

Dereliction of Duty:

Washington's failure to
protect our shared waters



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EXECUTIVE SUMMARY

This paper discusses the current problems with water law enforcement and the protection of stream flows in Washington, and provides a ten-year retrospective of the political dynamics at the Department of Ecology and the State Legislature that have compounded these problems. Practical solutions are then presented that can help the state to ensure that water use is sustainable and our shared waters are preserved for future generations.

Our state population is rapidly increasing, and is expected to double in the next fifty years. As our population grows, we continue to tap the supply of clean water flowing in our rivers for use in our homes, on our farms, and for our businesses and industries. The state of Washington has a fundamental duty to ensure that we meet our growing needs for water, while at the same time preserve our rivers for use and enjoyment by future generations of Washington citizens.

In many areas of the state, we have already over-tapped our water supplies by granting people the right to take more water than a river, stream, or aquifer can sustainably provide. This depletion in the natural flow of our rivers has come with great consequences: One quarter of the state's 62 watersheds do not have enough water to meet the needs of both people and fish.

Washington's water laws provide the state the means to determine how much water is currently being used, by requiring that water use be measured. These laws also provide for the setting of instream flows – a minimum amount of water left instream to protect fish and wildlife. And finally, these laws give the state broad authority to protect instream flows, and to enforce against illegal users.

Unfortunately, some of our water laws as designed are flawed. Many others that could be effective are simply not well implemented. This is particularly true where water law compliance is concerned: Illegal water use – using water without a water right, beyond the limits of a water right, or wastefully using water - is widespread and greatly impacts stream and river flows.

While state officials and legislators may show public concern for protecting river flows, they often lack the political will to enforce the environmental protections found in state water law. In fact, both the Department of Ecology and the Washington Legislature have failed to make the tough choices necessary to ensure enough water flows in our streams and rivers for fish and wildlife.

Ecology has failed to use and enforce specific laws designed to protect stream flows: Water users are not required to measure *and* report their water use, there has been little-to-no enforcement of conditions in water rights that serve to curtail water use when stream and river flows are below minimum levels, and the agency has backed away from enforcing against illegal users when faced with political pressure. Ninety percent of the state lacked an active water enforcement presence in the last decade, and in the past 16 years more than two thousand water rights have been granted while only one new instream flow has been set.

The Legislature is equally accountable for the state's poor implementation of laws designed to protect stream flows. Rather than funding and supporting Ecology's enforcement program, the Legislature has noticeably cut the agency's budget, periodically sought to protect illegal users from potential enforcement actions, and at times interfered with administration of the agency's water resources program.

Consequently, despite laws on the books that enable the state to set and enforce limits to the use of water from our publicly owned rivers and streams, the state has been derelict in its duty. This dereliction has led to an era of water policy gridlock, with many disputes ending up in court.

Significant reforms are needed to bring the Water Code out of the 19th Century and into the 21st, yet basic administrative

and legislative steps can be taken now to enforce and enhance the environmental protections in Washington's water laws. Whether the Governor's promise to reform water law in the 2001, 2002, and 2003 legislative sessions will culminate in changes necessary to ensure that our rivers and streams are restored and preserved in tandem with meeting the needs of a growing population, remains to be seen.



Walla Walla River near Milton-Freewater, August 1999

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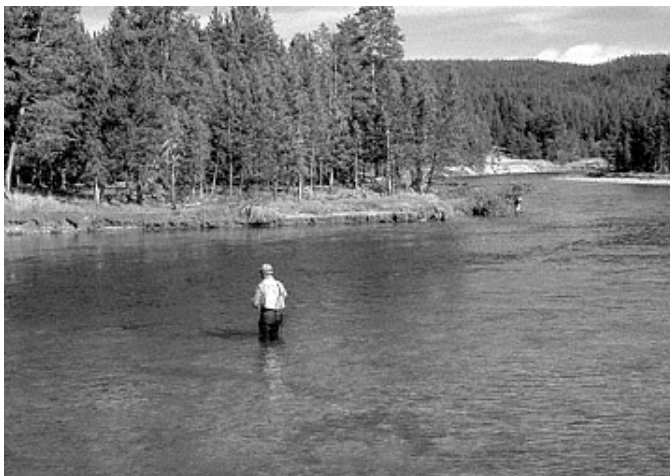
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Washington's Failure to Protect our Shared Waters

Introduction

We use as much as 8.86 billion gallons of water per day in Washington in our households, for irrigating crops, and for supporting business and industry.¹ This water comes from our shared rivers, streams, and aquifers. As our state population increases, the needs of our growing society continue to tap the supply of clean water left flowing in our rivers – water that provides essential habitat for fish and wildlife, and for our use and enjoyment. In many areas of the state, we have already over-tapped, or “over-allocated” this supply by granting people the right to take more water than a river, stream, or aquifer can sustainably provide.

Depletion of the natural flow in our rivers comes with great consequences: One quarter of the state's 62 watersheds, called WRIAs or Watershed Resource Inventory Areas, do not have enough water to meet the needs of both people and fish.² These watersheds are host to numerous fish species that depend on clean, flowing water for their very survival, yet now are on the brink of extinction. Low flows in our rivers and streams are a contributing factor to their decline.³ This decline not only affects our natural heritage, it affects our economy as well, with the loss of Washington's once-abundant fisheries.



Many of Washingtonian's favorite activities, such as kayaking and flyfishing, depend on sufficient river flows.

Washington has passed important state laws designed to preserve stream and river flows in the face of continued water allocation. These laws allow the Washington Department of Ecology (Ecology) to assess the amount of water we use and the impacts of this use on the health of our rivers and streams, to set minimum “instream flows” – a baseline amount of water left instream to protect fish and wildlife, and to enforce state law provisions to protect instream flows. Unfortunately, some of these laws as designed are ineffective: Instream flows, for example, are secondary or “junior” to previously

existing water rights, allowing water right holders to continue using water from depleted rivers. Many other laws that could be effective are simply not well implemented. This is particularly true where water law compliance is concerned: Illegal water use – using water without a water right, exceeding the limits of a water right, or wasting water – is widespread and greatly impacts our ability to meet instream flows.⁴ Yet this problem continues largely unabated.

In fact, while state officials and legislators may show public concern for protecting river flows, they often lack the political will to enforce environmental protections found in state water law. Over the past decade both Ecology and the Washington Legislature have avoided the tough decisions necessary to ensure enough water flows in our streams and rivers for fish and wildlife, under pressure to find water available for new growth, industry and agriculture. Consequently, the state has been derelict in its duty to properly manage our most valuable natural resource. Whether Governor Locke's promise to reform water law in the 2001, 2002, and 2003 legislative sessions will culminate in changes necessary to ensure that our rivers and streams are preserved in tandem with meeting our growing populations' needs, remains to be seen.

This paper presents an analysis of the current state of water law enforcement and protection of stream flows, and offers solutions to better achieve these objectives. Enforcing permit limits and assuring compliance with water laws protects both individual rights and the integrity of our rivers and streams for generations to come.

Every generation of Washington citizens is responsible for protecting the natural legacy that we inherit. We are the descendants of men and women who protected this legacy for us. And one day we will be the ancestors of the Washington citizens who will inherit this legacy from us.⁵

Managing Water in Washington: The Basics

Effectively managing a resource requires knowing how much of the resource is available for use at any given time, how much is currently being used, how this use impacts the resource, and how to define and protect a sustainable limit on use of the resource to ensure it is not depleted beyond its ability to recover. Once limits to the use of a resource are established, effective monitoring and enforcement to ensure compliance with these limits, and protection for the resource, is crucial to responsible management.

Management of water in Washington rests on the fundamental precept that the right to use water is sacred and defensible, and those who are first to use water, who are "senior," must be protected against those who are "junior," or later in time.⁶ This system of "first in time, first in right" priority dates back more than a century. In the early years that people settled in Washington, water "management" didn't even exist. To obtain a right to use water, one merely posted a notice to indicate an intent to divert water, with no public oversight.⁷

Illegal water use – using water without a water right, exceeding the limits of a water right, or wasting water – is widespread and greatly impacts our ability to meet instream flows.

When the state did begin to manage water use by adopting the 1917 Water Code,⁸ it encouraged out-of-stream use of water with no regard for the value water holds if left flowing instream.⁹ Until the mid-20th Century, water right development occurred largely unchecked. Since 1949, a suite of

laws have been passed by the Legislature that provide the state with authority to exercise basic stewardship responsibilities, and even require the state to ensure sustainable use of its rivers, streams and aquifers.¹⁰

Despite the state's intention to preserve river flows in the face of continued growth and water allocation, these laws are too-little-too-late and have been exercised far too timidly to protect Washington's waters. Sadly, the current system of managing water in Washington falls short on every one of the basic management elements described above. In nearly every watershed in Washington, the state does not know how much water is available for wildlife or out-of-stream use. The state also does not know how much water is actually being used by legitimate water right holders or by illegal water users. Similarly, there is little understanding of the impacts of water use on the health of river systems, and no effective limits on water use have been implemented to ensure we preserve a sustainable level of water flowing in our rivers for generations to come.

Preserving River Flows in the Face of Continued Growth

Despite any misperception, Washington receives a finite amount of rainfall each year, resulting in a finite snow pack and river runoff, and a finite amount of accumulated groundwater.¹¹ Gauging our success in maintaining clean, flowing waters to sustain natural needs and the health of Washington's economy provides us with a litmus test for how well we are managing our shared waters.



