyed.

"Maximum Net Benefits"

Users Bear Cost

The concept that the costs of water use should be incurred by the users rather than by society at large is familiar to those living in urban or suburban areas, who pay the costs of their water use in the form of their utility bills. Any mitigation costs necessitated by operation of the municipal water system are recovered from the user. Rural water use should be no different. Simply put, there is nothing "unethical" about asking that an individual pay the cost of his resource use. This can be accomplished by requiring that a water user adequately mitigate his or her impact on the water resource, either by providing replacement water directly (through purchase of a water right) or by working through a system such as water banking. What actually would be "unethical" would be allowing the depletion of instream resources, which belong to all citizens of Washington, and the rich fisheries (and thousands of jobs) which those instream resources support, for the benefit of a relatively small number of property owners.

Water Banks

Viewed in terms of economic rationality the hostility to water banking is difficult to understand. Rather than "eliminat[ing] beneficial uses" of water, water banks efficiently allocate water to the uses on which users place the highest value. A water bank provides a simple, objective mechanism for rural water users to mitigate their water use. To the extent that banked water results from farmland being taken out of production, the water banking system allows farmers, who are unquestionably the best-informed about their agricultural practices, to make that decision.

PROTECTION OF INSTREAM FLOWS & OTHER ENVIRONMENTAL ENHANCEMENTS NOT MUTUALLY EXCLUSIVE

Habitat Improvements

Mr. Pors argues that by protecting instream habitat through "establishing instream flows as water rights that are not to be violated," opportunities for other habitat improvements such as planting vegetation to shade streambanks or creating holding areas for salmon are "lost." This presents a false conflict, however, and this line of reasoning ignores the fact that other types of habitat improvements can and should be done regardless of any water use issue.

Uniqueness of Water

This argument also depends on the premise that other habitat improvements can somehow substitute for water in the stream. In the example of wetland mitigation, there are cases where it may be possible to create an artificial wetland, or restore one that was previously filled, as a substitute. In that scheme wetlands are more-or-less fungible, and what matters is the net amount of functional wetlands present. Not so with streamflows. Where there is not enough water in the stream, there is really no stream at all, regardless of what other habitat improvements may have been made. It is illogical and improper to trade off water for other aspects of environmental improvement.

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Chapter 90.74 RCW, which discusses mitigation alternatives, defines "compensatory mitigation" as:

> restoration, creation, enhancement, or preservation of uplands, wetlands, or other aquatic resources for the purposes of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

RCW 90.74.010(1).

Clearly avoidance and minimization of impacts (in the case of water, avoiding or minimizing new withdrawals) is to be preferred even under the statutes discussing mitigation techniques.

CONSIDERATION OF THE FULL HYDROLOGIC CYCLE DOES NOT SUPPORT INCREASED WATER WITHDRAWALS

Development Impacts

Septic Systems

Consideration of the full hydrologic cycle demonstrates that development (including rural domestic development) has impacts on streams beyond the simple withdrawal of water. Land clearing changes runoff patterns; relative to a forested area, more water runs off more quickly from cleared areas and impervious surfaces such as roofs and driveways, and less water infiltrates into the ground, where it otherwise recharges streamflows over time. The result is increased streamflow just after storm events and reduced flow at other times. For a discussion of these effects, *see* "*The Impact of Rural Development on Puget Sound Lowland Stream Hydrology and Health: A Summary for the Water Resources Program*" (Ed O'Brien, September 30, 2015) (available at: www.ecy.wa.gov/programs/wr/wrac/rwss-leg.html, last viewed March 15, 2016). Rather than mitigating the withdrawal of water, then, the land use changes associated with development are likely to exacerbate the effect on streamflows at critical (low-flow) times. While use of a septic system may result in some of the wastewater re-infiltrating to the aquifer or perhaps nearby streams, it is logically impossible for more water to be returned to the stream than was withdrawn. If the amount of groundwater that is withdrawn from a domestic well versus what is re-infiltrated via a septic system is to be considered in calculating mitigation requirements, then the actual withdrawal should be metered to ensure that the calculation is correct.

CONCLUSION

Limited Resource

The bottom line is this: water is a limited resource, just like land, and "they are not making any more of it." Just as the available land has already been claimed, the amount of water that can reasonably be exploited has already been set aside for out-of-stream uses. The requirement that new water uses be mitigated is simply recognition of this fact. Basins are not closed "accidentally," or because the courts have misinterpreted "impairment"; they are closed because no more water can be appropriated without unacceptable impacts on fish and other aquatic resources. Whether it is called "out-of-kind mitigation," "values-based mitigation," or "flexibility in mitigation," the net effect of removing water from streams is to impair the ability of the stream to support fish and other aquatic life.

Water Availability Issue

The frustrations of rural property owners are understandable. But the solution to water availability issues is neither to destroy the prior appropriation system without providing a new regulatory scheme, nor to destroy what remains of our fish and wildlife resources. The only way to simultaneously provide for our growing population, protect instream resources, and honor our obligations under the federal Endangered Species Act and treaties with Native American tribes is to develop better and more economically efficient ways to allocate the water that has been appropriated, so that streamflows are not further impaired. Property owners, as would-be water users, logically share the obligation to accomplish this outcome.

Facilitate Redistribution

In Washington State, the successful use of "water budget neutral" approaches, including water banking, in the Dungeness and Kittitas basins suggests a path forward. The effort and energy that is now being expended in an attempt to salvage out-of-kind mitigation strategies or the "overriding consideration of the public interest" exception would be far better spent in making existing water use more efficient and in expanding structures such as water banking to facilitate redistributing the water that is already designated for out-of-stream uses. This conservation-based strategy also has the virtue of making water users more resilient to the reduced water supplies that will result from climate change.

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