

Current Challenges and Issues for Utilities Seeking Water Rights

Dave Christensen, Water Resources Deputy Program Manager

American Water Works Association | May 6-8, 2026

Overview

- Managing water rights under the Municipal Water Law
- Mitigating for new water rights and changes
- Climate change

Our Foundations

Vision

Washington State's water resources support thriving ecosystems and communities in the face of climate change.

Mission

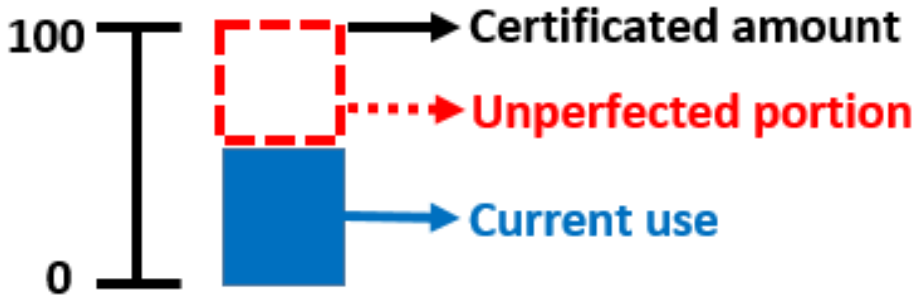
We manage water resources to benefit all Washingtonians and to protect the natural environment for current and future generations.



Managing water rights under the Municipal Water Law

Municipal Water Law Background

- Water right certificates are relinquished (revert to the public) if they are not used for five years.
- Legislature protected municipal water right certificates from relinquishment since relinquishment law was passed in 1967.
- Up until mid-1990s, Ecology issued water right certificates for municipal uses once the main withdrawal and distribution works had been constructed (based on system capacity) before all of the water was put to use.



2003 Municipal Water Law



Theodoratus v. Ecology created uncertainty for pumps and pipes certificates and leads to the MWL.



Protects pumps and pipes certificates from diminishment (except during **changes, adjudications**, or errors).



Allows flexibility for municipal water suppliers to serve new growth throughout their service areas.

