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**WASHINGTON STATE INITIATIVES
FOR SUSTAINABLE WATER USE**

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Sustainable Use of the West's Water

**Natural Resources Law Center
University of Colorado School of Law
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I. INTRODUCTION

Like many areas of the western United States, the state of Washington has experienced phenomenal population growth during the past two decades. During much of the 1980s, state population grew approximately 100,000 persons per year. Much of this growth occurred in the Seattle-Tacoma-Everett metropolitan area, but rapid growth also occurred in less developed areas of the state, especially south and north Puget Sound, the Kitsap Peninsula and up and down the east slopes of the Cascade Mountains. State population is now over 5 million. Demographic projections say that another three million people will reside in Washington by the year 2020.

Growth at these startling rates creates concerns about the state and the region being able to sustain its vital natural resource base and the jobs and amenities that are provided by that base. Water resources have been and continue to be at or near the center of whirling controversies about the region's future.

We are a state and a region that is blessed with abundant water resources. The Columbia River discharges about ten times the average natural runoff of the Colorado River. Coastal Washington receives anywhere from about three feet to twelve feet of precipitation per year.

It is easy to conclude the state and region should not have any water problems. Unfortunately, we do. Even where water is abundant, it is not necessarily available when and where it is needed. Parts of Eastern Washington receive only 5 to 7 inches of precipitation each year. Even in wet western Washington, there is an extended dry period every year during the summer. Often the spring and fall are dry too.

Much of our water resources are already committed to existing uses. All of the major watersheds in the Central Puget Sound corridor have water supply developments on them. Many rivers in the state have hydropower facilities on them. Rivers in eastern Washington are heavily diverted and in some cases are dewatered for irrigated agriculture. For example, the natural flow of the Yakima River was fully appropriated to support 100,000 acres of irrigation before 1900. Federal storage development increased this to nearly 500,000 acres. At the same time, the number of returning salmon and steelhead declined from over one-half million to today's remnant population of about five to ten thousand. Low streamflow conditions hamper efforts to recover even modest numbers of these lost resources.

The mighty Columbia River itself is asked to do more than it is capable of. Within Washington alone, eleven dams span the mainstem (and four more span the lower Snake River) to provide power to the region. About 45 million acre-feet of storage have altered the hydrology of the river from one with a dramatic spring peak to one that is relatively flat year round. Eight million acres are irrigated in the Columbia basin. Very little water is ever spilled unintentionally at the mainstem hydropower

projects. In other words, every drop of water in even that massive river is spoken for. No new use can be accommodated without impacting an existing use.

The hydroelectric power industry is under siege. Three runs of salmon in the Snake basin are listed as endangered and numerous additional fish stocks throughout the region have depressed populations and are under consideration for listing. Many of the problems of these crashing fish populations are laid at the feet of hydropower. Major changes are being required in the way the Columbia River is managed and manipulated. The power industry is taking a big hit at the same time that regional growth has absorbed what was in the 1980s a large power surplus.

Sustainable Water Use

The region is slowing coming to grips with a new reality. That reality is one in which there is not a lot of water that is not already spoken for. Naturally there is resistance to this view by interests who covet water for additional irrigation development (eg. apples for Japan), more hydropower development, and to serve burgeoning populations with domestic water. The state agency that I work for is under extreme duress because for the first time in history we are up against the limits of the resource and people do not like being told they cannot cheaply or easily secure the water they want to support their economic development proposals or personal lifestyle preferences. It used to be simple to rubber stamp 19 out of 20 water right applications. Now many are denied or conditioned due to tight water availability or to protect existing rights.

Oregon and Washington both have moratoria on new withdrawals from the Columbia pending resolution of endangered fish problems. Major changes are being required in power and irrigation operations. If implemented, there is hope that these resources can be sustained. The Endangered Species Act itself is under siege under the leadership of Northwest congressional representative and Senators. Society faces the life or death decision regarding Northwest anadromous fish runs that sustained themselves, native human populations and wildlife for untold millennia. That has been changed in the short span of a little more than a century. Loss of this once great resource would be a crime against nature on the same scale as the elimination of the buffalo.

The Pacific Northwest is a region in dire need of a new resource management model and there are those who believe that sustainable use can be the cornerstone of such a model. Washington has been slowly but inexorably moving in that direction for about the past ten years. The practical limits against which we now find ourselves may speed the arrival of a new paradigm.

- In 1985, the state Ecological Commission vetoed a proposed instream flow rule of the department because it was viewed as not sufficiently protective of fish, aesthetic, and recreation resources.

- In 1987, the department of Ecology proposed to evaluate the water conservation performance of an applicant before granting any new rights to water. It also proposed to adopt more highly protective instream flows, especially for wild fish stocks and to require mitigation of fishery resource loss if lower flows were negotiated. This initial attempt to move toward a sustainable use standard was blocked by the state legislature which then began a futile four year effort to deal with the issue.
- In 1989, the state Legislature adopted new policies on water conservation including explicit recognition of conservation as a potential source of water. It also established a cost-effectiveness test to compare conservation with new source development. Since 1989, conservation and water use efficiency has become an ethic within parts of the water using community.
- Also in 1989, the Legislature passed a bill authorizing the state to acquire "trust water rights" in the Yakima basin by purchase, lease, receipt of gift, or by funding water use efficiency improvements. Legislation in 1991 and '93 expanded the scope of this law to be statewide.
- In 1990, the landmark Chelan Agreement on Water Resources was forged by the state, local and tribal governments, and various water interests. The agreement made a commitment to grass roots style regional water planning in lieu of litigation. It also established a strong commitment to instream resource protection.
- Also in 1990, the Legislature passed the Growth Management Act which mandates that fast growing counties do better land use planning - planning that is tied to the available resource base, including water availability. New developments must have concurrent provisions for public service (roads, water, sewer, etc.) It also required local governments to deny building permits and plats if no water is available.
- In 1993, the Water Resources Forum (chartered under the Chelan Agreement) recommended new policies for higher levels of instream flow protection and for protection of ground water in hydraulic continuity with streams and lakes. These recommendations are controversial, but if adopted and implemented will go a long way toward sustaining the state's rivers and aquatic resources.
- In 1994, the first two regional water plans were completed. They call for investments in water conservation with the water savings allocated to instream flow improvements as well as new offstream uses of water.
- In 1995, the Department of Ecology contracted with consulting firms to carry out 16 watershed assessments. The reports pull together all known

information relating to water availability in those watersheds and will serve as the basis for future water right decisions. They will also be used in future regional planning.

