Washington State Water Law

Pacific Northwest Section
American Water Works Association
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Cascadia Law Group
ENVIRONMENTAL ATTORNEYS

Overview of Presentation

- Historical Development of Washington Water Law
- Fundamentals: Permits, Certificates, Claims
- Fundamentals: Streamflow Protection
- Key Case Law: Postema and Foster Decisions
- Ecology Water Resources Policy and Rules
- Emergent Issues



Historical Development

How WA water law evolved from common law to a permit-based system

Washington Water Law: History

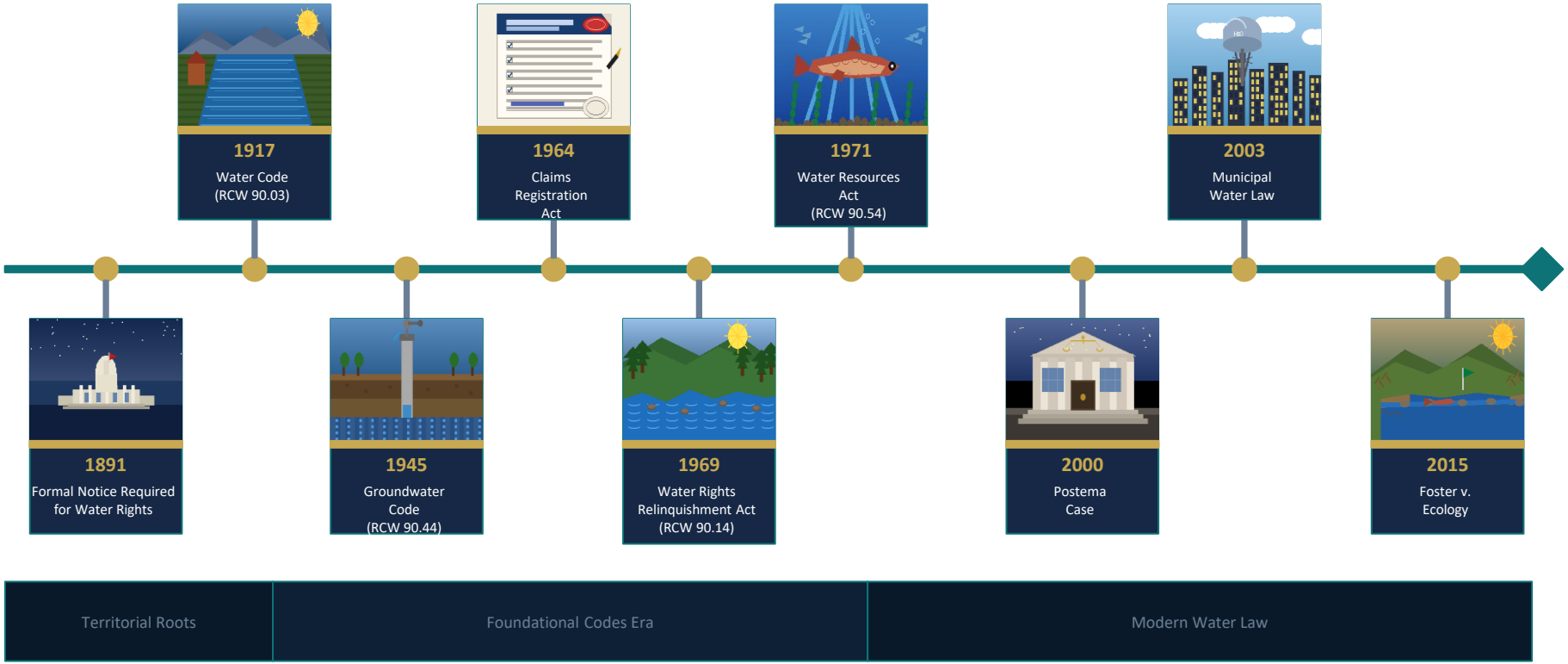
- Water is a public resource held for the people.
- Early Washington followed the riparian doctrine: rights tied to land along waterways.
- Shift to Prior Appropriation: 'First in time, first in right'
- Beneficial use – related to human use (e.g., irrigation, industry, domestic) or habitat (instream for fish).
- Appurtenancy – when landowner obtains the right to apply water to land for beneficial use then the right becomes attached, or appurtenant, to the land.