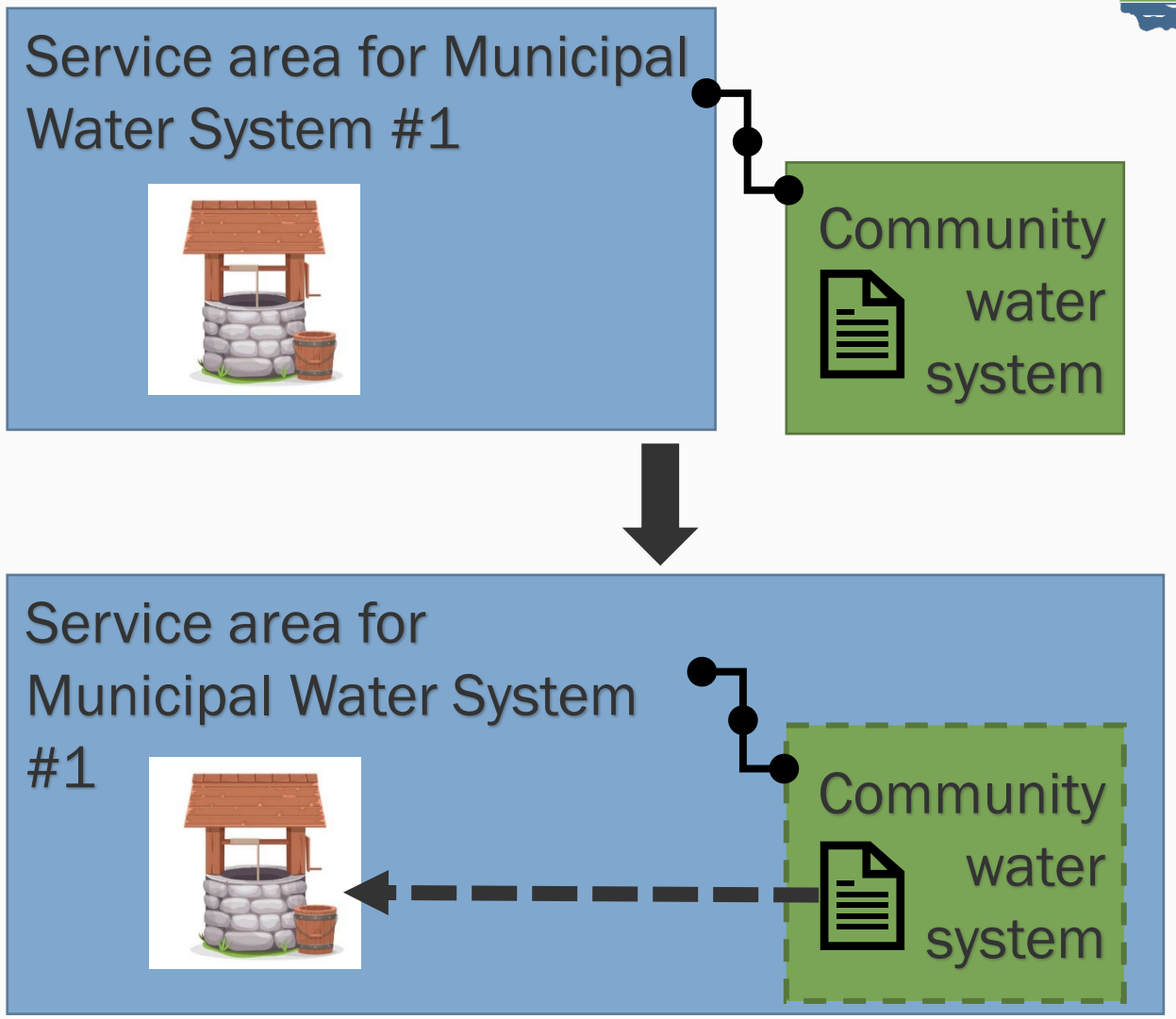


Requires service connection metering and conservation standards to be met.

