



PRESIDENT'S NOTES

By Megan Kogut, PhD, University of Washington, AWRA-WA President

In this newsletter are technical reviews for two of our most recent dinner meetings. To complement those reviews, I offer a non-technical perspective on our dinner meetings in general.

Attendance at each dinner meeting is dependably about 30 people. Our volunteer dinner committee often discusses who comes to our meetings and why, in part out of curiosity and in part to explore strategies to increase attendance.

After talking with multiple attendees, we've decided that almost half of the attendees at any given dinner in Seattle are regular attendees. Regulars include many current and past AWRA-WA board members and AWRA-WA members who find the dinners an excuse to catch up with former colleagues and friends. They also enjoy learning something new about water resources not necessarily directly related to their career.

Another quarter of the attendees attend dinners because they are directly interested in the subject material presented by a particular speaker. Our dinners are usually relatively informal in tone, with questions welcome, so they offer a valuable opportunity to get a more detailed and nuanced account of recent events and developments. There is also plenty of time before and after the talk to network with the speaker and each other. So, our dinner talks are often invaluable for many different types of water resource professionals.

The remaining quarter of the attendees are students. Students do not pay for dinner talks; their attendance is paid for by our corporate sponsorship. Of course, dinner talks are a great way for students to gain perspective on careers as well as exposure to different policies in action and different applications of science and engineering. And students can take advantage of the networking opportunities before and after the talk.

Our dinner meetings have usually been at the Pyramid Alehouse in South Seattle, with occasional trips to Tacoma, Ellensburg, and even Spokane. At the beginning of May

the Seattle meeting switched to Ivar's Salmon House in Wallingford due to the limited availability at Pyramid during baseball season. Dinner meeting attendees enjoyed a close-up view of about 10,000 boats on Lake Washington during the first of many warm days this spring, in a large well-designed room and over great food and beverages (as well as the fine technical talk by Brent Lackey of Seattle Public Utilities.) We will probably be returning to Ivar's for future dinner meetings.

As this newsletter goes to print, the May 20th dinner meeting, which includes our traditional Washington State Legislative Update will take place at Naked City Brewery in a joint meeting with the Washington Hydrological Society. This meeting draws quite a few more people since it's a joint meeting and perhaps because the subject is more general than most topics.

If you would like to volunteer on the dinner committee or recommend speakers, please feel free to contact the dinner committee chair Tyson Carlson at tcarslon@aspectconsulting.com.

To see upcoming meetings, visit our website at <http://waawra.org/Events/Calendar>.

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SAVE THE DATE FOR THE AWRA WASHINGTON SECTION ANNUAL CONFERENCE
OCTOBER 23, 2014

THIS YEAR'S TOPIC:

WATER RESOURCES INFRASTRUCTURE
EMERGING FRAMEWORKS TO MEET MULTIPLE OBJECTIVES

FIND ALL THE DETAILS ON PAGE 9

AWRA WASHINGTON SECTION GRADUATE STUDENT FELLOWSHIP

CALL FOR APPLICATIONS

The American Water Resources Association Washington Section (AWRA-WA) is now seeking nominations for its 2014 – 2015 Graduate Student Fellowship Award. The Fellowship is dedicated to the memory of Rod Sakrison, former AWRA-WA board member instrumental in creating the Student Section at the University of Washington.

This year two fellowships will be given: one award will be to a member of a AWRA-WA affiliated Student Chapter; the other award will be open to all students enrolled in a graduate program in Washington State. Both fellowships are for a full-time graduate student completing an advanced degree in an interdisciplinary water resources subject. The fellowship award includes \$2,500 in cash, a one-year membership in both the State and National AWRA sections, a one-year subscription to the Journal of the American Water Resources Association, and admission to the Washington State Section Annual Conference.

Any academic department with qualified applicants may submit nominations for the award. The application packet, limited to five pages, should include the following:

1. A brief letter of nomination from the department head (not included in the total page count)
2. Completed Application Form
3. Statement of goals and objectives for graduate work
4. Detailed description of research objectives

Qualified students need to fill out the application form and prepare the additional information requested above and submit it to the address below. The letter of nomination may be mailed

under separate cover by the department head or included with the applicant's package. Items two through four constitute the application package and must be prepared by the applicant.

Nominations will be evaluated on:

1. The interdisciplinary nature of the applicant's course of study and research
2. The clarity and completeness of the applicant's discussion of research objectives
3. The applicability of the research work to current needs in water resources management and
4. The reviewers' overall impression of the applicants qualifications and presentation

Applications will be accepted at any time between the date of this posting and October 31, 2014. Students are encouraged to submit an application early. In early November the Fellowship Committee will evaluate all applications received and will recommend recipients for the Open and Student Section winners to the Washington Section Board of Directors. The Board will approve the selections during the December 2014 Board meeting.

The winners will be notified as soon as the board approves the award. Special recognition will be given to the fellowship recipients at a AWRA-WA Student function following announcement of the award and recipients will also be recognized during the 2015 state conference. After receiving the award recipients are expected to prepare and submit an article describing their research for the AWRA-WA Section newsletter.

WHERE ARE THEY NOW? CATCHING UP WITH PREVIOUS FELLOWSHIP WINNERS

AWRA Washington Section sponsorship helps to fund two annual student fellowships, promoting study of, and research in water resources. Today's fellowship winners will be the water resources leaders of tomorrow. Thank you for your generous support of AWRA Washington Section, and for promoting water resources professions. Here's how a few of the more recent fellowship winners are applying their talents

Daniel Haskell, 2011 AWRA-WA Fellowship Recipient

Daniel now works in the Office of Water and Watersheds for the US EPA Region 10, where he is responsible for implementing the permit program under the Clean Water Act to control the discharge of pollutants to waters of the United States.

Julie Vano, 2010 AWRA-WA Fellowship Recipient

Julie is now a Postdoctoral Fellow at Oregon State University, she researches innovative approaches to understanding climate impacts on Pacific Northwest water resources. "My connections with AWRA, through participating in many AWRA events and being recognized as a fellowship recipient, have helped motivate my work and its connection to real-world applications."

Erin Donley, 2009 AWRA-WA Fellowship Recipient

Erin is now a research scientist with the USDA Agricultural Research Service and a graduate student at UC Davis, where

she studies implications of invasive macrophytes on aquatic food webs. "The AWRA-WA fellowship was instrumental in my ability to complete my Master's thesis project at the University of Washington." By networking at AWRA events "I made key contacts with water managers who provided me with expert advice and in some cases data for my water resources modeling project"

Eric Rosenberg, 2007 AWRA-WA Fellowship Recipient

Eric is an Associate with Hazen and Sawyer Environmental Engineers, working with the Water Resources Management group. "I work on projects ranging from water supply modeling and forecasting for the NYC reservoir system to climate change adaptation studies for wastewater infrastructure. The AWRA-WA fellowship was instrumental in helping to meet graduate school expenses so that I could complete my PhD and land this great job."

Amy Yahnke, 2006 AWRA-WA Fellowship Recipient

Amy is currently completing her PhD dissertation studying aquatic herbicide effects on native amphibians. The AWRA-WA fellowship helped Amy pay for essential field gear and provided a contact with WDFW scientists who were essential to her research. "Thanks, AWRA-WA- you definitely helped me get started on the right foot!"