KEY PRINCIPLES

"First in time,
first in right."

Senior rights holders are protected during shortages. Junior rights may be curtailed.

Key Milestones



Fundamentals of Washington Water Law

Nature of rights, permit systems, relinquishment

Acquiring Water Right Permits: The Four-Part Test

Permit Requirements

RCW 90.03.290

- Water must be available
- Use must be beneficial
- No impairment
- Use must not be detrimental to the public welfare/public interest

Once Ecology grants a permit, the permit holder has a reasonable amount of time to perfect the water right.

Core Water Right Principles

- Priority date: date of application establishes seniority among water rights
- Appurtenancy: right is attached to the land where water is used
- Beneficial use: continuous, productive use is required to maintain rights
- Adjudication: courts can formally determine all rights in a basin

Groundwater Permits

Groundwater ☐ Surface Water

Groundwater Code enacted in 1945

(RCW 90.44)

- Standards for obtaining groundwater permit essentially the same as for withdrawal of surface water
- Except that Ecology also analyzes whether a proposed groundwater project is reasonable and feasible in terms of well pumping practices to be employed.
- Prior appropriation doctrine applies

The Water Code recognizes the connection between surface water and groundwater.

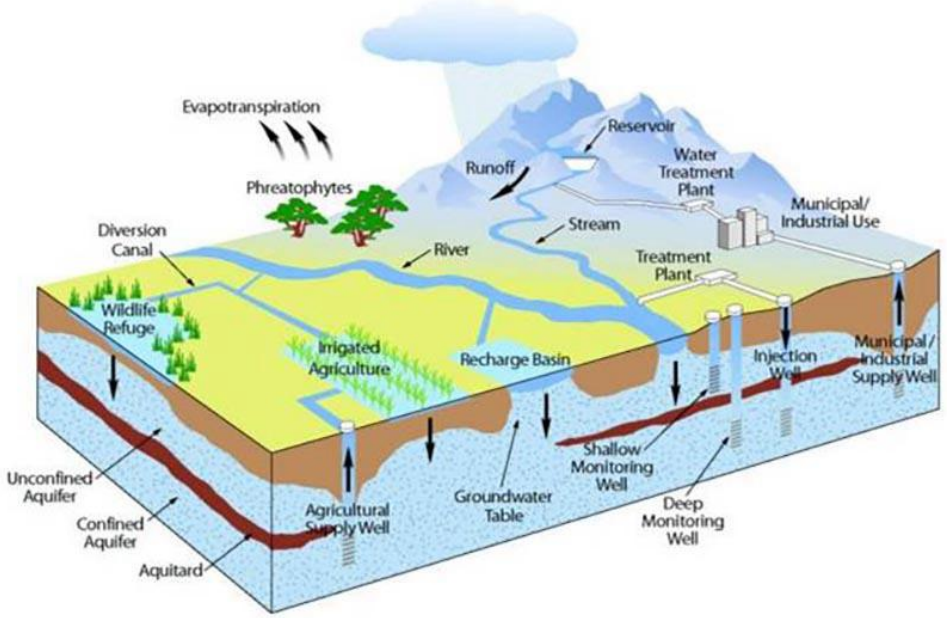


Image from the Department of Ecology, available at https://ecology.wa.gov/water-shorelines/water-quality/groundwater/groundwater-resources

Public Interest/Public Welfare

- A permit cannot be issued if the proposed use of water will be "detrimental to the public welfare" or "public interest"

- No statutory definition – Ecology discretion

- Referenced in multiple statutory sections, including:
  - RCW 90.03.290 – new water rights
  - RCW 90.03.320 – permit extensions
  - RCW 90.03.110 – adjudication
  - RCW 90.42.040 – trust water rights

- Factors that may guide Ecology's public interest determination:
  - Environmental Impact
  - Instream flows
  - Impairment
  - Tribal interest and treaty rights
  - Economic effects
  - Public health and safety
  - Land use
  - Environmental justice

Pre-Code Claims

Claims Registration Act (1967) required holders of pre-code water rights (pre-1917 for surface water and pre-1945 for groundwater) to register their claims.

Claims not filed by 1974 waived and relinquished.

Registry has re-opened for certain specific purposes since 1974.

Approximately 169,000 claims have been recorded.