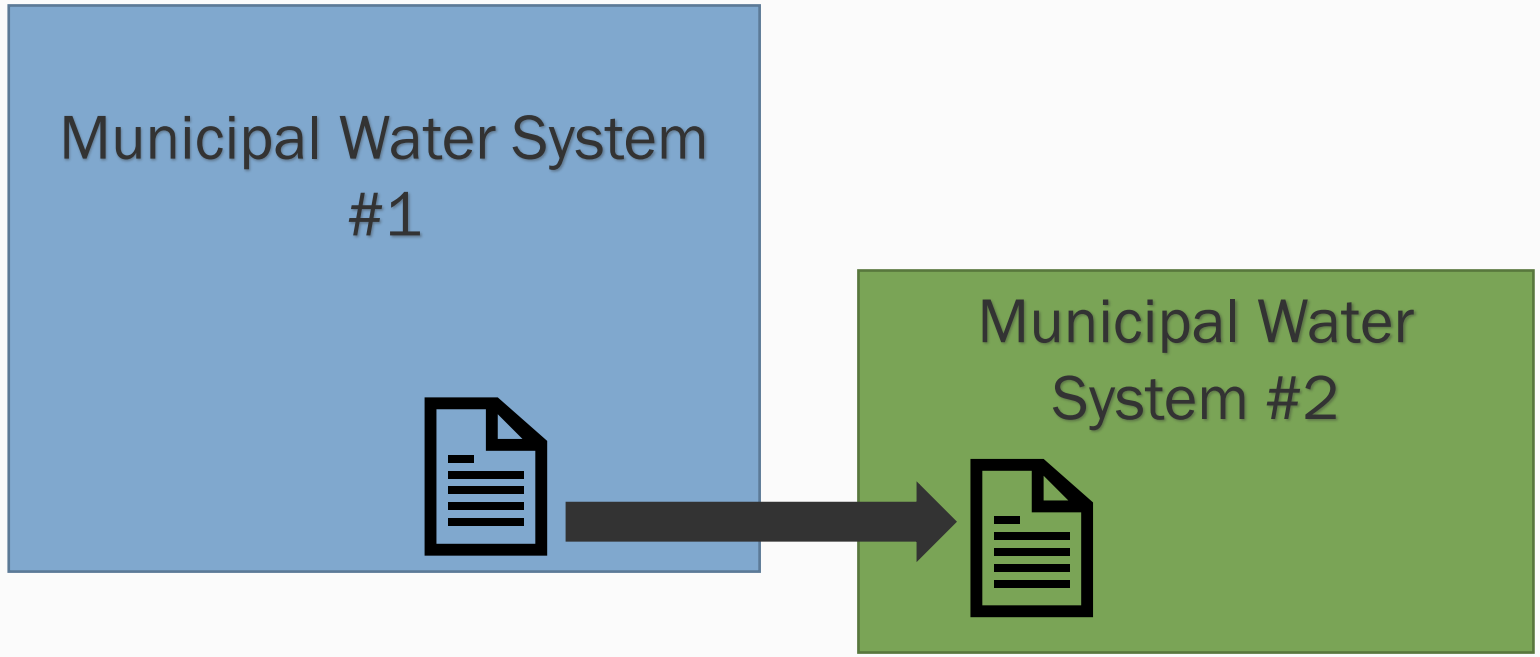


Two Supreme Court decisions upheld the MWL (*Lummi* and *Cornelius*).