OUTSTANDING CONTRIBUTION TO WASHINGTON WATER RESOURCES AWARD

CALL FOR NOMINATIONS

The AWRA Washington Section plans to honor an individual at the State AWRA Conference which will be held this year on October 23, at the Mountaineers Event Center in Seattle.

This award will be presented at the conference for outstanding contributions to the water resources profession in the State of Washington. Current State Chapter members are encouraged to send in a nominating letter for themselves or another candidate by July 31 of this year.

In addition to identifying a nominee, the letter must contain an explanation of how the candidate specifically meets the criteria listed below. An individual need not satisfy all of the criteria to win the award, and other appropriate factors brought up in the nomination letter may be considered.

- Outstanding contribution or achievement in the water resources field (broadly defined) in the State of Washington.
- Leadership, so that others are enabled, inspired or orga-

nized to advance the understanding, management or wise use of water resources.

- Degree of innovation.
- Interdisciplinary or bridge-building qualities.

Any person may be nominated for this award, but only current AWRA-WA members may submit a nomination. The nomination letter must be received by July 31, 2014.

The winner of the Outstanding Contribution award will receive a handsome commemorative plaque. In addition, the AWRA Board will make a donation to a water-related, nonprofit organization of the winner's choosing.

There are lots of people out there working hard to protect and enhance Washington's water resources. This is your chance to bring some much-deserved recognition to one of them.

Submit nomination letters to Tyler Jantzen by email at Tyler.Jantzen@ch2m.com

TURNING THE AWRA-WA MENTORING PROGRAM UP TO ELEVEN

We recently built up our mentorship program by increasing the number of "official" mentors from two to eleven. Many of the mentors are board members, but we've also recruited a few AWRA-WA members. We now represent a range of career backgrounds, including consulting, regulation, municipal planning, and research. We also have good geographic representation, with two mentors in eastern Washington and one mentor in the San Juan Islands.

This year already, AWRA-WA mentors have helped several dozen students and young professionals seeking advice and feedback. Some of these students are finishing school in other states and planning ahead to move to Washington, so they are searching for jobs remotely. There are many factors that go into successfully picking and pursuing a career in water resources. Resume advice, job seeking tips, and practical first-hand experience with experienced professionals is invaluable.

We are, of course, always happy to have more mentors. In early June, we will advertise our expanded list of mentors to

the 1100+ people subscribed to the AWRA-WA jobs listserv. If you want to mentor or be mentored, please contact us soon. We will get you on our website as a mentor or get you connected with a mentor before we get swamped! See our mentoring webpage at <http://waawra.org/GetInvolved/Mentoring> for more details about level of commitment (up to mentor and mentee).

To subscribe to the AWRA-WA jobs listserv, visit https://mailman1.u.washington.edu/mailman/listinfo/wa-awra_water_jobs. The listserv is self-service; to sign up, enter your name and choose your own password and subscriber preferences.

To learn more our mentoring program, and to post open positions to the AWRA-WA listserv, email Megan Kogut at mbkogut@gmail.com.

WHAT AWRA WASHINGTON SECTION IS ALL ABOUT!

The Washington State Chapter of the AWRA fosters educational and professional development. Student support is provided in the form of two annual student fellowships, sponsorship of a student chapter at the University of Washington (and hopefully soon at Central Washington University), underwriting of a special meeting in Winter Quarter hosted by the student chapter, and other subsidies. Inter-organizational support is fostered with local, interstate, national, and international organizations.

A newsletter is published several times per year containing in-depth analysis and editorials on current issues. Several dinner meetings are held throughout the year providing good food and good company followed by a presentation by featured guests. Brownbags are organized on special issues as they arise. And of course don't forget the Annual Section Fall Conference.

The Conference is the principal funding vehicle for many Section activities, including providing financial support to the Section's Student Fellowship program. A dedicated board meets regularly to plan, organize and facilitate events. If you wish to learn more about your Section and/or wish to participate more in Section activities, you will be warmly welcomed. Please contact any of the board members listed on Page 9.

WASHINGTON'S BROKEN WATER ALLOCATION POLICY AFTER SWINOMISH INDIAN TRIBAL COMMUNITY V. DEPARTMENT OF ECOLOGY

By Thomas M. Pors, Law Office of Thomas M. Pors

In 2001 Ecology adopted the Skagit River Basin Instream Flow Rule that included minimum instream flows (MIFs) for rivers and streams but did not allocate or reserve water for other future uses. After Skagit County appealed, Ecology issued an amended rule in 2006 that used the overriding considerations of public interest (OCPI) exception to establish twenty-seven reservations of water for specified future uses, including exempt wells in rural areas. The Swinomish Indian Tribal Community (Tribe) challenged the amended rule as exceeding Ecology's authority and the Supreme Court agreed.

By declaring the amended rule invalid, over 475 new groundwater uses, primarily rural homes supplied by exempt wells that were built since 2001, were instantly subject to uncertainty about the legal status of their water supplies and unable to sell or refinance their homes. Since then, Ecology and the Tribe announced plans to develop mitigation projects to offset the impacts of these exempt wells, but the decision creates numerous legal uncertainties relating to the water rights permitting program and other MIF rules with similar findings.

The Court rejected Ecology's interpretation of the OCPI exception as allowing it to exempt certain categories of future water use from the regulatory effect of MIFs and closed streams using a three-part economic balancing test. The Court's 6-3 majority decision treats MIFs as senior water rights protected by the prior appropriation doctrine from impairment by new water rights or reservations, regardless of OCPI, and decided that reservations for future uses cannot be established if they would impair an existing MIF.

There is an inherent contradiction in the Court's decision. Because the OCPI exception specifically refers to authorizing water uses that conflict with protected instream flows, the majority's "prior appropriation" analysis appears to contradict RCW 90.54.020(3). To avoid the circular logic of one statute violating another, the majority opinion should be read not as eliminating OCPI altogether, but as severely narrowing its scope. In the author's opinion, that doesn't rescue the current water allocation scheme or leave Ecology with sufficient authority to correct its earlier mistakes. As explained below, that will be up to stakeholders and the Legislature.

A BRIEF HISTORY OF INSTREAM FLOW PROTECTION IN WASHINGTON STATE

Instream flow protection is important for the health of natural watersheds, including preservation of fish production, water quality, recreation, navigation, power production, and scenic and aesthetic values. As early as 1955 the Legislature

declared the policy of the state was to have sufficient water in streams to support fish populations and authorized rejection of water right applications that would impair these flows. In 1969 the Legislature authorized Ecology to establish minimum instream flows and lake levels throughout the state. The Water Resources Act of 1971 established fundamental state policy for the utilization and management of waters of the state including retention of base flows in perennial rivers and streams and adequate water supply to satisfy human domestic needs. The primary purpose of the 1971 Act was to insure that waters of the state are both protected and fully utilized for the greatest benefit to the people of the state. The Legislature established a balancing test for choices between competing uses of water, providing that "allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state."