Housing development on the Sammamish River in Western Washington

Unfortunately, just as with the significant depletion of water bodies like the Colorado River and the Midwest's

Ogallala aquifer in other states, Washington is now feeling the impacts from over-allocation of its water resources. While our population growth has doubled in the past 50 years and is expected to double again in the next fifty,¹² our natural resources are suffering. Washington now boasts over 12,000 miles of river impaired by flow modifications,¹³ and 15 runs of wild salmon listed under the Endangered Species Act (ESA)¹⁴ as threatened or endangered across 75% of the state.¹⁵ Of the

The state also does not know how much water is actually being used by legitimate water right holders or by illegal water users.

state's 62 WRIAs, 16 have both an ESA-listed species and a water-supply problem.¹⁶ The depletion of flows in our rivers and streams, and the decline in

our salmon populations impacts far more than our desire to preserve a natural heritage – it impacts our economy as well. Our commercial and sport fishing industry have lost an estimated \$500 million in annual economic benefits, and tribal harvests have been similarly impacted – dropping 90% from a total of roughly 5 million salmon caught in the mid-1980s to only 500,000 in 1999.¹⁷

Protection of stream and river flows is important because in most years, not just drought years, streams and rivers run so dry that not enough water exists to meet the needs of wildlife, fish, recreational, aesthetic and other environmental values. Even under natural conditions, streams experience significant flow variation, with the lowest flows typically occurring in late summer when many salmon return to spawn. However, the low flows we now experience are, for the most part, not natural. Instead, these low flows are due to the significant amounts of water diverted and withdrawn at the time of the year when most rivers are already at their lowest.

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In Eastern Washington, which can receive as little as 3 inches of precipitation annually,¹⁸ the cumulative impacts from water diversions and withdrawals can reduce rivers like the Walla Walla to dry rock beds. Even in Western Washington, an area perceived as a rainfall mecca, streams such as Rock Creek and the North Fork of Issaquah Creek in King County are experiencing significant low flow problems, compounded in part by excessive vegetation removal and impervious surfaces from increased development.

We do have a means for protecting a level of flow in our rivers and streams for wildlife and recreation, by setting and protecting “instream flows” (water rights that preserve a minimum amount of water flowing in a stream or riverbed.¹⁹) Yet setting “instream flows” has not been very effective in ensuring that enough water remains in our rivers to meet the needs of fish and wildlife. Few flows have been established. Roughly two-thirds of the state lacks instream flow protection, and over the past 16 years only one new instream flow has been set.²⁰

Instream flow rights are also “junior,” or secondary, to all other water rights that existed prior to the date they were



Aerial view of the Snohomish Watershed. Instream flows in the Snohomish River are typically not met for one-third of the year,

established.²¹ Since much of the water flowing in our rivers and streams was already appropriated by the time instream flows were set, efforts to preserve enough water instream for fish and wildlife have been almost completely ineffective. Meanwhile, thousands of water permitting decisions have been made that cumulatively deplete the amount of water left instream, as evidenced by the following disturbing trends:

- Annual flows in the Chehalis River in Southwestern Washington have decreased by 300 cubic feet per second (cfs) since 1930 and 800 cfs since 1953, respectively. At the Porter gage the instream flows are not met an average of 77 days per year.²²
- Stream flows in the Little Spokane River in Eastern Washington have declined since the 1950s and, in some years, are not met for more than six months.²³
- Monthly flow data from the Tucannon River near Starbuck from 1915 to 1990 indicates the mean annual flow of the river has been declining for the past 31 years, even while the annual precipitation has increased.²⁴
- Data from the Puyallup-White watershed in Western Washington indicates that flows have continued to decline despite the establishment of instream flows in 1980.²⁵
- Since instream flows were established on the Snohomish River in Western Washington, flows near Monroe have typically not been met an average of 121 days per year, especially between mid-July and mid-October.²⁶
- Up until this past summer, the entire flow of the Walla Walla River, which now hosts two threatened fish species, was diverted for irrigation in summer months.²⁷ Instream flows have never been set for the Walla Walla River – the setting of such flows was deferred in 1977 when the watershed was closed to additional withdrawals, pending development of possible storage projects.²⁸



Summer, 2001. Water flowing in the Walla Walla River near the Tum A Lum Bridge, just south of the Washington border, for the first time in summer months for over 100 years.

To ensure enough water remains in our rivers for fish and wildlife, we must commit not only to setting instream flows, but to *meeting* them as well. Because instream flows are junior to most water rights in many watersheds, however, our state water laws do not provide a

clear method for doing this. Meeting instream flows in over-appropriated basins may require some combination of increasing water conservation, purchasing water rights and protecting them instream, and executing local agreements among water users to reduce their use.

Our state laws do, however, provide a way to ensure that all water use is legal, stays within the limits of the rights that are granted and created, and honors conditions that protect instream flows. In addition to over-appropriation, illegal water use practices – using water without a right or beyond permitted limits, or wastefully using water – contribute significantly to low-flow problems statewide.²⁹

Unfortunately, enforcement efforts to ensure these laws are being followed have been abysmal to nonexistent. In fact, in only five watersheds where instream flows have been set has any effort been made to regulate water users to ensure flows are met.³⁰ While enforcement alone will not completely restore flows in over-appropriated basins, such efforts are nevertheless a necessary step in restoring and protecting flows statewide.

Assuring Compliance with Water Laws

Management and regulation of water in Washington is an exercise of the state's police powers, and consequently the state holds extensive authority to regulate water use and enforce water laws.³¹ The Water Code,³² the Water Resources Act of 1971,³³ and other state statutes create a management system that, while imperfect and incomplete, could still do much to improve river flows if properly implemented and aggressively enforced. These statutes together formulate a structure for managing water by providing for adjudication of water rights in all water basins, ongoing measuring and reporting of water use, and broad enforcement authority given to Ecology, water masters, and stream patrolmen to assure compliance with state laws.³⁴

A water right exists only to the extent that water is put to beneficial use, and water rights that are not continuously used may be lost or diminished.³⁵ When water is physically present, the only way to assess whether it is truly available to support new uses is to cumulatively consider all water rights as granted or claimed on paper (permits, certificate, and claims).³⁶ Unfortunately, since the validity and extent of water rights change over time, “paper rights” do not give a fair estimate of water availability.³⁷ Knowing the limits of



Surface water diversions that are newly permitted, exceed one cubic foot per second, OR are in areas critical for salmon must be metered under state law.

such paper rights, and enforcing these limits can return illegally diverted water to a stream or river, benefiting fish and allowing for a clearer determination of whether any water remains for further out-of-stream uses.

“Adjudications” clarify the extent and validity of paper rights: An adjudication is a court determination of whether and to what extent water rights have been created, and what their priorities are in relation to other water rights from the same water body.³⁸ Adjudications further provide a mechanism to determine the validity and quantify the extent of the numerous water rights claims created prior to the 1917 and 1945 Water Codes.³⁹ Roughly 169,000 claims have been recorded with the state, yet “[s]hort of litigation, it is impossible to assess how many of these claims represent vested water rights. Many claims may be invalid, overstated, overlapping, abandoned, reduced, or modified in their scope.”⁴⁰

Adjudicating water rights, coupled with ongoing measuring – or “metering” – and reporting of water use answers the elemental question of “how much water is being used” under valid water rights and claims. Meters provide an instantaneous measure of the rate at which water is diverted or withdrawn, as well as a measure of the overall quantity of water diverted or withdrawn over time.⁴¹ Metering, which is mandatory under state law,⁴² provides a monitoring tool to ensure water users do not exceed the limits of their rights. Metering data can be combined with stream flow data, where stream gauges exist, to monitor and assess the cause of changes in river flow.⁴³

Where water rights are fully adjudicated,⁴⁴ Ecology as manager of the resource holds authority to enforce against all types of illegal water use. Ecology defines “illegal water use” to include:⁴⁵

- Diverting or withdrawing water without an existing permit, certificate, or water right claim
- Diverting or withdrawing water in excess of authorized amounts
- Irrigating more than the authorized number of acres
- Diverting or withdrawing water beyond the authorized period or time of use
- Diverting or withdrawing water beyond the authorized place of use
- Using water for purposes other than those described in the water right
- Using water in a manner that does not comply with permit and/or certificate provisions (such as instream flow restrictions, fish screen requirements, family farming, and others)
- Wasting water or not using water beneficially



Enforcing against illegal water users helps to keep enough water instream for fish, wildlife and recreation.

Water masters and stream patrolmen also may enforce against illegal users. Water masters are individuals appointed by Ecology to act as managers of a given district, under Ecology's supervision.⁴⁶ A water master divides, regulates, and controls the use of water within his or her district, and prevents water from being used in excess of the amounts to which water users are legally entitled.⁴⁷ A water master further enforces

Ecology's rules in his or her district.⁴⁸ The water master holds the power to arrest any person violating the provisions of the Water Code, deliver them to the county sheriff and bring them before the district court for judgment.⁴⁹

Trying to manage water without knowing the limits of existing water rights, monitoring and enforcing these limits, and identifying instream flow needs, is akin to a bank trying to manage money without ever keeping track of deposits and withdrawals.