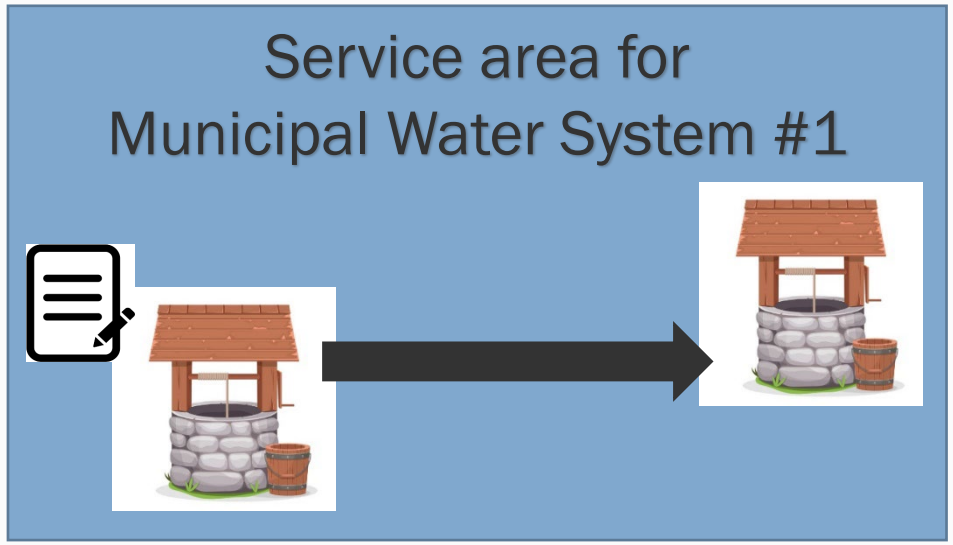
Interties and Consolidation



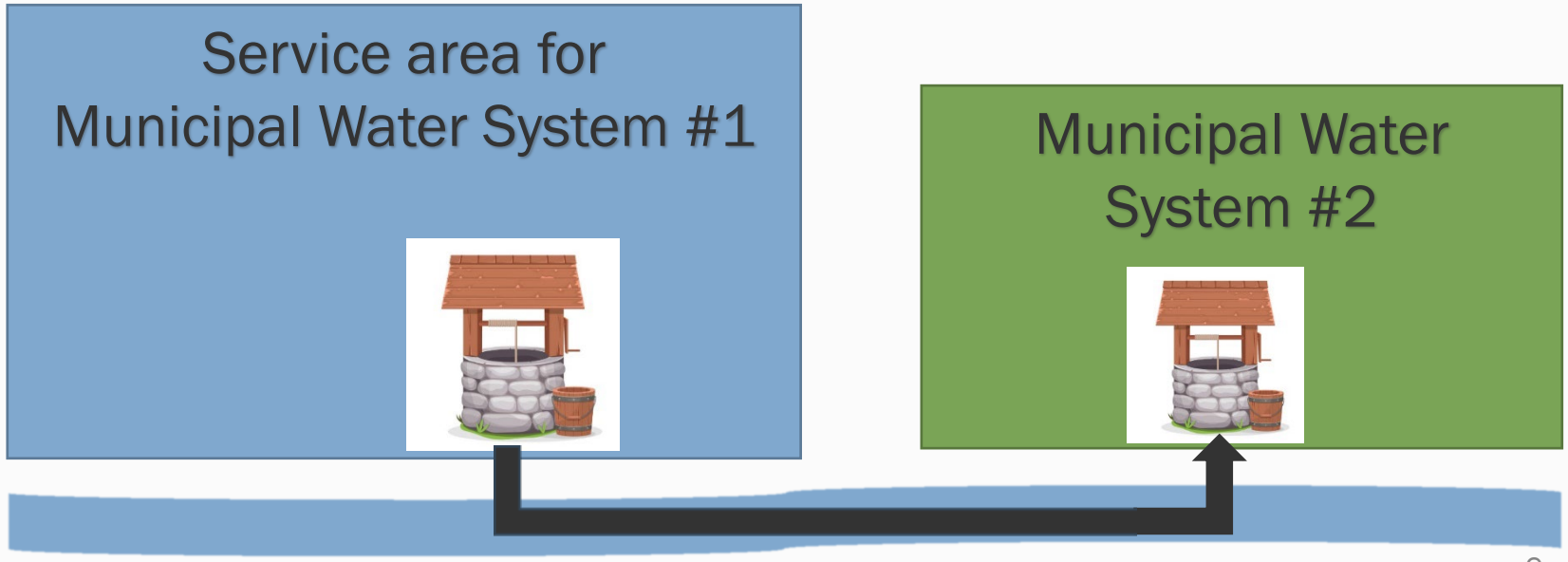
Transferring Municipal Water Rights



Using Municipal Water Rights for Mitigation



OR



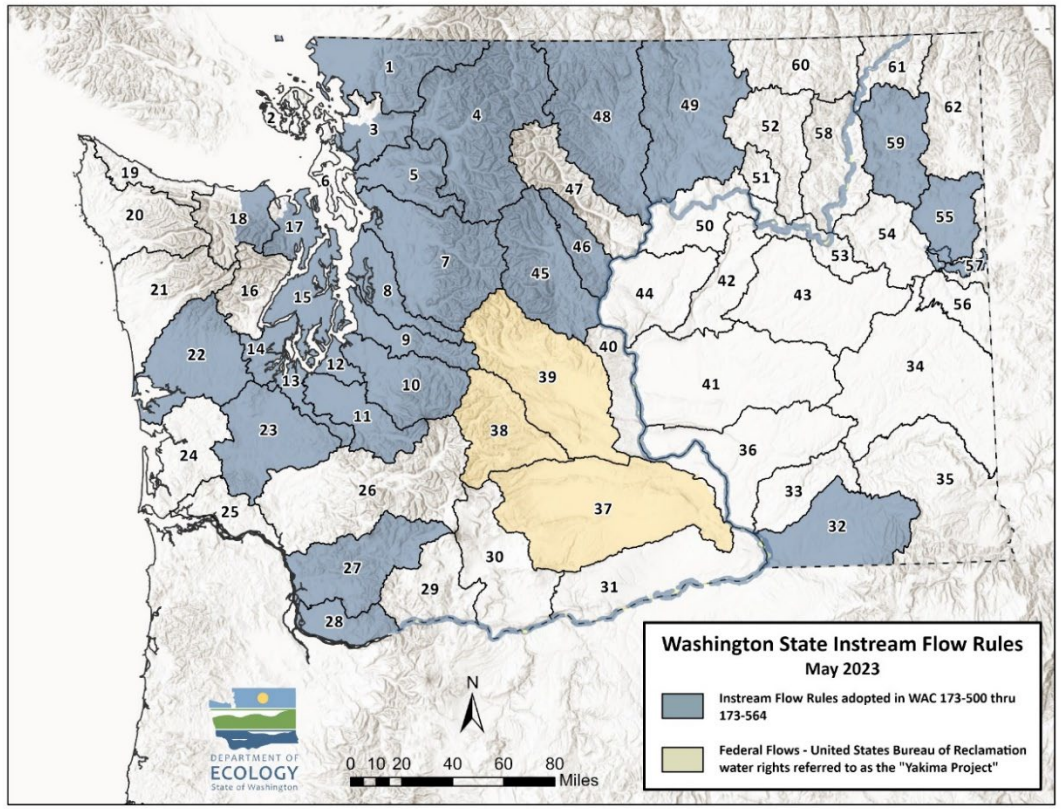
Mitigating for new water rights

Instream Flows

1971 Water Resources Act

- Chapter 90.54 RCW
- Ecology must manage water resources to benefit all uses/users
- Instream flows identified as a beneficial use that must be protected via adoption of administrative rules
- First rules adopted in 1976 in Chehalis & Little Spokane basins