The maximum net benefits policy was elaborated by a 1979 statute that states in part, "It is the policy of the state to promote the use of public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the State's public waters and retention of waters within streams and lakes in sufficient quantity to protect instream and natural values and rights." This balancing test may favor leaving water in streams and lakes in some cases, leading to denial of water right applications. But the statute also supports new appropriations for out of stream uses that are identified as having a greater benefit than the water would if left in the stream.

Once established by rule, MIFs constitute an appropriation with a priority date, and cannot be impaired by subsequent surface or groundwater withdrawals. The primary method used by Ecology to create and quantify MIFs was to select flow numbers that represented a likelihood that historical flows would be met on a given day. These "exceedence" flows generally ranged from 50- to 80-percent of historical flows, meaning that on any given day there was a 20- to 50-percent chance that the MIF would not be met. This method means that any water right thereafter issued which withdraws from or impacts a regulated river or stream is subject to curtailment (it is interruptible) whenever actual flows are below the MIF set by rule.

The maximum net benefits policy was not employed when Ecology adopted MIF rules and Ecology did not incorporate it into the Instream Resources Protection Program (IRPP) for

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Editor's Note

Water rights and the issues surrounding them are one of the most frequent topics addressed in the AWRA-WA newsletter. And rightly so, water resources in many areas on both sides of the Cascades are stretched between competing demands for agricultural, industrial, ecological, and domestic needs.

In this newsletter we offer two contrasting views on the recent Washington Supreme Court decision Swinomish Indian Tribal Community v. Ecology. The articles, submitted by Thomas M Pors, and Suzanne Skinner offer contrasting views on the impact of this decision to rural water supplies, ecological needs, and water rights case law.

The views expressed in both articles are those of the respective author, and both articles have been edited for length.

NO QUICK FIXES TO COMPETING DEMANDS FOR WATER: SWINOMISH INDIAN TRIBAL COMMUNITY V. DEPARTMENT OF ECOLOGY

By Suzanne Skinner, Executive Director, Center for Environmental Law and Policy

In *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), the Washington Supreme Court overruled the Department of Ecology's (Ecology) reliance on "overriding considerations of the public interest"¹ (OCPI) to justify reservations of water for new permit exempt wells created in 2006, that conflicted with minimum instream flows for the Skagit River basin established in 2001. Chap. 173-503 WAC. The Court clarified that those 2006 water rights were junior to the minimum environmental flows set in the 2001 Skagit River instream flow rule. To avert the hardship of potential curtailment of those junior rights in water-short periods, and preserve property values, Ecology, the Swinomish Indian Tribal Community, and their partners in the Skagit Basin are working to find mitigation (or alternate) water for those properties.

The broader implications of the Court's decision are even more difficult for Ecology and for land use planning reliant upon permit exempt wells. The Court threw into question Ecology's use of OCPI in seven other instream flow rules², from 2005 to the present, to create reservations for new water rights from concurrently created instream flows. The ruling may also constrain the agency's use of OCPI to approve individual permits that impinge on minimum instream flows, since the decision requires "extraordinary circumstances before the minimum flow right can be impaired." Id. at 576.

The Swinomish Court rejected Ecology's OCPI interpretation for two reasons. First, the plain language of the OCPI statute did not support Ecology's balancing test weighing the economic benefits of new consumptive water uses against harm to established minimum instream flows. Id. at 586. Second, Ecology's construction of OCPI allowed permit exempt wells to "jump to the head of the line" in violation of the prior appropriation doctrine and "the many statutes that pertain to appropriation of the state's water and minimum flows." Id. at 598. Nothing in the OCPI statute enabled Ecology to use it "as an alternative method of appropriating water when the requirements of RCW 90.03.290(3) cannot be satisfied."

1. The Water Resources Act (WRA) at RCW 90.54.020 contains a declaration of principles to govern use and management of Washington's waters. Preservation of water for aesthetic and environmental purposes are specifically added to the traditional consumptive uses deemed beneficial in water law. Id. at (1). Allocation of waters should provide the "maximum net benefits" to Washington's people-with consideration of benefits against opportunities lost. Id. at (2). And, of particular importance here:

The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) 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. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

Id. at (3).emphasis added

2. Those basins are the Stillaguamish, Quilcene-Snow, Salmon-Washougal, Lewis, Wenatchee, Entiat, and Dungeness

The Court's two-pronged decision reflects its recognition that Washington is running short of water. "There is no question that continued population growth is a certainty and limited water availability is a certainty." Id. Washington water policy historically fostered consumptive uses exclusively but "as time passed and the state's population increased demands on water resources also increased. Id. at 591-92. "Growing, competing demands for water led to a number of new laws over time, among these are acts and statutes designed to further the goal of retaining sufficient water in streams and lakes to sustain fish and wildlife, provide recreational and navigational opportunities, provide scenic and aesthetic values, and ensure water quality." Id. In short, because consumptive uses, however important economically, could dry up essential streams and rivers, the State enacted the Minimum Flows Act (MFA) and the Water Resources Act (WRA) to preserve minimum or base flows: the statutory basis for the Skagit minimum instream flow rule at issue in the Swinomish decision.

The Swinomish decision did not create new precedent. The Court applied black letter law on the validity and priority of minimum instream flow rights in relation to both prior and subsequent water rights. *Postema v. PCHB*, 142 Wn.2d 68 (2000). But the Swinomish decision nevertheless sent shock waves through Ecology and counties that have come to rely on OCPI-created reservations for new uses which conflict with minimum instream flows. The Court's decision, grounded solidly in Washington water law, including its maximum net benefits policy³ for balancing between competing demands for water, suggests that no "quick fixes" exist in the scramble for water.

BACKGROUND

Washington adopted the MFA and WRA because many streams and rivers have been fully appropriated, if not over-appropriated, for decades, leaving us without the base or minimum instream flows to sustain community water supplies, water quality, and fish and wildlife⁴. Pursuant to the MFA and the WRA, Ecology adopted minimum instream flow regulations for eighteen of Washington's sixty-two watersheds between 1969 and 1985. Significantly, not one of the eighteen rules included groundwater -- allowing permit exempt wells to trump minimum instream flows and subsequent consumptive water rights. The Skagit rule changed that paradigm.

The Skagit River uniquely supports all five Puget Sound salmon species; three of which have Endangered Species Act listings. Shortages in the river's tributaries since the 1940's have prompted Washington's Department of Fish and Wildlife to issue surface water limitation notices for Skagit River tribu-

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3. See RCW 90.54.020(2); RCW 90.03.005.

4. [Ecology, Managing Our Water Successfully](#), at 3 (2007) . See Species Reports, Listings and Occurrences for Washington, [U.S. FISH AND WILDLIFE SERVICE ENVIRONMENTAL CONSERVATION ONLINE SYSTEM](#), (visited 8/15/11). Reduced stream flows from consumptive uses are a primary obstacle to salmon survival and recovery. See [National Marine Fisheries Service, Factors Contributing to the Decline of Chinook Salmon](#), at 6 (1998)..

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Western Washington that was the framework for Ecology's adoption of MIF rules in dozens of Washington river basins from 1978 to 1986. Instead, Ecology adopted a protect then balance approach creating a priority for instream flow protection before evaluating other potential uses of the State's waters. This action was not supported by the 1971 Act.