Stream patrolmen are water masters in a limited sense: they share the same powers, but their regulatory authority is confined to a particular stream or streams.⁵⁰ Stream patrolmen can only work in adjudicated basins, where water users with adjudicated rights apply to Ecology for their appointment.⁵¹ The water users then pay the costs of the stream patrolmen. Patrolmen answer to either the Director of Ecology, or the water master of their district.⁵²

Ensuring compliance with water laws and permit limits benefits all water users and the public at large. As outlined by Ecology, compliance with water laws:⁵³

- ✓ Protects legal water users from impairment (loss of water) by those using water without a right, or beyond the terms of their right;
- ✓ Protects those senior water right holders from impairment by junior users;
- ✓ Keeps enough water in streams to protect the environment, restore fish runs, and meet Endangered Species Act requirements;
- ✓ Ensures that water being used without authorization is returned to the stream for allocation to others who are waiting in line for new water rights, and to assist in restoring stream flows;
- ✓ Ensures that water use can be sustained for the long term, rather than drying up streams and depleting aquifers faster than they can be recharged;
- ✓ Ensures that water laws and the permitting system are credible and deter further illegal use;
- ✓ Creates awareness of the importance of water use and the need for wise use of our limited water resources.

Management Realities: Politics, Shifting Priorities, and Inadequate Funding

While our laws provide *tools* for assuring compliance with water laws, implementation has been weak and inconsistent. Trying to manage water without knowing the limits of existing water rights, monitoring and enforcing these limits, and identifying instream flow needs, is akin to a bank trying to manage money without ever keeping track of deposits and withdrawals.

For instance, the state has failed to utilize water measurement and reporting as a tool to determine how much water is currently being used, and enforce against illegal use.⁵⁴ Furthermore, even though the adjudication process serves to identify the limits of existing water rights – a necessary element of managing water – only 10% of the state has been adjudicated.⁵⁵ The process is considered burdensome⁵⁶ and many water right holders fear any limitation of their paper water rights, which may overstate the amount of water to which they are actually entitled.⁵⁷ Yet, without adjudication the state's enforcement powers are greatly limited. Ecology does not have independent authority to make determinations on the validity and extent of existing rights in order to regulate water use and resolve water rights conflicts.⁵⁸ The agency cannot, for example, regulate junior users on behalf of

senior rights that have not been adjudicated,⁵⁹ and also cannot regulate water use under the 169,000 water right claims registered with the state.⁶⁰

The state's salmon recovery strategy recognizes that illegal water use greatly depletes stream and river flows, and highlights enforcement against such illegal use as key to recovering salmon.

Use of the extended enforcement personnel allowed by state law has also been limited. Though generally supported by environmentalists and water

users alike, only three water masters exist *in the entire state* of Washington,⁶¹ and their powers are similarly curtailed where water rights have not been adjudicated.⁶² Water users also cannot take advantage of enforcement benefits from stream patrolmen unless their rights are adjudicated.⁶³

In essence, the state does hold broad enforcement powers. Yet without widespread adjudications or other methods for determining the validity and extent of current water rights, and comprehensive measuring and reporting of water use, the state cannot know how much water is currently being used. Also lacking, as discussed below, is a strong commitment on Ecology's part to aggressively enforce against illegal users, and the proper funding and support from the Legislature to do so.

Ecology and the Legislature: No Will, Poor Funding, Few Results

Problems with water management in Washington are due in part to conflicting *directives* in state law, and the ease with which political pressures can play out these directives in real life. The state's water laws set out dueling priorities – encouraging maximum use of the water and providing Ecology with authority to act as an agent to help people find new water, yet simultaneously requiring the agency to be a steward of the resource and maintain flows for fish and wildlife.⁶⁴ Ecology, as manager, is given the deference to strike the proper balance between these conflicting directives.

Even in theory, these priorities are oppositional, and lead to conflicts of interest. In practice they are chaotic, and the balance between them shifts with the changing political climate. Enforcement of water laws that protect instream flows has followed this pattern of chaos – with bursts of activity followed by long periods of inactivity and shifting priorities, on the part of both the executive and legislative branches.

Ecology as Manager: Broken Promises

The Department of Ecology was created in part “to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.”⁶⁵ Presently, the mission of Ecology’s Water Resources Program is characterized as meeting “the current and future needs of the natural environment and Washington’s communities.” Ecology is well aware of the complexity of this mission.⁶⁶

Widespread illegal water use significantly complicates Ecology’s mission to protect Washington’s water resources. The state’s salmon recovery strategy recognizes that illegal water use greatly depletes stream and river flows, and highlights enforcement against such illegal use as key to recovering salmon.⁶⁷

Some areas of the state have a significant amount of water being used (1) without authorization from Ecology, (2) in excess of the quantities allowed under a water right, (3) in excess of the acreage allowed to be irrigated, and/or (4) outside the authorized place of use. Ecology has found these forms of illegal activity to some degree in most areas of the state that it has investigated.⁶⁸

Ecology’s compliance strategy is to target salmon-critical watersheds, and enforce against the most egregious and repetitive illegal users after first attempting to gain voluntary compliance.⁶⁹ Such enforcement actions are then coordinated with press releases detailing the violation and amount of penalties incurred to alert the public to the violator and deter other illegal users.

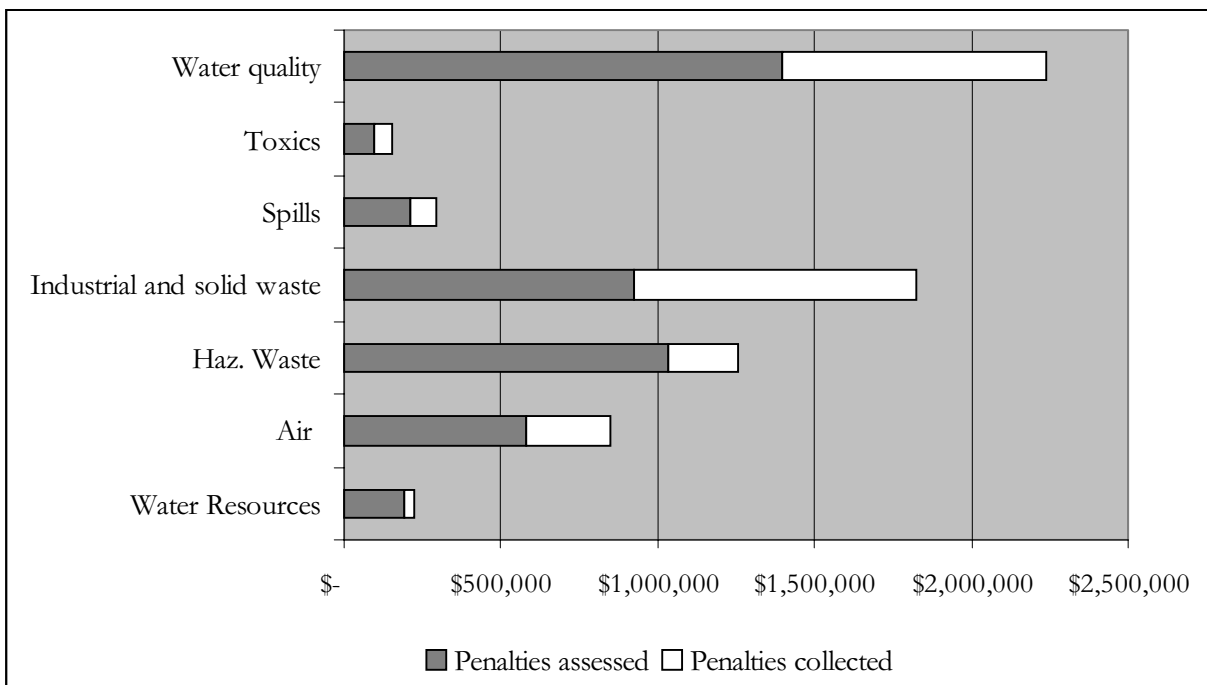
Despite Ecology’s efforts to publicly enforce against egregious violators, however, the agency has fallen far short of adequately protecting water rights and instream flows. In fact, over 90% of the state has lacked an active enforcement presence during the past decade.⁷⁰ Enforcement has been sporadic and complaint-driven versus proactive, and largely inconsistent across locales.⁷¹ At times it has taken Ecology a decade to enforce against known illegal users.⁷² Further, the penalties that are assessed – while quite possibly a deterrent for small-scale water users were the resources available to enforce against them – are in actuality minimal, and serve only as “a cost of doing business for larger operators (violators).”⁷³



More than 70% of water taken out of stream in Washington is used for irrigation.

Moreover, poor collection rates on penalties provide for a weak deterrence system. In a two-year period between April 1999 and 2001, Ecology's Water Resources Program issued \$181,460 in penalties, but only collected \$29,326 – more than 80% uncollected.⁷⁴ Within the agency as a whole, nearly half (46%) of the all penalties assessed between July of 1997 and May of 2001 have gone uncollected.⁷⁵ Note that Water Resources Program collected the fewest penalties of all Ecology's programs.

**Washington Department of Ecology
Penalties Assessed vs. Penalties Collected, July 1997 - May 2001**



While Ecology's poor enforcement efforts can be attributed in part to agency budget cuts (discussed below under "*Legislative Failings*"), they can also be attributed to the agency itself: A clear shift in Ecology's management culture has occurred in recent years, placing less emphasis on environmental considerations and more on serving a specific "clientele."⁷⁶ Ecology's clientele is increasingly defined as permit applicants and water users, rather than the public at large. This culture shift has included selective enforcement of illegal water use and instream flow conditions in the face of political pressure, an outright failure to enforce specific laws designed to protect stream flows, and a general lack of accountability on Ecology's part to set new instream flows and gauge the effectiveness of programs designed to improve flows. In fact, over the past 16 years, the agency has approved more than two thousand water rights,⁷⁷ yet only set one new instream flow.