Permitting conditioned to protect flows



Case Law & Mitigation

Postema (2000) and Foster (2015)

- Instream flow rights are rights subject to the same protection as other water rights
- No impairment to existing instream flow rights are permissible, including *de minimis* impairment
  - Impairment may be from modeled "*de minimis*" impacts that cannot be physically measured
  - Impairment must be mitigated in-place, in-time, and in-kind



Mitigation Challenges

Foster Task Force (RCW 90.94.090)

- Legislators, stakeholders and tribes
- Five mitigation pilot projects
- Projects intended to inform process
  - Sequenced mitigation
  - Authorized “out-of-kind” mitigation
  - Goal to protect instream resources and provide flexibility
  - Only one approved project in eight years despite the flexibility
- Task Force sunset in 2022 with no specific recommendations
- Ecology continues to implement law under Postema/Foster framework



Policy 1280

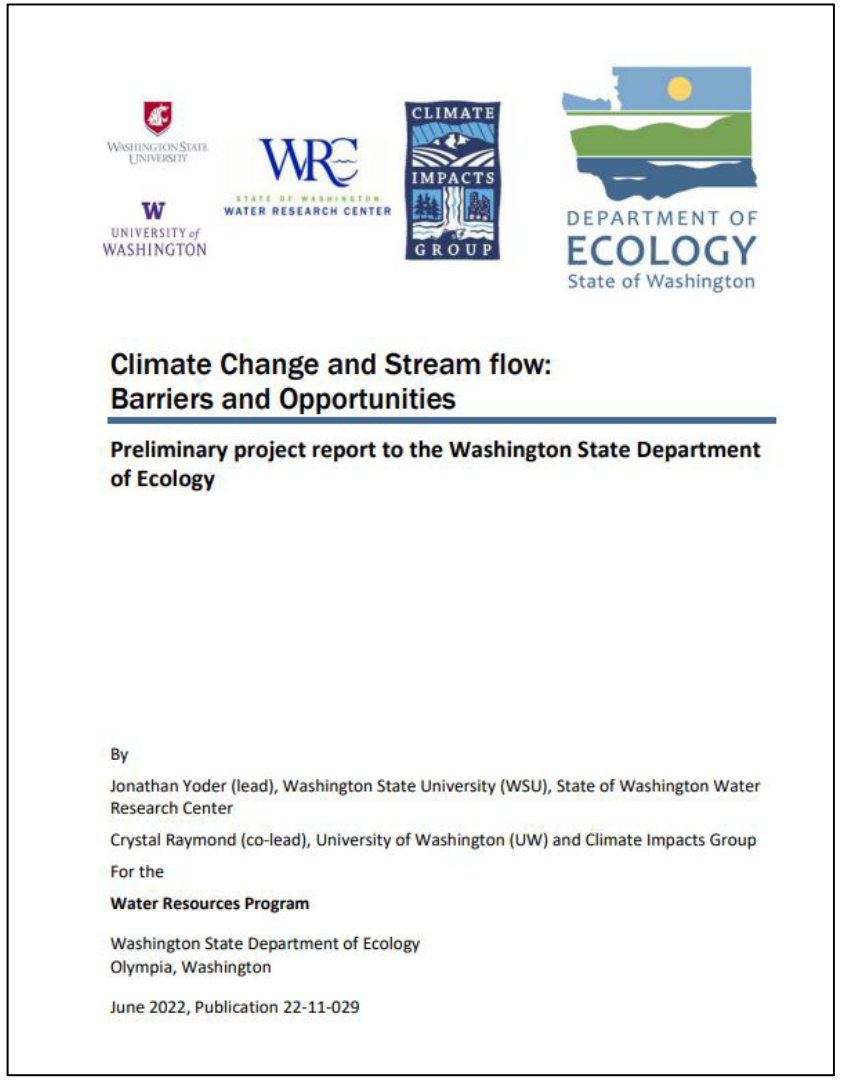
Development Schedules for Water Right Changes