RCW 90.54.020(3), the statute that requires protection of base flows, follows the statute that requires securing the maximum net benefits (balance then protect). It is also impossible to balance the allocation of water between instream flows and other uses if all water, including groundwater, is already committed to protecting instream flows. That is like sharing the crumbs in the pie tin after eating the pie, and violates two important canons of statutory interpretation:

1. That statutes related to the same subject matter or having the same purpose should be read together constituting one law; and
2. That a court or administrative agency must not interpret a statute in a way that renders any portion of the statute meaningless or superfluous.

The "maximum net benefits" provision has no meaning if interpreted to apply only after MIFs are protected.

THE ACCIDENTAL GROUNDWATER CLOSURE

When the first MIF rules were adopted in the late-1970s, Ecology was aware of the connection between surface and groundwaters, known as hydraulic continuity, but it drew a distinction between "direct continuity" with measurable effects on surface water (which would be subject to the MIF rules) and indirect effects for aquifers that were deeper or further away from streams (which would not be subject to MIFs). New permits for groundwater withdrawals were issued for projects throughout the state for many years following adoption of MIF rules, based on the assumption that they had negligible or unmeasurable effects on protected streams and therefore did not impair the MIFs. However, advances in groundwater science led Ecology to change course. By 1994 Ecology developed a new assumption that all groundwater pumping affects surface water, based on "steady state" theory and a model study by the U.S. Geological Survey that all groundwater pumping is eventually captured from streamflow.

In 1995-1996 Ecology issued a batch of over 600 decisions denying pending groundwater applications on the grounds of hydraulic continuity between groundwater and surface water protected by MIF rules. Over 130 of those denial decisions were appealed to the Pollution Control Hearings Board, many of which were later consolidated for appeal to the Washington Supreme Court. The Court's decision on those appeals in *Postema v. Pollution Control Hearings Board* held that a finding of hydraulic continuity was not enough by itself to deny a groundwater application—there needed to be evidence and a finding of impairment.

However, the Court rejected the appellants' arguments that MIF rules must be interpreted as intended by Ecology years earlier, to allow new groundwater appropriations unless their withdrawal had a direct and measurable impact on stream flow. While acknowledging that "all parties to this case originally expected that only nearby and shallow groundwater

withdrawals would affect surface waters," the Court allowed Ecology to rely on new scientific knowledge to prevent interference with instream flows. What the Court did not do, in either *Postema* or *Swinomish*, was to require that MIF rules adopted prior to 1990 be amended to reflect the new science and to consider the maximum net benefits before subjecting all groundwater to maintaining MIF levels. This was a significant disconnect with the Legislature's intent in the 1971 Act, and effectively closed groundwater to further appropriations.

THE ROLE OF OVERRIDING CONSIDERATIONS OF PUBLIC INTEREST

After *Postema* and the accidental groundwater closure, Ecology continued to regard instream flow protection as its primary responsibility and began to use the OCPI exception as a relief valve for communities and applicants in need of additional water.

Ecology has the authority to amend instream flow rules, and is even mandated to update them as needed [RCW 90.54.040(2)]. The Legislature made this process financially viable by adopting the Watershed Planning Act, Chapter 90.82 RCW, and appropriating tens of millions of dollars since 1998 for grants to local watershed planning groups. However, this new planning tool and financial assistance has not led to amendments of existing MIF rules to accommodate the maximum net benefits policy. Instead Ecology has used the OCPI exception to authorize reservations for future uses. The Court in *rejected* this approach in the *Swinomish* decision, even though Ecology determined that the environmental impacts of reservations for future uses were minor and the economic benefits were significant.

Ecology has also used OCPI as its relief valve for water right applications by municipal water suppliers, typically when proposed mitigation achieves substantially greater environmental and other public benefits than the withdrawal does harm to MIFs and closed streams. Even where mitigation plans effectively over-mitigate impacts on instream flows, OCPI findings are probably required whenever hydrogeologic studies predict any effect on remote streams or lakes that are closed or have MIFs. If Ecology has to use OCPI for every groundwater application, it cannot be characterized as a "narrow" exception for use in "extraordinary circumstances" as restricted by the Court in *Swinomish*. This argument is already being tested in a water right appeal pending in Thurston County Superior Court, *Sara Foster v. Ecology*. For OCPI to be a reliable and predictable statutory relief valve for groundwater applications needed to serve municipal growth, the Legislature must clarify Ecology's authority to use OCPI and/or to issue water rights or reservations that conflict with MIF rules.

THE GROWING DIVIDE

There is no question that instream flow protection was a top, if not the top environmental priority and public policy goal of the late 1960s, the 1970s, and beyond. The duty to protect rivers is strong and the benefits are innumerable, but this single-sighted mission fails to comply with legislative mandates in the 1971 Act to also provide for other uses of water, most notably to serve human domestic needs and irrigated agriculture. If MIF rules and the accidental groundwater closure are left uncorrected and Ecology is denied any effective statutory

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taries -- restraining Ecology from granting new water rights to protect threatened wildlife and fish. But these tributaries are also hot spots for new residential, rural development based upon permit exempt wells. United States Geological Survey studies showed creeks in the middle and upper basin commonly suffered "intermittent low flow conditions," and groundwater supplied all the flow there during "late-summer and early-fall." Threatened Chinook and steelhead in the Skagit River basin migrate upstream during these same months to spawn. In addition to salmon, the future water supply of Skagit County and the City of Anacortes was at risk.

Spurred by this mounting water shortage, the Skagit River tribes, Skagit County, Ecology, and the City of Anacortes entered into a 1996 Memorandum of Agreement (MOA) to allocate water and become the basis of the 2001 Skagit instream flow rule. In the agreement, the tribes gave up their right to challenge the very large municipal water rights of Skagit County Public Utility District and the City of Anacortes for fifty years, and Skagit County agreed not to issue building permits that relied upon permit exempt wells if minimum instream flows, once established, would be impacted.

The MOA also provided that the Skagit instream flow rule would incorporate best available science, while setting aside 200 cubic feet per second (cfs) for future consumptive uses conditioned upon existing rights and the newly created minimum instream flows. WAC 173-503-050. This reserve for future allocations explicitly included groundwater as well as surface water -- recognizing the reality of the Skagit basin's hydrology and our growing understanding of hydraulic continuity -- the interrelationship between surface and groundwater.

Peace in the Skagit Valley did not last long. Two years later, Skagit County sued Ecology over the instream flow rule. Despite the intervention of the other MOA parties to defend the rule, Ecology settled the County's lawsuit by amending the rule in 2006 to move 25 cubic feet per second of water from instream flows to new domestic, commercial, agricultural, stockwatering, and industrial uses: essentially skimming off 2% of the water set aside for minimum instream flows in the original rule. Ecology stated that once these new 2006 reservations were used, it would close the tributary subbasins to all new, unmitigated groundwater withdrawals. Skagit County agreed to the reservations and inevitable anticipated closures. The Swinomish Indian Tribal Community challenged the rule in court. After losing in Superior Court, last October, the Supreme Court held in favor of the Swinomish.