The following examples serve to highlight these management deficiencies:

Selective Enforcement

WHATCOM COUNTY

During a 1999 tour of the Whatcom County area, then-Representative Gary Chandler discovered an example of high profile illegal water use, and was apparently “flabbergasted” to discover that a cranberry business was operating without water permits.⁷⁸ The cranberry operator – the largest irrigator in the basin – had a working knowledge of water law and his need to obtain a water right, yet counted on the threat of using his political connections to avoid enforcement: The operator allegedly threatened Ecology staff with losing their jobs were they to enforce against him.⁷⁹ Ecology has yet to take enforcement action against this user.⁸⁰

COLUMBIA RIVER BASIN

During the 2001 drought, Ecology Director Tom Fitzsimmons suspended a 21-year-old minimum flow requirement for the Columbia River to avoid cutting off water to a few hundred larger, mainstem diverters. In the face of massive political pressure⁸¹ and calls for civil disobedience from irrigators,⁸² the agency went to extraordinary measures to meet the irrigators demands, by further purchasing water from the Bonneville Power Administration (BPA) as part of a package that cost the state roughly \$800,000 of taxpayer dollars.⁸³ At the same time, the agency notified 180 people in the Methow, Okanogan, and Wenatchee river basins that their water supply would be cut off during the drought.⁸⁴ As Tom Fitzsimmons pointed out, a stark difference existed



The Columbia River hosts 12 species of threatened and endangered salmon and steelhead species, and is to many Northwesterners a symbol of enduring spirit.

between the water-right holders on the Columbia River and those on the Methow, Okanogan, and Wenatchee – justifying the imbalanced enforcement: “Fitzsimmons said the farms along the Columbia River are larger operations, and their failures would have a much larger effect on Washington’s economy.”⁸⁵

Failures to Enforce

WATER METERING

Despite a 1993 law directing that water use be measured, Ecology failed to make metering a priority and implement substantial metering requirements. The agency was sued to force compliance: In a 1999 lawsuit brought by the Center for Environmental Law & Policy (CELP) and the Washington Environmental Council (WEC), along with various other groups, the Thurston County Superior Court found that Ecology had violated the 1993 law, and ordered the agency to comply.⁸⁶ In doing

so, the Court stated that metering “is a necessary step in order to bring us out of the dark and into the light” in managing Washington’s most precious water resources.⁸⁷ Although Ecology followed through by redrafting and broadening its metering rule, the agency still does not require that metering data be reported⁸⁸ – undercutting the very purpose of metering as a monitoring and enforcement tool.

INSTREAM FLOWS

In 1996, the Washington Department of Fish and Wildlife’s (WDFW’s) then-Director Robert Turner requested Ecology to establish flows in five watersheds.⁸⁹ In responding to the WDFW request, Ecology’s then-Director Mary Riveland acknowledged the continued existence of an unresolved ten-year old policy debate stymieing instream flow and water allocation activities, but committed the agency to fulfilling the request, as was required under state law:⁹⁰

I believe....that further delay could be damaging to the health and welfare of the state’s important instream resources including fish and wildlife. At this preliminary state, we believe we can accommodate instream flow establishment in the five watersheds you recommend in your letter.⁹¹

Despite Ecology’s duty to act, and its solid assurance of action, however, flows still have not been established in *any* of these WRIAs.

Lack of Accountability

FAILURE TO SET INSTREAM FLOWS

In 1993, the Legislature enacted a law to promote wild salmon production and assigned Ecology several responsibilities, including development of a statewide list of priorities for evaluating instream flows.⁹² The principle goal of this process was to prioritize a “list of areas where instream flows studies are needed and

areas where instream flows need to be amended or adopted by rule.”⁹³

Ecology prioritized a list of 37 WRIAs and further predicted flows would be set for both the Methow and the Dungeness/

The Department of Ecology’s enforcement resources were slashed from nine FTEs to less than one following a period in which Ecology prioritized increased enforcement actions in a budget request.

Quilcene in January and June of 1994, respectively. Of all 37 WRIAs, however, Ecology has only set an instream flow in *one* (The Skagit).⁹⁴

WATER SAVINGS NOT TRACKED

Despite \$25 million spent by Ecology,⁹⁵ and the millions more spent by the federal government on irrigation efficiencies over the past 20 years, there has been little effort by the state to track the water savings and whether the water ends up in stream.⁹⁶

Legislative Failings

Ecology is only partially to blame for ineffective management and lax protection of Washington's waters. The Legislature itself has played a central, and often obstructionist, role in water management. At various times, the Legislature has:

- ✓ Sought to protect illegal water users from potential agency enforcement action
- ✓ Created water legislation but failed to adequately fund its implementation
- ✓ Second-guessed agency expertise and interfered with agency actions

Overall, during the past decade the flux of Ecology's role in enforcing against illegal users and managing water resources has been largely at the whim of the Legislature and its shifting funding and policy moods.

Protection for illegal users

In 1991, the Legislature funded six new Ecology employees devoted to enforcement of the Water Code.⁹⁷ With these new resources, the agency initiated water law compliance programs in various areas of the state, including the Lake Washington and Lake Sammamish areas in 1992, and Whatcom County in 1993.⁹⁸

In Whatcom County, where the enforcement effort was focused on the Johnson Creek drainage area, Ecology found large-scale illegal water use: the unauthorized irrigation of approximately 3200 acres of land.⁹⁹ Here, the agency actually met with some success in seeking voluntary compliance.¹⁰⁰

In the Lake Washington and Sammamish areas, Ecology staff also learned of a wide range of illegal activities – documenting more than 100 unauthorized water users and estimating the actual scope of the problem to be more on the order of “thousands of unauthorized water users.”¹⁰¹ In contemplating compli-

ance actions in these areas, however, Ecology personnel predicted “strong resistance from water-front property owners and lack of voluntary compliance.”¹⁰² Ecology personnel also acknowledged that the enforcement actions in the area “... may anger some influential people in our state. We have to be prepared for that or acknowledge that the job is impossible and do nothing.”¹⁰³

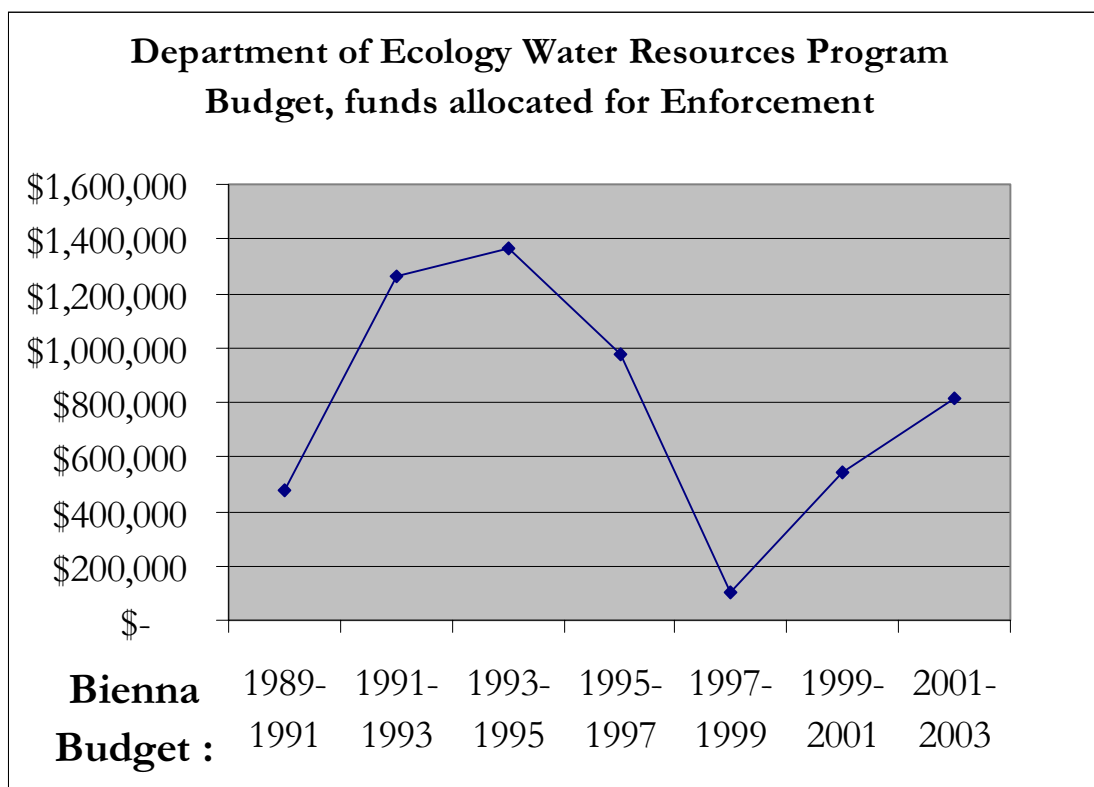
The agency's fear of future budget cuts has helped pave the way for political pressure and individual legislators to greatly influence agency administration and enforcement of water laws.

