

Sara Foster v. Ecology and Yelm

A Application of the OCPI exemption for new municipal water rights and the impact
of ESSB 6091



Sara Foster v. Ecology and Yelm

- ◆ 1994 Yelm applied for new municipal water rights totaling 3,500 acre-feet per year and 3,000 gallons per minute
- ◆ These were reduced in 2011 to 942 acre-feet and 2,100 gallons per minute
- ◆ Lacey requested new rights totaling 6.6 million gallons
- ◆ Olympia was transferring existing rights

Sara Foster v. Ecology and Yelm

- ◆ Use of these new and transferred rights will impact instream flows for rivers and streams in the Nisqually and Deschutes Basins
- ◆ Rivers and streams within the Nisqually River Basin, including Yelm Creek, have had instream flows and stream closures since 1981
- ◆ The Deschutes River Basin watershed rules were adopted in 1979

Sara Foster v. Ecology and Yelm

- ◆ The projected impact from Yelm's pumping to the Nisqually River will be up 0.32 cfs and 0.11 cfs
- ◆ The projected impact to Yelm Creek, which is closed year round, is between 0.04 and 0.06 cfs
- ◆ This equates to between 1.3 and 56 percent of the baseline discharge

Sara Foster v. Ecology and Yelm

- ◆ Mitigation for these impacts?
- ◆ Nisqually River: Voluntary out-of-kind mitigation, which is restoration of Yelm Creek
- ◆ Yelm Creek: Maintain recharge from Cochrane Park and Habitat Restoration
- ◆ McAllister Creek: Provided when Olympia transfers its water rights to the McAllister Wellfield

Sara Foster v. Ecology and Yelm

- ◆ How did Ecology make its OPCI determination?
- ◆ The Permit Writer applied the three-part test
- ◆ This test is not a rule nor has Ecology produced any guidance on how to apply it and what factors to consider

Sara Foster v. Ecology and Yelm

1. Whether and to what extent public interests would be served by the water appropriation
2. Whether and to what extent the public interest would be harmed
3. Whether the Public Interests Served (1) Clearly Override Any Harm (2)

Sara Foster v. Ecology and Yelm

- ◆ What “public benefits” did Ecology consider?
- ◆ Yelm’s new water right would serve “future customers and businesses served by Yelm”
- ◆ Also includes, “net ecological benefits for water resources specifically and natural resources generally.”
- ◆ Ecology relied heavily on the Mitigation Plan

Sara Foster v. Ecology and Yelm

- ◆ What “public interest harms” did Ecology consider?
- ◆ Ecology’s public harms analysis focused only on the impacts that Yelm’s water use would have
- ◆ It did not use the cumulative impacts from all three cities

Sara Foster v. Ecology and Yelm

- ◆ In October 2013, the Supreme Court released its determination in *Swinomish Indian Tribal Council v. Ecology*
- ◆ The Swinomish Tribe challenged Ecology's rule amendment to the Skagit River rule, which set aside reservations of water for future use that were not conditioned on the existing instream flows

Sara Foster v. Ecology and Yelm

- ◆ The Court held: “the overriding-considerations exception cannot reasonably be read to replace the many statutes that pertain to appropriation of the state’s water and minimum flows.” *Swinomish* 178 Wn.2d at 598
- ◆ While *Swinomish* looked at reservations of water and not individual permits, the Court still found that:

Sara Foster v. Ecology and Yelm

- ◆ “[w]e see no meaningful difference between water reservations that reserve water for future individual applicants to obtain the right to put water to those beneficial uses and individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows is concerned. In both instances, the result is a water right held by an individual to the detriment of the existing minimum flow water right.” *Swinomish*, 178 Wn.2d at 585-586.

Sara Foster v. Ecology and Yelm

- ◆ Ms. Foster argued that *Swinomish* controls as to the issues in her case and Ecology lacks authority to use the OCPI exemption to issue individual water rights
- ◆ Ecology argued that Yelm's mitigation plan made it different and that this is a permit and not a reservation to distinguish this from *Swinomish*

Sara Foster v. Ecology and Yelm

- ◆ In October 2015, the Court agreed with Ms. Foster and found that Ecology improperly relied on the OCPI exemption to issue the permit
- ◆ The Supreme Court in *Foster* held, “Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimis impairments of senior water rights.” *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015) (cites omitted)

Sara Foster v. Ecology and Yelm

- ◆ However, the Court went further and stated that The water code...is concerned with the *legal* injury caused by the impairment of senior water rights—water law does not turn on the notion of “ecological” injury.” Id.
- ◆ This cast the use of out-of-kind mitigation into doubt

Hirst Bill

- ◆ The Hirst Bill undid many of the protections that the Supreme Court upheld in the Swinomish, Foster, and Hirst cases
- ◆ There were adequate protections for senior rights and instream flows, but there wasn't the political will to enforce them
- ◆ Instead it created a new system whereby exempt wells and municipal use take priority over existing senior rights and instream flows

What the Hirst Bill did to the Foster ruling

- ◆ **Mitigation:**
- ◆ Task force, which sunsets on December 31, 2019 is to review “the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat.”
- ◆ The task force is designed to “review” the Foster decision
- ◆ The task force will create and recommend mitigation sequencing and a scoring system to determine the approval of mitigation projects

Hirst Bill

- ◆ Task force consists of:
- ◆ Two members from each of the two largest caucuses of the senate: Appointed by president of the senate
- ◆ Two members from each of the two largest caucuses of the house: Appointed by speaker of the house
- ◆ Ecology representative: Appointed by the director
- ◆ WDFW representative: Appointed by the director of WDFW