One very positive recent development is the formation of watershed councils and planning groups in a number of watersheds. No public moneys have been required to get these cooperative efforts going in several cases. People are grasping the necessity of working out their problems locally in cooperative efforts. One group in the Yakima basin has raised enough money to hire an executive director and other staff and establish an office. They are working closely with the Bureau of Reclamation and the state to begin implementation of federal Yakima Basin Enhancement Project legislation.

There is increasing recognition that new water will not be easy to find and develop and that the existing developed water supply needs to be used more efficiently.

- The Yakima Enhancement legislation focuses on water conservation and on optimizing use of existing water storage and delivery facilities. It also calls for water leasing and on-farm water conservation. The bill provides for higher instream flow targets at several key points in the river system with provisions for further instream flow increases as conserved water is created from water system improvements. Under these provisions, about two thirds of saved water will benefit instream flows and about one-third will improve the water supply for existing irrigation. The bill explicitly recognizes fish, wildlife and recreation as purposes of the federal Yakima reclamation project.
- The Methow Basin Regional water plan, developed by a volunteer group calls for state and local investments in irrigation conservation with water savings to be dedicated to a water bank and managed as a trust water right. Ninety percent of water savings would be allocated to instream flow improvement, five percent to new domestic uses and five percent to new agricultural needs.
- Recent legislation enables water utilities and other public bodies to generate and use reclaimed water from sewage effluent. This is expected to save considerable quantities of potable water and be used for irrigation, industrial and other nonpotable uses. Some may be used to recharge groundwater, supplement instream flows and maintain wetlands.
- The state Supreme Court in 1993 affirmed that appropriators have an affirmative duty to use water in a reasonably efficient manner using careful management without waste. A use must be reasonable and economic in view of other present and future demands on the source of supply. Customary practices in an area are an important consideration but do not justify waste.

(Department of Ecology v. Grimes et al. - Washington Supreme Court No. 58857-1)

- In another very important case, the Yakima County Superior Court ruled, and the State Supreme Court upheld, that the Yakama Indian Nation (YIN) has off-reservation instream flow rights related to its treaty right to take fish in its ceded area. In this case the judge ruled that the YIN's rights have been diminished by various acts of Congress on behalf of the tribe and a monetary award from the Indian Claims Settlement Court. The remnant instream flow right was not quantified by the Court. Instead the Court directed the Bureau of Reclamation to receive annual advice on streamflow targets from the System Operations Advisory Committee (consists of tribal, state and other fish biologists) and to assure that the fisheries are maintained. This decision will be significant for other Northwest Indian Tribes with similar treaty provisions. It also apparently means that the earliest priority date water rights on many (and perhaps most) streams in the Pacific Northwest will be tribal instream flow rights with a priority date of "time immemorial." (Department of Ecology v. Acquavella, et al., Yakima County Superior Court No. 77-2-10484-5, Memorandum Opinion Re: Motions for Partial Summary Judgment, May 22, 1990 and Amendment to Memorandum Opinion Re: Motions for Partial Summary Judgment, October 22, 1990.)

Initiative 164

A major potential reversal of all this progress toward sustainable use of water resources and related lands occurred by action of the 1995 state Legislature. Property rights advocates acquired sufficient signatures to validate an initiative to the state legislature called Initiative 164. The initiative requires that any government agency (state or local) that takes an action that reduces the value of private property must compensate the owner for the reduction in value. It defines property to include "proprietary water rights." It also requires that all decisions of government agencies that may affect property be preceded by an economic analysis of the proposed action and all reasonable alternatives. The agency must select the least burdensome alternative. This is the most extreme property rights law in the entire country at this time.

An initiative to the legislature can be ignored by the legislature, in which case it goes to a vote of the people; modified by the state legislature, in which case both measures go before the voters; or passed by the legislature, in which case it becomes law 90 days after passage (July 22 in this case). The Governor has no opportunity to veto it. The legislature in the last week of the regular session passed it on a close vote. Civic and environmental groups are now gathering signatures on an initiative to repeal I-164. If it gets 90,000 signatures, it will go before the voters in November and will not go into effect until December if it is not repealed.

Initiative opponents say the initiative is so ambiguous it will tie up all regulatory agencies in a legal morass. The requirement to pay compensation for any property value diminishment goes well beyond the normal criteria for regulatory takings. Ironically, it could bring a halt to all land and water permitting until the legal issues get sorted out by the courts. Initiative 164 could place the department of Ecology in the position of having to compensate an applicant if it does not issue a water right in order to protect existing rights, or having to compensate existing right holders if it does issue the right.

Conclusions

Sustainable water use may be an elusive goal, but the state of Washington has made some progress in that direction in recent years. A burgeoning state population and lack of available water for new development is bringing about more creative and environmentally friendly means of supplying water. Reactionary legislation threatens to reverse progress in some areas, but it will not and cannot reverse the reality that little new water is available for development without impacting existing uses. Thus the goal of sustainability should remain viable for the foreseeable future.