The agency had reason to be concerned. The Legislature stepped in numerous times seeking to indemnify the illegal uses Ecology had uncovered. In 1993, a bill was introduced, but did not pass, that directed Ecology to determine if sufficient water existed in lakes and reservoirs for lawn and garden irrigation by single-family residences: If water was available, these water users would be exempted from needing water rights to use it.¹⁰⁴

In 1996,¹⁰⁵ and again in 1997 and 1998,¹⁰⁶ the Legislature introduced further bills to protect illegal water users. Three of the bills introduced in 1997 actually passed the Legislature, but were vetoed in whole or in part by Governor Locke.¹⁰⁷ The bill that became law provided for a limited amnesty period for water users to file claims with the state¹⁰⁸ – allowing these water users to revive water rights that had been relinquished more than twenty years earlier.¹⁰⁹ Most recently in 2000, the Legislature again tried to open up yet another claims registration period.¹¹⁰

Inadequate funding

The legislative trend of passing water laws that are inadequately funded, is nothing new. As far back as 1967, with passage of the Water Rights Claim Registration Act,¹¹¹ the Legislature failed to appropriate the necessary funds for providing public notice and administration of the Act, thus “passing the buck” to the agency. The Director of Water Resources at the time responded in an extraordinary fashion – by making an administrative ruling that the agency simply could not implement the flawed legislation.¹¹²



Most recently in the 1990s, the Legislature’s handling of the agency’s budget exhibits a similar failure to adequately fund the agency. In the 1980s, Ecology’s water resource program budget was generally maintained at \$6 to \$8 million with approximately 75 full time employees (FTEs).¹¹³ Beginning in 1989 and over the subsequent six years, the program roughly doubled in size to more than \$17 million and roughly 130 FTEs.¹¹⁴ Then, program staff was dramatically reduced in the 1995-97 biennium, including a water rights permit staff reduction from 55 to 20 FTEs – an action largely

responsible for creating the politically contentious 7000-long permit backlog today.¹¹⁵ And, in the following two years, Ecology's enforcement staff was reduced from nine to less than one FTE.¹¹⁶

There appear to be several factors accounting for the reductions in water resource funding. In 1993, a water fee bill was introduced to generate revenue to support the water permitting program.¹¹⁷ A proviso was included in the budget, specifying that the budget for water permitting would be halved if the water fee provision did not pass.¹¹⁸ The bill passed, but without the water fee provision, when this provision did not garner bi-partisan support in the House. The agency's budget was consequently cut in half. Further budget cuts are also likely attributable to retribution for the agency's denial of hundreds of groundwater applications in the mid-90s to protect depleted surface waters, and for Ecology's attempted compliance efforts.¹¹⁹ In fact, the agency's enforcement resources were slashed from nine FTEs to less than one following a period in which Ecology prioritized increased enforcement actions in a budget request.¹²⁰

The Legislature's failures to adequately fund Ecology have in effect paralyzed the agency and punted important water resource issues to Washington courts. In two recent cases, judges cited the Legislature for its failures to adequately fund water management and for leading to impossible conflict situations.¹²¹ In the most searing of these judicial quotes, Judge Hicks of the Thurston County Superior Court stated:

*To pass a law and then not fund it so that it looks as if something has been done when it really hasn't creates an intolerable situation, it seems to me, that breeds disrespect for the whole government, all three branches.*¹²²

Recently, Ecology's budget has rebounded in the current biennium to an all time high of more than \$35 million.¹²³ This rebound is directly related to passage of House Bill 1832, which aimed in part to speed up the processing of water right applications.¹²⁴ One result of this bill was a near quadrupling of Ecology's water permitting budget from \$2 million to more than \$7.5 million.¹²⁵ These recent changes roughly doubled Ecology's permit processing staff and added six new enforcement personnel: Ecology now has nearly 50 FTEs devoted to processing applications and just under seven FTEs devoted to enforcement.¹²⁶ Whether and to what extent this influx of resources will be maintained, and whether the agency will respond with more aggressive water law compliance programs, remains to be seen.

Interference with agency actions

Due to funding swings in the 1990s, agency personnel have become highly sensitized to legislative reactions that could serve to decrease their budget. Though many of the bills to indemnify illegal water use failed, there is still significant political pressure to avoid a strong enforcement approach. As already mentioned, Ecology's interest in enforcing against the largest irrigator in Whatcom County – a knowing illegal user – allegedly met with the threat of punitive consequences for the agency's budget and personnel.¹²⁷ The agency's fear of future budget cuts has helped pave the way for political pressure and individual legislators to greatly influence agency administration and enforcement of water laws.

In 1997, for example, the Legislature revoked a moratorium on the Columbia River that Ecology had implemented years earlier, under a state law provision allowing Ecology to defer permitting decisions whenever inadequate information exists to make sound allocation decisions.¹²⁸ In revoking the moratorium, the Legislature changed the law so that Ecology must now *consult with the legislature* to implement such a moratorium, even when the agency in its own expertise believes that information is lacking to further permit water use from a given source.¹²⁹

Further, certain legislators have recently attempted to influence Ecology's actions: The Senate Republican Caucus wrote to Governor Locke, asking him to influence Ecology to weaken minimum flow protections on the Columbia River in favor of continued irrigation during the 2001 drought, and Ecology did indeed reduce the minimum flows.¹³⁰ A group of legislators also plan to be intimately involved in Governor Locke's Columbia River Initiative, an administrative initiative designed to set new instream flows by administrative rule: They are expected to form a steering committee that will oversee key components of the initiative.¹³¹

Solutions

Our state waters belong to all citizens of Washington, as members of the public.¹³² The state has a responsibility as trustee of our water resources to ensure that water use is sustainable and our rivers are preserved for use and enjoyment by future generations. Yet water management generally, and over the past decade specifically, points to a failure of the state to adequately set and enforce limits to the use of water from our publicly owned rivers, streams and aquifers.

Sparring between Ecology and the Legislature in recent years has exacerbated an ineffective management system and drastically limited the state's ability to seek even minimal compliance with water laws and basic protections for stream flows. If we cannot move beyond the ineffective politics of years past, litigation will continue to be the primary means to defining the future of water in Washington. As acknowledged by Ecology:

*Washington State has been experiencing an era of gridlock on water policy and funding. The outdated framework for water management and inadequate funding are colliding with the new realities of heightened competition for water, unprecedented population growth, a changing economy, and endangered fish issues. Despite repeated efforts over years, little progress has been made on water resources policy and funding. Instead courts and litigation are the dominant path to defining Washington's water future.*¹³³

Significant reforms are needed to bring the Water Code out of the 19th Century and into the 21st - not only to avoid this litigious path but also to better reflect today's environmental values. Yet until there is the political will to modernize the Water Code, basic administrative and legislative steps can be taken to place us on a more prudent and sustainable path to managing Washington's waters. These steps will require the resources, where necessary, and political will to implement, but they are achievable.

We recommend that the State:

Adequately Fund Compliance Efforts

The Legislature has done a pitiful job of providing Ecology with the resources needed to carry out its basic responsibilities of enforcing the Water Code and protecting stream flows. In the mid-1990s, Ecology had less than one FTE to enforce against illegal water use and the agency was not allocated any funding to set instream flows.¹³⁴ Recent increases in Ecology's budget in the last two biennia should reflect a continued commitment to adequately fund key Ecology activities, including enforcement.

Establish or Revise Instream Flows

Less than one-third of our watersheds have flows established by rule, and some of these are known to be inadequate.¹³⁵ Moreover, only one instream flow has been set in the past 16 years.¹³⁶ While establishing stream flows by rule does not in and of itself put water back in streams, it is a first step on the road to protection and/or restoration. In 1999, the state identified 17 high and highest priority watersheds to accomplish this task; it is time to move forward with this important work.¹³⁷

Aggressively Enforce Against Violators of the Water Code and Collect Penalties

Ecology is well aware of a wide variety of violations of the Water Code, and needs to implement much more aggressive and comprehensive actions to curb illegal uses. In doing so, Ecology must collect the penalties assessed, which should be used to help defray the costs of enforcing against illegal users. Taking clear, quick and decisive action against blatant violators of the law would serve as a deterrent to other users who believe they can operate above the law.

Raise Civil Penalties for Water Law Violations

The current penalty rate for violations of the Water Code is woefully outdated at \$100 per day.¹³⁸ This rate fails to serve as a deterrent for illegal users, especially large-scale users that can subsume such trivial penalties as a minor cost of doing business, if in fact they pay the penalties at all.

Implementing a graduated structure for varying offenses, ranging from minor to more serious violations, would greatly enhance the deterrence factor provided by penalties, and compliance with water laws.



As well as being important cultural icons, Salmon carry nutrients from the ocean which form a base for inland food chains.

Require Measuring and Reporting of Water Use

Knowing the extent of water use is a basic requirement to effectively managing water. Ecology should not only use its discretion to expand the extent of metering requirements, but should ensure such data is useful for monitoring by requiring it be reported periodically. Understanding who is using how much water and for what purpose not only makes sense, it reflects Ecology's mandates under existing state law.

Simplify the Adjudication Process

Adjudication is the only means to determine the priorities of all rights in relation to each other, inclusive of instream flows, federal and tribal rights.¹³⁹ However, completing adjudications statewide will take considerable time and resources. One suggestion for streamlining the process is to create a separate system of specialized water courts for the sole purpose of completing adjudications. This would assure superior expertise and expediency in completing the process. Another interim step is to provide Ecology with clear authority to make determinations as to the validity and extent of water rights and claims for purposes of individual enforcement actions and resolution of water right priority disputes.

Establish a Citizen Suit Provision to Enforce the Water Code

Where Ecology does not itself have the political will or resources to bring enforcement actions against water users who are using water without a right, or exceeding the limits of their current rights, third party lawsuits should be a last resort to assure compliance with water laws. While the

task of assuring compliance still must fall first to an adequately-funded and strong agency enforcement effort, the public should still have recourse to protect publicly-owned waters from illegal users.