THE SUPREME COURT'S RULING

Given how well grounded the Court's decision is in Washington water law, the surprise the decision caused is in itself surprising. The decision is founded upon Postema's declaration that the prior appropriation doctrine makes base flows and minimum instream flows co-equal with consumptive water rights. Minimum flows therefore cannot "be impaired by subsequent groundwater withdrawals" unless "[t]he narrow exception to this rule found in RCW 90.54.020(3)(a)" applies. Id. at 586.

With Postema as its springboard, the Swinomish Court tossed out Ecology's OCPI balancing test that weighed "benefits flowing from 'beneficial uses' against harm to instream uses and

values after minimum flows have been set." Id. "Beneficial uses," as the Court noted, are a term of art in water law -- if the Legislature had intended OCPI to apply to private beneficial uses, including permit exempt wells, it would have said so. Therefore, the term "public" in OCPI did not equate to private water uses. Id. The Court also rejected Ecology's interpretation of the term "overriding" in RCW 90.54.020(3)(a) to warrant new permit exempt wells for domestic uses because the "need for potable water for rural homes is virtually assured of prevailing over environmental values". Id. at 587. Ecology's reading of OCPI failed to give "effect to legislative intent that water for population growth would not trump domestic water needs in every instance and every area of the state where rural development is thought to be desirable." Id. at 588.

OCPI, after all, is an exception to RCW 90.54.020's mandate to maintain base flows. A bedrock rule of statutory construction directs that exceptions be narrowly construed, which Ecology's expansive OCPI interpretation violated to find "a way to reallocate water supply and priority of rights. Nothing in the limited number of words in the exception can be said to grant such expansive power." Id. at 583. Ecology's reservations based upon OCPI failed to meet the four-part test of RCW 90.03.290 because uninterrupted water for the exempt wells was neither available nor accessible without impairing "existing minimum instream flow rights." Id. at 589.

CRITICISM OF THE RULING

The Court cited both the MFA and the WRA to dispel any notion that minimum instream flow rights were "lesser" rights—which Ecology or the state could devalue in favor of later-in-time rights that served economic purposes or new development. Id. at 595. But that ruling has raised questions. River flows fluctuate seasonally. Many minimum flows established by the rule go unmet at times, and sometimes regularly, raising the question of whether unmet minimum instream flows mean that water is unavailable, and the rule therefore invalid.

That analysis falls short for two reasons. First, the prior appropriation doctrine does not invalidate junior water rights that cannot be fully met day after day, year after year. Like any other junior water right, minimum instream flows are effectively curtailed, that is they go unmet when water levels are low, to satisfy senior rights. That interruptibility does not render minimum instream flows *ultra vires*.

Second, and more importantly, minimum instream flow rules are based upon both the MFA and WRA. The WRA is by far the broader statute, declaring among the fundamentals of Washington water management, the mandate that "[p]erennial 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." RCW 90.54.020(3) (emphasis added). While minimum instream flows are base flows (Postema, *supra*), base flows are broader, applying not just to basins with minimum instream flow rules but to every perennial river and stream in the state. Where those base flows are insufficient to preserve the public benefits we all share, including navigation, water quality, wildlife, and aesthetics, the WRA's mandate places an inchoate lien on any future returned water on behalf of the public. Minimum instream flows, and base flows, there-

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RECENT DINNER MEETINGS IN REVIEW

March: King County Mitigation Reserves Program

By Megan Kogut Ph.D., University of Washington, AWRA-WA President

For the March AWRA-WA dinner talk, Michael (Murph) Murphy, Project Program Director at King County Department of Natural Resources and Parks, gave an overview of King County's Mitigation Reserves Program. King County has implemented an in-lieu fee program that sells mitigation credits to development permittees. In return for fees, King County assumes the responsibility to design and implement offsite wetland mitigation required for development projects that impact existing wetlands. King County is divided into seven "service areas" corresponding to watersheds. Mitigation fees from a project in a service area must go to wetlands mitigation within that project.

With centralized funding, King County can plan and fund function-based, high quality wetland enhancement projects using a watershed approach. A mitigation reserves program also simplifies the cost and schedule for builders, and it makes enforcement easier for regulators overseeing wetland mitigation. Murph also emphasized that mitigation may be preferable in cases where replacement wetlands would be surrounded by existing development, such as in the middle of a neighborhood or surrounded by freeway onramps.

Several large projects, including the WSDOT SR 520 bridge replacement, the Sound Transit Northgate Light Rail Link Station, the King County SWD Transfer Station in Bellevue, and the Williams Pipeline Project have taken advantage of the Mitigation Reserves program, with fees used to construct wetlands offsite.

Murph gave several specific examples of existing and future projects. In particular, the Williams Pipeline Project replaced a natural gas pipeline east of Renton with a bigger pipe for Puget Sound Energy. Mitigation fees funded wetlands construction at the Cold Creek Natural Area between Woodenville and Duvall (shown in image.)

The program is the first "in-lieu fee" mitigation program in Washington to be certified under new federal rules. One sticking point with the creation of the program was an older framework that emphasized on-site mitigation as a priority, with purchasing credits as the least preferable option. The fee program reverses that order of priority, recognizing that the best opportunities for mitigation may not be on site, and that a centralized program can better achieve "economy and ecology of scale".

For more information see the [KCMR Program website](#).



Cold Creek Natural Area between Woodenville and Duvall, an example of offsite wetland mitigation in action.

May: Water Supply and Demand

By Stan Miller, Inland NW Water Resources, AWRA-WA Board Member

On Thursday May 1, 2014 over 25 people attended a AWRA-WA sponsored function at the Spokane County Water Reclamation Facility. This was the second in what we hope will become a regular part of AWRA-WA's program. Attendees are encouraged to join the state section so that we may continue to provide this type of information and idea exchange in Eastern Washington.

Graduate students Melanie Thornton and Kate Tillotson from Washington State University presented updates on their projects related to water supply and demand in Spokane County. Both students are working on doctorate degrees in the School of the Environment under the direction of Allyson Beall-King. The perception that the Spokane Valley Aquifer is essentially and infinite supply source makes understanding water supply

and demand in the Spokane area important. The regions water purveyors, many of whom are pumping at near their permit capacity, are faced with telling their customers they will need to conserve water – especially during the summer – in the near future.

The close connection between summertime pumping of the aquifer and low flows in the Spokane River make it unlikely that new water rights will be approved without effective water conservation programs in place. Without a clear understanding of the motivation for the average citizen -- who uses over 200 gallons of water per day -- convincing them to modify this behavior will be nearly impossible. Our two presenters are developing programs to facilitate that education.

Melanie is developing a Collaborative Management Model for the Coeur d'Alene – Spokane River Basin. The idea is to bring together a wide range of water users to integrate their ideas on water management and build trust among them to facilitate changing management goals. She is using collaboration among a large number of stakeholders in the basin to apply the OASIS Model, developed by Hydrologics, to water use problems in Spokane County. OASIS will integrate the large amount of technical information and existing model data available for the Spokane River/Spokane Valley Aquifer system

Continued on Page 9: Demand

Demand: Continued from Page 8

into a tool that can be used to examine “what if” scenarios. When completed, this OASIS tool will be used in public meetings to help local water managers make water supply planning decisions.