Relinquishment

Beneficial Use

"Use it or lose it"

Chapter 90.14 RCW - Relinquishment

- Rights are deemed forfeited if they have not been used for 5 consecutive years without sufficient cause
- Abandoned if intentional nonuse or voluntary relinquishment

ECY can initiate forfeiture proceedings; burden shifts to holder to prove valid cause for nonuse

Sufficient Cause for Non-Use

RCW 90.14.140 exemptions include:

- Drought
- Weather
- Crop rotation
- Power development
- Determined future development
- Trust water right

Transfer of Water Rights

Transfer

- Can transfer water right from one entity to another
- Initial requirement for transfer is that a valid water right exists – extent and validity analysis
- Transfers must not injure other existing water rights holders
- Washington Supreme Court issued its first water right transfer in 1889

Change

Can change point of diversion, place of use, or purpose of use



Municipal Water Law

- Municipal rights are protected from relinquishment even during nonuse — cities need long-range planning flexibility
- Municipal Water Law enacted in 2003, chapter 90.03 RCW
  - Defines municipal water supplier
  - Validated “pumps and pipes” certificates
  - Flexibility to change place of use as service areas expand over time without losing existing rights
- Unperfected municipal rights: cities may hold placeholder rights for future growth planning
- Ecology Policy 2030 – defining municipal water supply purposes and policy on relinquishment protection

Tribal Reserved Rights

- Winters Doctrine: Federal reservations include water rights necessary to fulfill their purpose.
- Priority date tied to reservation creation; quantity limited to reservation needs.
- Reserved rights extend to groundwater and non-consumptive uses like fishing and wildlife.
- Yakima Adjudication recognized the Yakama Nation's reserved treaty right for fish:
  - "The maximum quantity to which the Indians are entitled as reserved treaty rights is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions." Priority date of "time immemorial".

Winters v. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908)

Cappaert v. United States, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976)

Arizona v. Navajo Nation, 599 U.S. 555, 561, 143 S. Ct. 1804, 216 L. Ed.2d 540 (2023)

Exempt Uses of Water

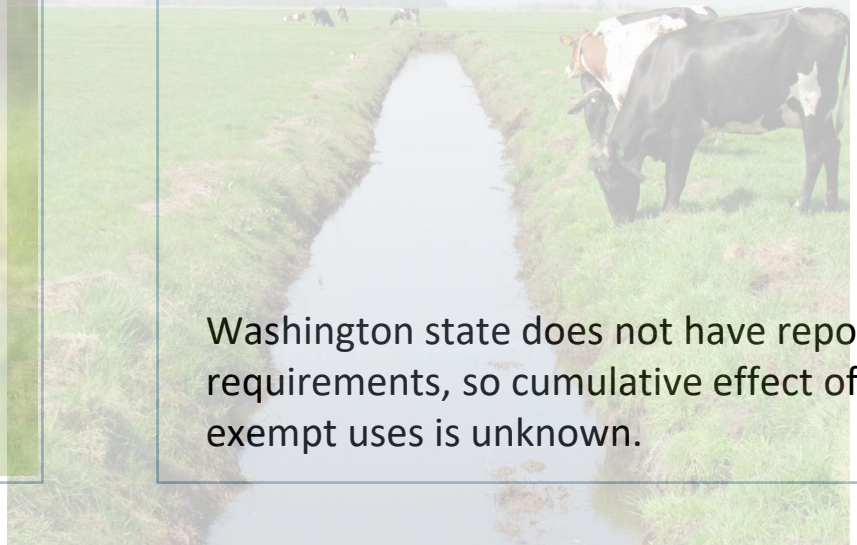
1. Stockwater (no quantity limit)

2. One-half acre lawn or noncommercial garden (no quantity limit)

3. Single or group domestic uses not exceeding 5,000 gpd

4. Industrial uses not exceeding 5,000 gpd

Although no permit requirements, exempt uses are still subject to priority system and requirement for continuous beneficial use.



Washington state does not have reporting requirements, so cumulative effect of exempt uses is unknown.