Enforce Standards for Beneficial Use, Waste and Conservation

State law requires that water not be wasted. Ensuring that existing water use meets a basic standard of “reasonable efficiency” would provide for more beneficial use of our finite public waters. The state should also exercise its police powers in various ways to cause water users to achieve better water conservation. Implementing meaningful conservation standards would extend our current water supplies without further depleting of our rivers and streams. Conservation savings could also be used to benefit instream flows, as was recently done in Seattle.¹⁴⁰

Employ Water Masters

The use of Water Masters – a local enforcement presence similar to neighborhood policing – has declined considerably over the past two decades. Water Masters can be effective in achieving compliance with water laws, and are generally supported by environmentalists and water users alike.

Expand Enforcement Role of Fish & Wildlife Officers

WDFW’s enforcement program should be expanded and adapted to other natural resource enforcement needs, including compliance efforts under the Water Code. This is already happening to some extent. For example, WDFW’s compliance program is taking steps in the Walla Walla Basin to bring irrigators into 100% compliance with state fisheries laws. Through this program, WDFW is coordinating with Ecology to map existing water rights while keeping in mind the mandate to measure water use under state law. As a result, fish screens are being designed so that meters can be easily installed at any future point.¹⁴¹

Encourage Proven Programs

Ecology established a relatively low-cost program aimed at achieving compliance with instream flows in the mid-1980s for the Wenatchee, Okanogan and Methow basins.¹⁴² Real-time stream gauges allow Ecology personnel to determine whether instream flows are being met and alert water users with conditioned permits to determine if and how water use should be curtailed. While assuring quality control of this approach may be difficult, expanding it to cover more watersheds would provide a basic tool to enhance compliance with water laws.

With but one exception,¹⁴³ these recommendations are consistent with the state’s salmon recovery strategy.¹⁴⁴ Implementing these actions would not only provide greater environmental protection, but would also provide greater clarity and certainty for both instream flows and individual water users. Enforcement, after all, occurs *after* a violation. By ensuring sensible and sustainable management of Washington’s waters, we can avoid the violations and adequately protect our shared public waters.



It is our responsibility to be good stewards of this precious resource for future generations.

¹ Estimate is from 1995. 8.86 billion gallons per day equates to 3.2 trillion gallons per year. *Our Changing Water Ways: Trends in Washington's Water Systems* 34, Washington Department of Natural Resources (2000).

² *Id.* at 35.

³ “Based on the Department of Fish and Wildlife’s analysis many fish stocks are in rapid decline due in part to the lack of adequate flows for fish. There is urgency to set, protect, and restore instream flows.” *Statewide Strategy to Recover Salmon: Extinction is Not an Option* I.4, IV.126, Governor’s Salmon Recovery Office, State of Washington (November 1999).

⁴ The state’s salmon recovery strategy recognizes that illegal water use greatly depletes stream and river flows, and highlights enforcement against such illegal use as key to recovering salmon. *Id.* at IV.275-6.

⁵ Washington Department of Natural Resources, *supra* note 3, at 2, *citing* The Washington Department of Natural Resources Aquatic Vision Statement (1998).

⁶ The Prior Appropriation System was codified in the 1917 Water Code. *See* Chapter 90.03 RCW.

⁷ *The Water Resources Program*, Washington Department of Ecology Publication No. 98-1817-WR (January 1998).

⁸ Chapter 90.03 RCW. The 1945 Ground Water Code adopted the same system of priorities and administration for groundwater. *See* Chapter 90.44 RCW.

⁹ “Prior appropriation law was based on utility. It rewarded the labor of immigrant builders seeking prosperity by altering the natural order, immigrants heedless of the knowledge of indigenous populations and as yet unchastened by environmental consequences.” Wick Dufford, *Washington Water Law: A Primer*, 11 *ilahee* 29, Institute for Environmental Studies, University of Washington (1995).

¹⁰ The State Fisheries Code of 1949 allows the Department of Fish & Wildlife to recommend conditions on water permits to protect stream flows needed for fish. Chapter 75.20 RCW. The 1967 Minimum Water Flows and Levels Act created a process specifically tailored to protect instream flows, by providing Ecology with the authority to establish water flows for streams to protect fish, wildlife, or recreational or aesthetic values “whenever it appears to be in the public interest.” Chapter 90.22 RCW. The Water Resources Act of 1971 directs Ecology to protect and enhance a broad range of instream values: “Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” Chapter. 90.54 RCW.

¹¹ Precipitation levels in Washington vary broadly across different regions – ranging from 180 inches of moisture a year in the coastal rainforests to less than 3 inches of precipitation in Eastern areas. *Supra*, note 1 at 6.

¹² Washington Department of Natural Resources, *supra* note 1, at 6.

¹³ Estimate provided by American Rivers. *EPA Cites Changes to Naturally Flowing Water as #2 Threat to Water Quality after Agricultural Pollution*, June 28, 2000 (available at www.amrivers.org/instreamflow/epaflow.htm).

¹⁴ 16 U.S.C. §§ 1531-1543.

¹⁵ *The State of the Salmon Report* Introduction, Office of the Governor, Washington State (December 2000).

¹⁶ Washington Department of Natural Resources, *supra* note 1, at 35.

¹⁷ Todd T. True, *What do Northwest Salmon Really Need?*, Seattle Daily Journal of Commerce, Aug. 21, 1997 (citing figures on commercial and sport fishing industry economic losses from the Institute for Fisheries Resources); *A Statement from Billy Frank*, Northwest Indian Fisheries Commission (available at www.nwifc.wa.gov/esa).

¹⁸ Washington Department of Natural Resources, *supra* note 1, at 6.

¹⁹ “Instream Flows” are established by Ecology through the administrative rule-making process. RCW 90.22.020.

²⁰ *See generally* Chapter 173-500 WAC for instream flows established by rule.

²¹ *Setting Instream Flows in Washington State*, Washington Department of Ecology Publication No. 1813-WR (November 2001).

²² *Upper Chehalis Watershed Initial Assessment*, Draft, The Langlow Associates, Inc., et.al. in cooperation with the Washington Department of Ecology (February 1995).

²³ *Little Spokane River Watershed Initial Assessment*, Draft, Dames & Moore, Inc., et.al. in cooperation with the Washington Department of Ecology (May 1995).

²⁴ *Tucannon River Watershed Initial Assessment*, Draft, Montgomery Water Group, et.al. in cooperation with the Washington Department of Ecology (February 1995).

²⁵ *Puyallup-White Watershed Initial Assessment*, Draft, Science Applications International Corp., et.al. in cooperation with the Washington Department of Ecology (May 1995).

²⁶ *Snobomish River Watershed Initial Assessment*, Draft, Pacific Groundwater Group, and Associated Firms in cooperation with the Washington Department of Ecology (May 1995).

²⁷ For a history of water use in the Walla Walla Basin, and summary of current efforts to restore flows in the Walla Walla River, see *Reasons for Hope in the Walla Walla River Basin*, Washington WaterWatch No. 15, Center for Environmental Law & Policy (Fall 2001).

²⁸ *Walla Walla Watershed Initial Assessment*, Draft, Pacific Groundwater Group, Inc. and Associated Firms in cooperation with the Washington Department of Ecology (May 1995).

²⁹ See *supra* note 4.

³⁰ Governor's Salmon Recovery Office, *supra* note 3, at IV.126.

³¹ *An Introduction to Washington Water Law* I:6, Washington State Office of Attorney General (2000).

³² Chapter 90.03 RCW.

³³ Chapter 90.54 RCW.

³⁴ See generally Chapter 90.03 RCW for adjudication, water measuring, and enforcement authority provisions. See RCW 90.08.040 re: stream patrolmen. See Chapter 90.54 RCW and Chapter 90.22 RCW for provisions relating to setting instream flows, and maintaining flows for fish and wildlife.

³⁵ Beneficial use is the basis, measure, and limit of a water right. *In re the Water Rights of Marshall Lake & Marshall Creek Drainage Basin*, 121 Wash. 2d 459 (1993). Water rights may be lost or diminished based on the statutory procedure of forfeiture, or common law abandonment. For an overview of both, see Washington State Office of Attorney General, *supra* note 31, at VI:1-11.

³⁶ *Id.* at IV:25.

³⁷ *Id.*

³⁸ *Id.* at IV:6-14. See RCW 90.03.110- 90.03.245.

³⁹ *Id.* at IV:6-14;VI:17.

⁴⁰ *Id.* at VI:17.

⁴¹ *American Rivers et al, v. Department of Ecology*, Transcript of Final Ruling at 5-6, Thurston County Superior Court No. 99-2-00480-6 (Dec. 6, 2000).

⁴² RCW 90.03.360 requires measuring as a condition for all new surface water permits, previously existing surface water rights and claims that exceed 1 cfs or are from waters where salmon stocks are depressed or critical, and all new and previously existing groundwater rights and claims where salmon stocks are depressed or critical and Ecology has a basis for believing the withdrawal may affect surface waters supporting these stocks. *American Rivers et al, v. Department of Ecology*, Order Denying Respondent's Motion to Dismiss, Granting in Part and Denying in Part Respondent's Motion for Partial Summary Judgment, and Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment, Thurston County Superior Court No. 99-2-00480-6 (March 22, 2000).

⁴³ *Id.*

⁴⁴ For a discussion of Ecology's limited enforcement capabilities where water rights have not been adjudicated, see *infra* *The Realities of Water Management: Politics, Shifting Priorities, and Inadequate Funding*. See also Governor's Salmon Recovery Office, *supra* note 3, at V.276.

⁴⁵ *Focus: Complying with State Water Use Laws*, Washington Department of Ecology Publication No. 00-11-004 (June 2000).

⁴⁶ RCW 90.03.060.

⁴⁷ RCW 90.03.070.

⁴⁸ *Id.*

⁴⁹ RCW 90.03.090.