Melanie’s project is part of a larger USDA funded study of water use in the Columbia River drainage, the Watershed Integrated Systems Dynamics Modeling (WISDM) project. This project is examining water use in the Coeur d’Alene/Spokane and Yakima River basins as well as other Columbia River sub-basins. This larger study intends to develop a collaborative plan for sustainably managing the water resources of the Columbia River Basin in light of changing supply and demand conditions.

Kate Tillotson’s work is focused on determining why there is such a wide range of water use in Spokane households. Water supplier data shows that household water use ranges from less than 450 gallons per household per day to over 750 gallons per household per day. Most significantly, this range of water use can be found within the same city block.

Based on the available data on water use most of this variability is related to outdoor water use. Kate’s research will investigate the relationships between the physical nature of outdoor watering systems, behavioral, socioeconomic and social factors and how they influence water use.

Kate has developed a questionnaire to evaluate use patterns. The questionnaire will involve two steps: first water users will be contacted by mail, then recipients will be directed to an on-line link where they will complete a questionnaire. The letters will be mailed to 2,500 randomly selected residences.

This approach was selected because research has shown that using mailed surveys generates better response than email or other electronic approaches. However, tabulation of mailed in data is time consuming, cumbersome and prone to errors. The approach chosen by Kate is an attempt to get at the best of both worlds, high response rates and ease of data management.

Though the participants are randomly selected, the census block in which the recipient lives will be tracked. This will allow linking the water use with census information, such as household size and socioeconomic status in the block, to the water use.

Because this potentially involves the use of personal information, special procedures were put in place to assure the ethical use of the data. A return of 350 to 400 responses is desired. Plans call for the mailing to out in the next week or two and the data evaluation completed by the end of 2014.

Kate’s current project involves only one water supply district in the Spokane area. That water supplier plans to use the results of the assessment for water supply planning and water use education. Successful application of the process here will provide a starting point for other water suppliers.

Join Us for the 2014 AWRA-WA State Conference

**October 23 at the Mountaineers Event
Center, Seattle**

This Year’s Topic:

WATER RESOURCES INFRASTRUCTURE EMERGING FRAMEWORKS TO MEET MULTIPLE OBJECTIVES

Much of the water resources infrastructure in Washington State is aging or outdated. Many existing assets are currently in need of either renovation or replacement. Additionally, new infrastructure and management frameworks are needed to respond to climate change, population growth, and existing or new land uses.

In the past dams, culverts, levees, and other infrastructure were planned and constructed with consideration of only a few management goals such as water delivery, flood control, or hydropower. Many projects benefited from a combination of abundant Federal coffers in the post-war economic boom and lenient environmental requirements, allowing new projects to move rapidly from conceptual design stages to construction.

Times have changed. The application of the Endangered Species Act, the recognition of Tribal Treaty Rights, increased public demand for recreational opportunities, and requirements for aesthetic flows have added a host of new management priorities.

Federal funding for large infrastructure programs is scarce. State and local budgets are squeezed from all sides, but still make up more than 90-percent of public sector spending on public infrastructure projects. New and renovated infrastructure projects are expected to meet multiple, frequently conflicting objectives that require creative engineering and management solutions.

This year’s AWRA-WA conference focuses on the issues surrounding water resources infrastructure at all stages of planning and implementation. Project managers and key stakeholders will discuss the challenges they have encountered, as well as successes, and lessons learned. Discussion topics will include engineering solutions, public involvement, and political collaboration strategies such as integrated planning frameworks.

A reception will follow with an opportunity to meet and mingle among water resource professionals of the highest caliber, and the opportunity to enjoy a variety of hors d’oeuvres and select beverages.

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exception to fix its earlier mistakes, communities, businesses, and farmers who need more water will be forced to pay higher and higher prices for water transfers and mitigation.

Communities without sufficient water rights cannot be expected to have guessed the outcome of future Supreme Court decisions and groundwater science several decades ago, but they will be forced to bear a disproportionate burden of protecting instream flows if the law remains unchanged. A growing number of counties and their residents are now forced to purchase senior water rights for mitigation banks in order to allow new development dependent on new groundwater sources. While many older cities gained substantial water capacity with the closing of industrial mills and implementation of conservation programs, younger cities and suburban and rural communities have not had the same opportunities and now have a difficult time finding new water supplies for growth and economic expansion.

POTENTIAL SOLUTIONS

For basins without existing instream flow rules, Ecology has the authority to allocate or reserve water for future uses before adopting MIFs, using the maximum net benefits policy. The watershed planning process is one way to determine maximum net benefits through local planning and consensus decision-making. OCPI findings are not required for these future allocations if they are established prior to MIFs. As MIF rules are developed in these basins, Ecology should incorporate maximum net benefits findings and allocate water for all uses directed by the 1971 Act before or simultaneously with adopting new MIFs.

For basins with existing MIF rules, the Legislature can clarify Ecology's authority to modify rules or to allow exceptions through watershed planning, OCPI, or otherwise. In this way, uninterrupted water can be made available for other important purposes concurrent with efforts to improve conservation practices, habitat, and water quality of area streams.

Legislation could also clarify Ecology's authority to use OCPI for reserving water for future uses or approving water right applications that have insignificant effects on closed streams or MIFs that cannot be practically mitigated. Alternatively, the Legislature could establish a reasonable impairment standard for groundwater applications that allows more flexibility than the current "any effect" standard. Instream flow advocates will likely argue that permitting numerous minor impacts to closed streams or MIFs will result in significant cumulative impacts. However, best available science and flexible administrative tools should be used to address individual and cumulative impacts on streamflow, whether implemented in rule-making or on a case-by-case basis for water right applications.

Another possibility is to leave existing MIF rules alone but clarify state water allocation policy in light of Swinomish and define criteria for permitting "exceptions" to established MIFs, lake levels, and surface water closures. One possible mechanism is to define "vital public water uses" that can be approved despite minor unmitigated impacts to MIFs or streams closed by rule.

Thomas Pors is a water resources and land use lawyer in Washington State. An unabridged version of this article is available on his website www.porslaw.com

Criticism: Continued from Page 7

fore, set a management objective on behalf of the public for the amount of flow necessary to meet nonconsumptive public purposes.

Nor does the Swinomish Court's upholding of the priority of the Skagit instream flow rule evidence disregard for the state's "maximum net benefits policy." That policy is intended to ensure that Washington citizens, as a whole, get as much value as possible from Washington's waters, including consideration of opportunities lost. RCW 90.03.005; RCW 90.54.020(2). But Swinomish made clear that value is not solely measured economically.

In the 2006 amendment to the Skagit instream flow rule, Ecology used a balancing test to apply OCPI, and implement maximum net benefits policy to take water already allocated to minimum instream flows through newly-created reservations for new homes and other development. The Court tossed out Ecology's balancing test as unbalanced because it short-changed instream and environmental values, and thereby skewed the maximum net benefits policy. That policy, the Court pointed out "refers to both diversionary uses, many of which can be quantified in dollars, and also to instream uses, many of which cannot be economically quantified." Id. at 599.