Hirst Bill

- ◆ Agriculture representative: Appointed by the Department of Agriculture director
- ◆ One representative from each of the following groups: Appointed by consensus of the cochairs of the task force:
 - ◆ Farming industry
 - ◆ Washington cities
 - ◆ Two representatives from environmental organizations
 - ◆ Muni water purveyors
 - ◆ Business interests
 - ◆ Representatives of two Federally recognized Tribes:
 - ◆ One recommended by Northwest Indian Fisheries Commission
 - ◆ One recommended by Columbia River Intertribal Fish Commission
- ◆ One cochair must be from the majority caucus in the legislature and one from the minority caucus

Hirst Bill

- ◆ A joint task force recommendation must be made to the legislature by November 15, 2019
- ◆ Task force recommendations must be made by 60% majority of the task force members
 - ◆ ECY, WDFW, and Ag are not eligible to vote on recommendations
 - ◆ Minority recommendations that receive support from 5 named voting members may also be submitted

Hirst Bill

- ◆ Ecology must (shall) issue permits for up to 5 water resource mitigation pilot projects
 - ◆ Legislative intent to use these projects to “inform” the task force and to allow the processing of water right applications
- ◆ What is the mitigation sequencing?

Hirst Bill

- ◆ Ecology can issue permits that impact instream flows and closed water bodies if:
- ◆ Avoid impacts by complying with mitigation required by rules
- ◆ Conditioning the water right on the instream flow
- ◆ HOWEVER, If mitigation is not “**reasonably attainable**” then:
- ◆ Offset impacts by providing permanent new or existing trust water rights
- ◆ “Or through other types of replacement water supply resulting in no net annual increase in the quantity of water diverted or withdrawn” and no net “detrimental impacts to fish and related aquatic resources”

Hirst Bill

- ◆ If avoidance and mitigation are not “reasonably attainable” then:
- ◆ Offset impacts via in-kind and out-of-kind mitigation by providing “net ecological benefits”
- ◆ That “improves the function and productivity of affected fish populations and related aquatic habitat”
- ◆ Out of kind means both instream and out of stream projects
- ◆ Ecology must monitor the implementation of the pilot projects at least annually through December 31, 2028

Hirst Bill

- ◆ Eligible pilot projects:
- ◆ A city in Kitsap County and WRIA 15 operating a Group A water system with a population of between 13,000 and 14,000
- ◆ A city in Pierce County and WRIA 1 operating a Group A water system with a population of between 9,500 and 10,500
- ◆ A city in Thurston County and WRIA 11 operating a Group A water system with a population of between 8,500 and 9,500
- ◆ A nonprofit mutual water system in Pierce County and WRIA 12 operating a Group A water system serving between 10,500 and 11,500 connections
- ◆ An irrigation district in Whatcom County and WRIA 1, solely for the purpose of processing changes of water rights from surface to ground and implementing instream flow augmentation

Hirst Bill

- ◆ These 5 projects must notify Ecology by July 1, 2018 that they want to be part of the pilot program
- ◆ By November 15, 2018 Ecology must furnish the task force with information on the “conceptual” mitigation plans for each project
- ◆ Ecology must expedite the water rights applications associated with these pilot projects

Hirst Bill

- ◆ In June Ecology issued interim guidance for what “net ecological benefits” means as it relates to mitigation projects
- ◆ The guidance requires the proponent to make a showing that “water offset projects were not reasonably attainable”
- ◆ Then there must be “a structured and transparent analysis for Ecology to use as the basis for making a NEB determination. This analysis should quantitatively compare the negative habitat and instream resource impacts of the proposed withdrawal project(s) or water resource management action to the benefits to be obtained from proposed mitigation.”
- ◆ OCPI 2.0?

First Bill

- ◆ The application must quantify all “consumptive use impacts to instream resources.”
- ◆ They must also quantify the “amount, location and timing of all of the water being provided through water offset projects.”
- ◆ Additionally, “benefits...must be described in detail and quantified to the maximum extent practicable.”

Hirst Bill

- ◆ The water permit application and NEB analysis should contain the following elements:
- ◆ Demonstrate that complete avoidance and minimization of impact is not reasonably attainable with water offset projects.
- ◆ Structure the analysis in the form of a ledger or matrix that describes all the impacts and offsets in detail and sums up the net benefits in a quantitative or semi - quantitative manner.
- ◆ Describe any ecological impacts that are not offset through in - place and in - kind replacement of consumptive water use.

Hirst Bill

- ◆ Include an evaluation of impacts and offsets based on a detailed hydrological analysis, conceptual model, or numerical model.
- ◆ Document financial and other assurances that the mitigation will be fully implemented and remain in place for the full duration of the new water use (likely in perpetuity).
- ◆ Include monitoring and evaluation plans that describe or detail maintenance needed to ensure lasting benefits.

Hirst Bill

- ◆ Include contingency plans or corrective actions to be taken if goals and measures are not achieved.
- ◆ Include information that describes the level of support for the proposed mitigation pilot from tribal, state and local resource managers (which may be in the form of letters of support or agreement).
- ◆ Identify and document scientific sources and methods of analysis.

First Bill

- ◆ Despite the short time frame in which to produce this data, there are still a lot of unanswered questions
- ◆ What does “reasonably attainable mean”?
- ◆ How are quantitative metrics going to be created and will they be standardized across all watersheds?
- ◆ What does a contingency plan or corrective action look like for a project that is supposed to last in perpetuity?

Thank you

Patrick Williams

The Law Offices of M. Patrick Williams

600 N. 36th St

Suite 228

Seattle, WA 98013

patrick@patrickwilliamslaw.com