⁵⁰ RCW 90.08.040.

⁵¹ *Id.*

⁵² RCW 90.08.040; RCW 90.03.070.

⁵³ See Washington Department of Ecology, *supra* note 45.

⁵⁴ Ecology recently promulgated a new rule expanding metering requirements, yet still does not require metering data be

reported to the agency - which the agency holds authority to do. *See infra*, *Ecology as Manager, Broken Promises*, for a discussion on Ecology's failure to implement the metering statute.

⁵⁵ When the Yakima Adjudication comes to completion, just over 20% of the state will be adjudicated. *See Overview of Water Resources Program* 30, Washington Department of Ecology (available at www.ecy.wa.gov/programs/wr/info/gi-home.html).

⁵⁶ The state's only pending adjudication process, the Yakima adjudication, has been ongoing for more than 20 years already. For a good overview of this process *see* Rachael Paschal, *Washington's 'Acquavella' Adjudication: Turning Paper Into Water*, Western Water Law & Policy Reporter Feature Article (June 1997).

⁵⁷ *See supra* note 35.

⁵⁸ Ecology can only make tentative determinations to decide the amount of water available for transfer or change of a water right. *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 237 (1993).

⁵⁹ Washington State Office of Attorney General, *supra* note 31, at IV:26.

⁶⁰ "Short of litigation, it is impossible to assess how many of these claims represent vested water rights. Many claims may be invalid, overstated, overlapping, abandoned, reduced, or modified in their scope." *Id.* at VI:17 (2000); *See also* Governor's Salmon Recovery Office, *supra* note 3, at V.276 (discussing Ecology's questionable authority to regulate unadjudicated water rights).

⁶¹ Telephone Conversation between Doug McChesney, Department of Ecology Water Resources Program and Kristie Carevich, Staff Attorney, Center for Environmental Law & Policy (January 2, 2002).

⁶² *See* RCW 90.03.060-90.03.090.

⁶³ "Where water rights have been adjudicated a stream patrolmen shall be appointed.....upon application of water users having adjudicated water rights..." RCW 90.08.040.

⁶⁴ The Department of Ecology is charged with ensuring "...rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values." RCW 90.54.020(3)(a). At the same time, the agency is to promote maximum use of the state's waters: "It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights." RCW 90.03.005. Ecology has authority to provide assistance to applicants for obtaining a water right or "developing an adequate and appropriate supply of water..." RCW 43.21A.064(5).

⁶⁵ RCW 43.21A.010

⁶⁶ "Washington State has been experiencing an era of gridlock on water policy and funding. The outdated framework for water management and inadequate funding are colliding with the new realities of heightened competition for water, unprecedented population growth, a changing economy, and endangered fish issues. Despite repeated efforts over years, little progress has been made on water resources policy and funding. Instead courts and litigation are the dominant path to defining Washington's water future." Washington Department of Ecology, *supra* note 55. *See also infra*, *Solutions*.

⁶⁷ "...Strategic enforcement against illegal uses will be taken in prioritized and high targeted areas starting first in the "highest priority basins" for protection and restoration of instream flows..." Governor's Salmon Recovery Office, *supra* note 3, at V.275-276.

⁶⁸ *Id.* at IV.275.

⁶⁹ "Senate Meeting Discussion", Washington Department of Ecology (August 21, 2000).

⁷⁰ "Department of Ecology Water Resources Program Enforcement Priorities", document attached to email from Keith Phillips, Department of Ecology Water Resources Program to Barb Tovrea, Department of Ecology (March 1, 1999).

⁷¹ "Compliance with Water Rights", Washington Department of Ecology Water Resources Program (August 21, 2000) (referring to the lack of any compliance program in wetter areas of the state, and a complete "compliance hiatus" during the 1990s).

⁷² "Rotta had been irrigating his land since 1991 without a permit. Last year, he received a cease-and-desist order from Ecology, but has continued to irrigate in 2001." *Grant County Man Fined \$46,000 for Using Unauthorized Water*, Washington Department of Ecology News Release (June 27, 2001).

⁷³ "Senate Meeting Discussion", Washington Department of Ecology document, August 21, 2000.

⁷⁴ *See* "Payment Status Report", Washington Department of Ecology (March 18, 2001).

⁷⁵ Information provided by Washington PEER at www.wapeer.org/enforcement.html.

⁷⁶ Ecology's shift in culture can be seen as part of a broader political trend of "regulatory reform" sweeping the state Executive and Legislative branches, and culminating with passage of legislation authorizing water conservancy boards and watershed planning units. Washington's trend of devolving its management over state waters to the local level tracked a national trend whereby governments sought to share authority with local citizens and other stakeholders to reinvent the existing model of environmental management. See Brent S. Steel & Edward Weber, *Ecosystem Management, Decentralization, and Public Opinion*, Global Environmental Change (March 23, 1999).

⁷⁷ Ecology approved 2,038 water rights from January 1, 1993 to December 31, 2001, according to the Ecology's Water Rights Application Tracking System (WRATS). Email from Roger von Gohren, Department of Ecology Water Resources Program to Josh Baldi, Policy Director, Washington Environmental Council (January 11, 2002) (Information derived from Water Rights Application Tracking System (WRATS) for time period of January 1, 1993 to December 31, 2001).

⁷⁸ Email from Jim Bucknell, Department of Ecology Water Resources Program to Keith Phillips, Department of Ecology Water Resources Program and Ken Slattery, Department of Ecology Water Resources Program (October 22, 1999) (Email is a second-hand account of the incident).

⁷⁹ "Curt Mayberry is the largest agricultural operator in this basin to the best of my knowledge. He allegedly told an Ecology permit writer that, if we ever take enforcement action against him, they won't have a job after the next legislative session." *Id.*

⁸⁰ See "Enforcement Actions by Program From 4/1/1999 to 5/7/2001", Department of Ecology.

⁸¹ The Senate Republican Caucus wrote to Governor Locke, asking him to influence Ecology to weaken minimum flow protections on the Columbia River in favor of continued irrigation during the 2001 drought. Letter from the Washington State Senate Republican Caucus to Governor Gary Locke (March 10, 2001).

⁸² "Columbia River irrigators have vowed not to turn off their pumps this summer even if the state orders them to shut down. "If it comes to civil disobedience, so be it – but the pumps are going to stay on," said Darryll Olsen, consultant for the Columbia-Snake River Irrigators Association" Mike Lee, *Irrigators Vow to Resist Plans to Curb Usage*, Tri-City Herald, March 13, 2001.

⁸³ *Locke Announces Drought Relief for Eastern Washington Farmers and Fish*, Department of Ecology News Release (April 12, 2001).

⁸⁴ *Drought Update: Don't be Fooled by April Showers*, Department of Ecology News Release (April 3, 2001).

⁸⁵ *Id.*

⁸⁶ *American Rivers et al, v. Department of Ecology*, Order Denying Respondent's Motion to Dismiss, Granting in Part and Denying in Part Respondent's Motion for Partial Summary Judgment, and Granting in Part and Denying in Part Petitioners' Motion for Summary Judgment, Thurston County Superior Court No. 99-2-00480-6 (March 22, 2000); *American Rivers et al, v. Department of Ecology*, Final Ruling, Thurston County Superior Court No. 99-2-00480-6 (Dec. 6, 2000).

⁸⁷ *American Rivers et al, v. Department of Ecology*, Excerpt of Proceedings (Court's Ruling on Summary Judgment) at 11, Thurston County Superior Court No. 99-2-00480-6 (Feb. 11, 2000).

⁸⁸ Instead of requiring that metering data be reported, Ecology reserved its discretion to require reporting at a later date. See Chapter 173-173 WAC.

⁸⁹ According to the 1967 Minimum Water Flows and Levels Act, Ecology is *obligated* to establish instream flows when requested by the WDFW. RCW 90.22.010. WDFW requested flows be established in the Dungeness-Elwha (WRIA 18), Upper Snake (WRIA 35), Quilcene-Snow (WRIA 17), Stillaguamish (WRIA 5) and Entiat (WRIA 46). See Letter from Robert Turner, Director, Washington Department of Fish and Wildlife to Mary Riveland, Director, Washington Department of Ecology (April 25, 1996).

⁹⁰ Under state law, Ecology must respond to such a request by establishing the requested flows, to protect the resource in question. RCW 90.22.010.

⁹¹ Letter from Mary Riveland, Director, Washington Department of Ecology to Robert Turner, Director, Washington Department of Fish and Wildlife (May 20, 1996).

⁹² RCW 90.22.060.

⁹³ *Implementation of ESHB 1309*, 1993 Report to the Legislature, Washington Department of Ecology Water Resources Publication No. 9410 (January 1994).

⁹⁴ Instream Resources Protection Program and Watershed Management Plan - Skagit River Basin - WRIA 3 and WRIA 4. Chapter 173-503 WAC.

⁹⁵ See Mike Lee, *Water Savings System Questioned, Cracked*, Tri-City Herald (April 5, 2001).

⁹⁶ *Id.*

⁹⁷ Governor's Salmon Recovery Office, *supra* note 3, at V.280.

⁹⁸ Buck Smith, 1993 Compliance Effort Investigation Summary, Department of Ecology Water Resources Program, Northwest Regional Office (January 11, 1994).

⁹⁹ *Id.*

¹⁰⁰ Rather than shut down the users involved, Ecology provided opportunities for voluntary compliance. A summary of the Johnson Creek study cited a total of 413 new applications received in 1993, noting that enforcement staff worked with nearly half of the new applicants. The report concluded that, "Judging from the number of unauthorized users identified, number of applications received, good will generated, publicity, and public education value, this compliance effort has been highly successful." See Smith, *supra* note 98.