Water already committed to minimum instream flows was therefore an expression of the policy. Ecology had erred in using the maximum net benefits policy in the Skagit to justify new consumptive uses for water that had already been committed to minimum instream flows. Moreover, the Court underscored that maximum net benefits policy should not be interpreted to mandate that any unclaimed water be put to consumptive uses, opining that "even as to allocation of water not already spoken for, best use of water does not necessarily mean economically beneficial use." Id.

CONCLUSION

In nullifying the 2006 amendment to the Skagit instream flow rule, the Swinomish Court severely constrained Ecology's future ability to use OCPI to reallocate environmental flows for new consumptive uses. And as previously mentioned, the ruling casts doubt on OCPI reservations previously created by rule in other basins -- as well as the agency's use of OCPI to approve individual permits that impinge on minimum instream flows except in "extraordinary circumstances." Id. at 576.

The lesson of Swinomish is simple. There are no quick fixes to the water challenges that we face due to increasing population and climate change. Ecology policies and court decisions did not create these challenges. We cannot simply waive a legislative wand to satisfy all the current human and ecological demands for water. But we must do better. We need to fund the hydrological science required to comprehensively assess our water resources to implement sustainable water management policies. We need to adopt and implement effective conservation requirements. We need to develop water markets that support affordable pricing. And, we need to re-visit the exempt well statute to limit its use in places where water is no longer available. We only have to look to the southwest to see the consequences if we fail to face reality.

Suzanne Skinner is the Executive Director of the [Center for Environmental Law and Policy](#).

WATER RESOURCES NEWS ROUNDUP

By Eric Buer, AWRA-WA Board Member

The past two months have seen a wide range of interesting developments in the world of water resources starting with the signing of the historic [Klamath River Pact](#) between the Klamath Tribes and ranchers in the Upper Klamath River basin, Oregon. Astute readers will recall the basin has been the subject of ongoing controversy for several years that included summoning Federal Marshals in 2001 to enforce an irrigation shut-off, followed by a massive fish kill in 2002 when irrigation flows were restored.

In 2013 an administrative judge held Tribal water rights as senior on rivers running through the former Klamath Tribe Reservation. Elements of the agreement between the Tribes and agricultural interests include increasing stream flows into the Upper Klamath Lake by at least 30,000 acre-feet per year, improved reliability of water delivery to irrigated agriculture in the Upper Klamath Basin through a voluntary water use program, improvement and protection of riparian habitat, and increased opportunity for Tribal members to exercise Treaty Rights on multiple rivers within the basin.

Drought remains a hot issue across the U.S. and along the West Coast in particular. The joint USDA, NOAA, and University of Nebraska [drought monitoring program](#) has now identified short and long term droughts covering all of California, Oregon, Arizona, New Mexico, the Columbia River Plateau, the Snake River Plain, and several other locations ranging from Oklahoma to Hawaii. Nationwide drought conditions have now effected at least 54-percent of the nation's wheat crop, 30-percent of corn, and 48-percent of cattle. Ongoing shortages of water in the Golden State in particular have brought about new scrutiny on [senior water rights holders](#) who are not required to conserve water, and include a variety of private corporations as well as cities ranging in size from the little known town of Moccasin to the metropolis of San Francisco.

The exceptional drought conditions have ignited a ferocious and early fire season in the western wildlands. The NASA Earth Observatory identified more than [18,000 acres](#) of burned or actively burning lands in California alone, and as of this writing the [Slide Fire](#) in Arizona had consumed more than 7,500 acres and was burning hot enough to consume entire trees as it climbed out of Oak Creek Canyon. Even more impressive is the Funny River Fire in on Alaska's Kenai Peninsula which has burned more than 43,000 acres and was powerful enough to create its own weather in the form of [pyrocumulonimbus clouds](#).

Internationally, May saw the unveiling of the [WarkaWater](#), a device that harvests drinking water from fog using a simple nylon net and bamboo frame. The concept of fog harvesting is not in itself new, more than 17 countries have some sort of system in place, and last year Massachusetts Institute of Technology published [a study](#) on increasing the efficiency of existing systems. However, the WarkaWater has garnered particular attention for its simplicity to maintain and low cost of deployment (the current design costs \$550 per unit). Plans are currently under way to begin installing towers in Ethiopia next year, where more than 60-percent of the population lacks access to a reliable drinking water source.

Closer to home, Portland experienced a temporary water shortage of its own when Mount Tabor Reservoirs 1 and 5 were found to be contaminated with E. coli bacteria that triggered a 24-hour [water boiling alert](#). Both reservoirs were emptied and decontaminated. This was the second time this year that Reservoir 5 was flushed, the first occurred in [April of this year](#) after the Portland Water Bureau caught a teenager urinating into it.

Finally, speaking of reservoirs, preliminary results of the \$61 million dollar study into the cause of the spillway crack in Wanapum Dam have been released by [Grant County PUD](#). The investigation team have determined that an error in the original design calculations left the spillway under-designed for the load applied by the water of the fully filled reservoir. The structural weakness allowed the crack to form and spread gradually until the upper spillway showed visual deformation that alerted operators to the problem. The repair will include installation of new steel reinforcements through the existing concrete of the dam down into the underlying bedrock. Since all of the dam spillways share the same design, reinforcement of the remaining 12 spillways is also expected.

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WASHINGTON LEGISLATIVE SESSION 2014

A REVIEW AND LOOK AHEAD

By Jennifer Holderman, Environmental Planner, Washington Department of Ecology

Due to a short session (only 60 days) and a legislature still wrestling with budget concerns (the McCleary decision, transportation, balancing new budget requests in light of a positive revenue forecast), the Water Resources Program saw relatively few bills of interest. In previous years Water Resources tracked issues ranging from relinquishment and exempt wells to novel approaches concerning rural water supply issues and engaged stakeholders with narrowly tailored legislative requests. In 2014 we saw bills focused primarily on water banks, legislative responses to recent legal decisions, and the “Berry Bill.”

Additionally, a few bills came up that impact work done throughout the Department of Ecology as well as the Water Resources Program; including restrictions on government surveillance, criteria to enhance customer service, and streamlining how the agency reports to the legislature and the public. Of the 17 bills tracked by the Water Resources Program, only three were signed into law. However the activity and discussion around those bills that died in 2014 give invaluable insight into what lies ahead in the 2015 legislative session. During the 2014 session three bills of significance to the water resource program passed the house and senate, two became law while Governor Inslee veto the third.

House Bill 2192 Promoting economic development through enhancing transparency and predictability of state agency permitting and review processes requires Ecology to track permit timelines and submit findings to the Office of Regulatory Assistance and the public. Ecology must also provide technical assistance to applicants as they apply for permits. Providing the regulated public with clear information and predictable timelines for permit processes is important and we work towards this goal every day through our permit handbook, agency LEAN efforts, as well as throughout the application process. On the other hand reporting requirements in this bill may complicate the message and public perception concerning permit timelines. Many times when a water right application is submitted staff must contact applicants and request additional information. Completing an application is an iterative process that may take up to a year. Once completed, the application heads to the bottom of the stack, a pile approximately 6,000 applications deep. HB 2192 requires Ecology to provide details on these two time frames. Under current authority, Ecology has tools at its disposal to accelerate these time lines, including the cost reimbursement program and the pre application process. The reporting requirements of this bill need to be carefully executed to ensure the public understands the administrative, technical, and backlog challenges associated with a water rights application as well as opportunities to accelerate timelines.