- RCW 90.03.380(1)(d) : “If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department **shall issue** to the applicant a certificate in duplicate…”
- Statute was written in 1917 in simpler times
- Development schedules provide clarity of intention to transition from one use to another
- Existing policy and our approach had not clearly identified our duty to issue certificate upon request
- Public comment on draft late 2025
- Finalizing updated policy in May 2026



Climate Change

Climate Change and Adaptation



Washington State University
University of Washington
WRC State of Washington Water Research Center
Climate Impacts Group
Department of Ecology, State of Washington

Climate Change and Stream flow: Barriers and Opportunities

Preliminary project report to the Washington State Department of Ecology

By

Jonathan Yoder (lead), Washington State University (WSU), State of Washington Water Research Center

Crystal Raymond (co-lead), University of Washington (UW) and Climate Impacts Group

For the

Water Resources Program

Washington State Department of Ecology
Olympia, Washington

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https://apps.ecology.wa.gov/publications/documents/2211029.pdf

Implications of Case Law

PDF **WAC 173-501-040**

Surface water source limitations to further consumptive appropriation.

(1) The following table indicates the status of streams, tributaries and lakes affected by this chapter.

Source Name	Tributary To	Former Administrative Status	Status Under Regulation	Period of Closure	Flow Established
Anderson Creek	Nooksack River	low flow	partial year closure	May 1-Oct. 31	WAC 173-501-030(2)
Bells Creek	North Fork Nooksack	open	closure	year round	WAC 173-501-030(2)
Bertrand Creek	Nooksack River	closure	closure	year round	WAC 173-501-030(2)
Black Slough	Nooksack - South Fork	low flow	low flow		
California Creek	Drayton Harbor	closure	closure	year round	WAC 173-501-030(2)
Canyon Creek	North Fork Nooksack	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)
Canyon (Lake) Creek	Middle Fork Nooksack	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)
Chuckanut Creek	Chuckanut Bay	low flow	closure	year round	natural flow
Colony Creek (incl. Whitehall)	Samish Bay	open	closure	year round	natural flow
Cornell Creek	North Fork Nooksack	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)
Dakota Creek	Drayton Harbor	closure	closure	year round	WAC 173-501-030(2)
Deer Creek	Barrett Lake (Tenmile)	closure	closure	year round	WAC 173-501-030(2)
Fishtrap Creek (incl. Double Ditch)	Nooksack River	closure	closure	year round	WAC 173-501-030(2)
Fourmile Creek	Tenmile Creek	closure	closure	year round	
Gallop Creek	North Fork Nooksack	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)
Hutchinson Creek	South Fork Nooksack	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)
Johnson Creek	Sumas River	closure	closure	year round	WAC 173-501-030(2)
Kamm Ditch/Stickney Slough	Nooksack River	closure	closure	year round	natural flow
Kendall Creek	North Fork Nooksack	open	closure	year round	WAC 173-501-030(2)
Maple Creek	North Fork Nooksack	open	closure	July 1-Oct. 31	WAC 173-501-030(2)
Nooksack River - mainstem	Bellingham Bay	low flow	minimum flow (new flow)		WAC 173-501-030(2)
Nooksack River - Middle Fk.	Nooksack River	low flow	minimum flow (new flow)		WAC 173-501-030(2)
Nooksack River - North Fk.	Nooksack River	low flow	partial year closure	Sept. 1-Oct. 31	WAC 173-501-030(2)
Nooksack River - South Fk.	Nooksack River	open	partial year closure	July 1-Oct. 31	WAC 173-501-030(2)

- Many basins have tributary closures adopted in rules.
- Because of strict impairment standard, cannot modify the hydrograph
- “Re-timing” of flow may be necessary to adapt to climate change
- Without this water management tool, we could face low flow reductions of greater than 50 percent in many basins

Summary

- The Municipal Water Law provides flexibility for utilities, with some limitations
- Mitigating for new water rights and water right changes is challenging due to case law
- Climate change is projected to dramatically impact our state's water supply

Thank you

Dave Christensen
Water Resources Deputy Program Manager
(360) 489-4227
Email: Dave.Christensen@ecy.wa.gov