¹⁰¹ Memo from Jacek Anuszewski, Department of Ecology Water Resources Program, Northwest Regional Office, to Linda Pilkey-Jarvis, Department of Ecology Water Resources Program (October 26, 1992).

¹⁰² *Id.*

¹⁰³ Memo from Jim Bucknell, Department of Ecology Water Resources Program, Northwest Regional Office to Terry Husseman, Department of Ecology Water Resources Program (March 18, 1992).

¹⁰⁴ H.B. 1844, 53rd Leg., Reg. Sess. (1993); H.B. 1729, 54th Leg., Reg. Sess. (1995). Note: both bills passed the House of Representatives but died in the Senate.

¹⁰⁵ H.B. 2199, 54th Leg., Reg. Sess. (1996). Note: as with both previous bills in 1993 and 1995, the House passed this legislation overwhelmingly, but the Senate did not.

¹⁰⁶ H.B. 1111, 55th Leg., Reg. Sess. (1997); H.B. 1118, 55th Leg., Reg. Sess. (1997); H.B. 2775, 55th Leg., Reg. Sess. (1998); H.B. 2924, 55th Leg., Reg. Sess. (1998); S.B. 5703, 55th Leg., Reg. Sess. (1998).

¹⁰⁷ Final Bill Report, E.S.H.B. 1111 (1997); Final Bill Report S.H.B. 1118 (1997); Final Bill Report E.S.S.B. 5703 (1998) (available on State of Washington Legislative web site at www.leg.wa.gov).

¹⁰⁸ S.H.B. 1118, 55th Leg., Reg. Sess. (1997).

¹⁰⁹ Washington State Office of Attorney General, *supra* note 31, at VI:16.

¹¹⁰ H.B. 2771, 56th Leg., Reg. Sess. (2000). The bill passed the House unanimously, but died in the Senate. The legislature passed three such claims registration laws, in 1979, 1985, and 1997, subsequent to the original one in 1967. Washington State Office of Attorney General, *supra* note 31, at VI:16.

¹¹¹ 1969 Wash. Laws ch. 233, § 5.

¹¹² See Dar Crammond, *Counting Raindrops: Prospects for Northwestern Water Right Adjudications*, Research Publication PO95-1 (Northwest Water Law & Policy Project 1996).

¹¹³ "Water Resources Program Budget History", Washington Department of Ecology Water Resources Program (December 2001).

¹¹⁴ *Id.*

¹¹⁵ "In addition, a 1994 budget cut reduced Ecology's water rights permit staffing from 55 to 20 FTEs." Washington Department of Ecology 2000 Supplemental Budget Request Decision Package (October 11, 1999).

¹¹⁶ This history is acknowledged in the state's salmon recovery plan: "In 1992, Ecology received funding for six new water resources enforcement positions. One position was designated the state enforcement coordinator. The positions were assigned to investigate the extent of illegal water use within five areas of the state. However, severe budget reductions in 1994 resulted in elimination of nearly all dedicated enforcement positions in order that Ecology retain a modicum of capability to do permitting. Two enforcement positions were retained. Consequently, the program returned to a low effort compliance-based approach." Governor's Salmon Recovery Office, *supra* note 3, at V. 280.

¹¹⁷ H.B. 1236, 53rd Leg., Reg. Sess. (1993).

¹¹⁸ "For fiscal year 1994, \$3,750,000 of the general fund – state appropriation is provided to administer the water rights permit program. For fiscal year 1995, not more than \$1,375,000 of the general fund—state appropriation may be expended for the program unless legislation to increase fees to fund at least fifty percent of the full cost of the water

rights permit program, including data management, is enacted by June 30, 1994.” S.S.B. 6244, 53rd Legis., Reg. Sess. (1994).

¹¹⁹ As previously discussed, the Lake Washington, Lake Sammamish and Whatcom County compliance efforts generated considerable legislative interest. *See supra*, *Protection for Illegal Users*.

¹²⁰ “Plans for ensuing biennium: Investigate significant complaints of illegal water use and carry out special investigations in high priority watersheds to discover and correct compliance problems. Effective enforcement is necessary to ensure the water resource is not over allocated or wasted as a result of illegal diversions or withdrawals.” Biennial Budget Estimate, Program Description, Washington Department of Ecology (April 18, 1994).

¹²¹ Judge Berschauer of the Thurston County Superior Court, in ruling in favor of CELP and WEC and finding that Ecology’s Water Conservancy Board Rule granted too much authority to the boards, stated in pertinent part: “In closing, I wish to digress to discuss the role of the courts vis-à-vis the Legislature and executive branch agencies... The Department is and was faced with a burden of a backlog of water rights applications. The Legislature cut funding and refused to allow the Department to impose user fees... The Legislature attempted to address some of these issues by passing [the water conservancy board legislation].... After the Governors section vetoes, the statutory scheme that remained was limited to transfers of water rights. The Department of Ecology and amici make out a good case that more expansive powers for the water conservancy boards would help alleviate that backlog. Such policy matters are not the concern of the judiciary...” *Center for Environmental Law & Policy et al, v. Department of Ecology*, Transcript of Oral Opinion at 13, Thurston County Superior Court No. 00-2-00156-5 (Sept. 8, 2000). Also, Judge Hicks of the Thurston County Superior Court, in ruling in favor of CELP, WEC and other groups and finding that Ecology failed to properly implement the metering statute, stated: “...I have to remember to show some temperance in my remarks because it’s not my task to criticize anybody, especially not the Legislature. It seems to me that any fair person could lay the difficulty that we find ourselves in at their feet by implementing legislation that is only effective if it’s funded and then instead of withdrawing the legislation declining to fund it creating an impossible situation...” *American Rivers et al, v. Department of Ecology*, Transcript of Final Ruling at 1, Thurston County Superior Court No. 99-2-00480-6 (Dec. 6, 2000).

¹²² *American Rivers et al, v. Department of Ecology*, Excerpt of Proceedings on Court’s Ruling on Summary Judgment at 19, Thurston County Superior Court No. 99-2-00480-6 (Feb. 11, 2000).

¹²³ Washington Department of Ecology, *supra* note 113.

¹²⁴ “1,500,000 of the general fund – state appropriation for fiscal year 2002, \$1,500,000 of the general fund – state appropriation for fiscal year 2003, and \$3,000,000 of the water quality account appropriation are provided solely to implement chapter 237, Laws of 2001 (Engrossed Substitute House Bill No. 1832, water resources management) and to support the processing of applications for changes and transfers of existing water rights.” E.S.S.B. 6153, 57th Leg., 2d Spec. Sess. (2001).

¹²⁵ Washington Department of Ecology, *supra* note 113.

¹²⁶ *Id.*

¹²⁷ “Curt Mayberry is the largest agricultural operator in this basin to the best of my knowledge. He allegedly told an Ecology permit writer that, if we ever take enforcement action against him, they won’t have a job after the next legislative session.” *See* Bucknell, *supra* note 78.

¹²⁸ E.S.H.B. 1110, 55th Leg., Reg. Sess. (1997).

¹²⁹ RCW 90.54.050.

¹³⁰ “We respectfully ask you to take action to help irrigators in light of next week’s expected decision by the Department of Ecology to curtail water deliveries to junior water-right holders... We implore you to issue an emergency rule to reduce or suspend the minimum stream flows on the Columbia River and other rivers and streams that would be affected by DOE’s decision.” Washington State Senate Republican Caucus, *supra*, note 81.

¹³¹ Telephone conversation between Gerry O’Keefe, Department of Ecology and Kristie Carevich, Attorney, Center for Environmental Law & Policy (January 2002).

¹³² State waters are a public resource, managed by the state in the public interest. Washington State Office of Attorney General, *supra* note 31, at 1:5; RCW 90.03.010.

¹³³ Washington Department of Ecology, *supra* note 55, at 31.

¹³⁴ For a discussion on Ecology staff numbers and resources in the 1990s, *see supra*, *Inadequate Funding*.

¹³⁵ Summary of Instream Flow Conditions by Water Resources Inventory Areas, October 1999. Governor’s Salmon

Recovery Office, *supra* note 3, at Appendix B.

¹³⁶ Chapter 173-503 WAC.

¹³⁷ Governor's Salmon Recovery Office, *supra* note 3, at IV. 138-139. The state has also complete an assessment on the adequacy of instream flows, and found that in 16 of Washington's 62 WRIs more water has been allocated through water rights, claims, and exempt withdrawals in all or significant portions of the watershed than is naturally available during parts of the year, and in which one or more stocks are listed as threatened or endangered under the ESA or are proposed for listing. *See Id.* at IV. 126-127.

¹³⁸ RCW 90.03.600.

¹³⁹ *See* RCW 90.03.240; RCW 90.03.245.

¹⁴⁰ Seattle City Ordinance No. 120532 (passed Sept. 19, 2001). For a brief overview of the conservation program adopted by Seattle, *see* Margaret Taus, *Water, Salmon Plan Ready for Approval*, Seattle Post-Intelligence, Sept. 19, 2001.

¹⁴¹ Information on this program is available from WDFW Cooperative Compliance Program.

¹⁴² For a description of this program, *see* Governor's Salmon Recovery Office, *supra* note 3, at IV.143.

¹⁴³ The suggestion regarding adoption of a citizen suit provision to enforce the water code is the exception.

¹⁴⁴ Governor's Salmon Recovery Office, *supra* note 3, at IV. 138 – 149.

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