House Bill 2636 Streamlining statutorily required environmental reports by governmental entities allows the Water Resource Program to migrate several legislative reports to web based updating instead of generating paper reports on an annual or biennial basis. As proponents of this bill, Ecology welcomes its passage as it embodies our campaign to incor-

porate LEAN efforts.

House Bill 2789 Concerning technology enhanced government surveillance laid out strict limits on the use of drones by local and state government. Collecting personal information (defined by an exhaustive list of considerations) is prohibited. Permitted data collection activities include in pursuit of a search warrant, emergencies, natural disasters, and scientific research. Specific prohibitions include use by agencies for regulatory purposes. At this time Ecology employs very few drones; one example includes monitoring during an oil spill. Programs that might have experienced complications if this bill became law include the Environmental Assessment Program and the Water Resources Program. One example of data collected via aerial surveys used in the WRP includes infrared data used to determine plant types propagated on land to calculate water duty. This analysis may reveal if a land owner is using water in excess of their water right or exemption. This bill passed both the house and senate but was vetoed by Governor Inslee. In his veto letter, Inslee established a 15 month purchasing moratorium for state agencies and encourages local agencies to do the same. During the interim, Inslee will convene a task force to develop legislation for the 2015 session.

During the 2014 session several Water Resources related bills were introduced but never became law. Nonetheless these bills are worth mentioning as several represent ongoing issues that will eventually need to be addressed either through a statewide approach such as statute, local ordinance or agency rule. The Department provided feedback and guidance on several of these bills, ranging from providing testimony at legislative hearings to one-on-one meetings with legislatures, stakeholders, and proponents. This group of bills essentially fit into one of five categories: 1) agency reform, 2) legislative proposals from previous years, 3) water banking and local governments, 4) response to case law, and 5) managing the cost of water infrastructure.

Agency reform bills included HB 2192 (mentioned above) and **SB 5821 Establishing consistent standards for agency decision making.** SB 5821 proposed to allow applicants to seek decisions from superior court if DOE fails to render a decision on a permit within 90 days. This bill would also allow applicants to contest Ecology decisions in superior court instead of first seeking relief at the PCHB. The agency had several concerns with this bill. In particular, the Water Resources Program receives applications for water rights that many times require additional consultation with the applicant. Completing an application can take more than 90 days. Due to the programs extensive backlog, completed applications sit in the queue for extended periods of time waiting for a decision. The PCHB is a venue with specialized experience and knowledge in water resources issues; removing their review will likely complicate current decisions and later appeals.

Back for a second tour is **House Bill 1438 Concerning de**

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Legislature: Continued from Page 12

facto changes in water rights for irrigation purposes that involved conversion to more efficient microirrigation technologies. Fondly dubbed the “Berry Bill,” the impetus of this bill occurred in the late 1980s due in part to social unrest in the Balkan region. Prior to that Yugoslavia was the largest raspberry producing region in the world. Consequently production shifted to Whatcom County where dairy operations and complementary irrigation practices once existed. This change in production resulted in a shift to microirrigation technologies. Also at around this time the Water Resources program took a significant budget hit. Hence when a large stream of change applications came in, the capacity to process them did not exist. This bill proposed to process the change applications of approximately 20 raspberry producers in Whatcom County. Although this bill failed to become law in 2014 work has already begun to process these applications.

Across the state, local governments are tackling issues surrounding rural water supply. One tool at their disposal is a water bank, used to acquire water rights for mitigation purposes. **SB 6239 and its companion HB 2596, Providing that sales and use taxes imposed by rural counties may be used for purchasing water rights for water banking,** allows counties to use a portion of their sales and use tax towards the purchase of water rights to seed water banks. After the public hearing on this bill, interested parties from Kittitas County dropped **HB 2760 and its companion SB 6533, Concerning best practices for water banks.** In addition to establishing transparency and consistency requirements, this bill would also prevent banks from offering mitigation credits at a free or reduced rate provided a few exceptions. Ecology supports consistency and transparency measures for water banks as well as the capacity of local governments to participate in rural water supply issues. Neither bill made it past the committee of origin but gave stakeholders an opportunity to explore rural water supply strategies.

The legislature dropped two bills responding to legal decisions from 2013, *Swinomish v Ecology* and *Hirst v Whatcom*. Both cases are indicative of a statewide phenomenon, the balance between instream and out-of-stream water supply in rural areas is becoming more difficult. In *Swinomish*, the Washington Supreme Court invalidated the 2006 amendment to the Skagit River Instream Flow Rule, and barring legal access to water for 450 homes. **SB 6467, Ensuring that existing water uses in the Skagit river basin are not subject to interruption,** would have reinstated the legal right to use water for

these properties without interruption, by stating that exempt groundwater uses “established between April 14, 2001 and October 3, 2013 in the Skagit river basin shall not be subject to interruption from...Skagit river basin instream flow rule.” We testified in opposition to this bill. Our current efforts in the Skagit River basin focus on collaboration and mitigation. If this bill had passed it would have resulted in litigation. In *Hirst*, the Growth Management Hearings Board found that Whatcom County comprehensive plan failed to protect rural character by not addressing protection of water resources. **SB 5983 and its companion HB 2288, Limiting the authority of growth management hearings boards to hear petitions challenging the regulation of permit exempt wells,** added an exemption to the list of matters not subject to review by the GMHB, “petitions challenging the regulation of withdrawal of public groundwater exempt from permit requirements.” Although this bill didn’t directly impact our work in the Water Resources program, it would have impacted the efforts of our local government partners as they develop plans and regulations concerning water resources. Maintaining instream resources while providing water for rural development will continue to challenge the hearts and minds of all stakeholders. Ecology continues to work with stakeholders and legislatures to seek workable strategies for rural water supplies.

Lastly, **SB 6516 Creating a joint legislative task force to study financing options for water supply, flood control, and stormwater projects,** would have convened a task force with representatives from the Legislature, the Governor’s office, and local government to review risks, technology, financing and governance options to address these water issues. At least 30 individuals either testified or participated in the associated work group in support of this planning process. Although this bill failed to pass due to its fiscal impact the subject matter it addressed needs to remain in the lime light; with antiquated infrastructure and climate change looming, the price tag for water infrastructure projects will continue to climb.

Looking ahead, issues surrounding water banking and strategies for rural water supplies will continue to be raised in both the courts and at the legislature. The 2013-2015 biennium budget was the first in several years where the Water Resources Program received funds sufficient to hire 6 new staff. However the days of budget cuts are very recent and the legislature will continue to direct Ecology to practice LEAN efforts. The legal and policy realm of water resources always seems to be in flux, as the demand for water resources grows in the face of diminishing supply. And every year these changes play out in arena of the Washington legislature.

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