Streamflow Protection

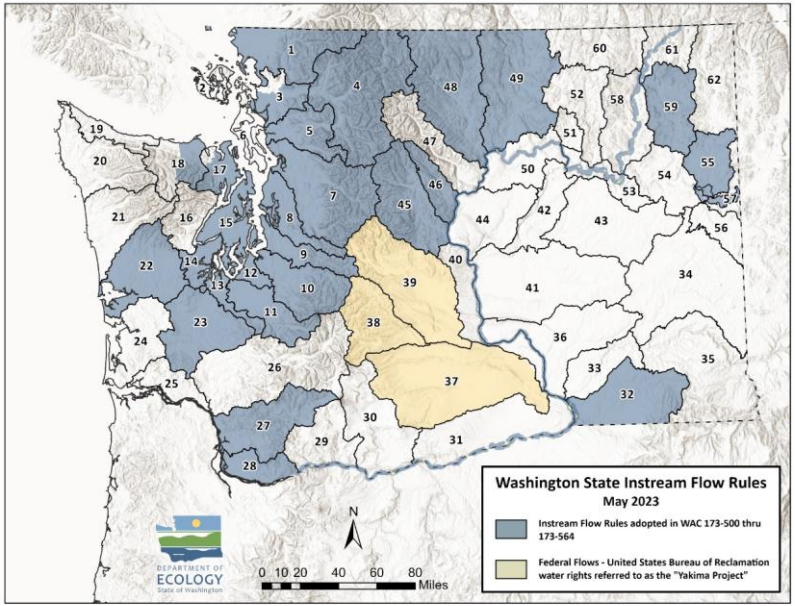
Modern water law developments

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 and Little Spokane River basins
- Last new instream flow rule adopted for Spokane River in 2015

Permitting conditioned to protect flows



Key Cases in Washington Water Law

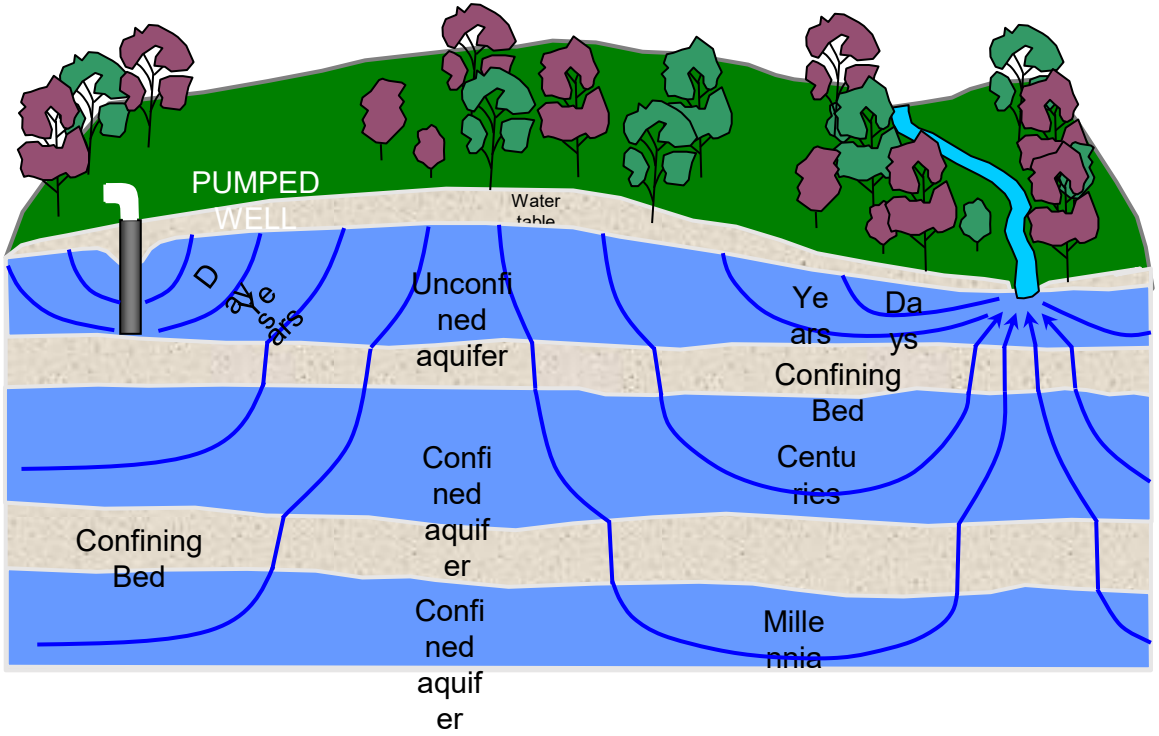
Postema (2000) and Foster (2015)

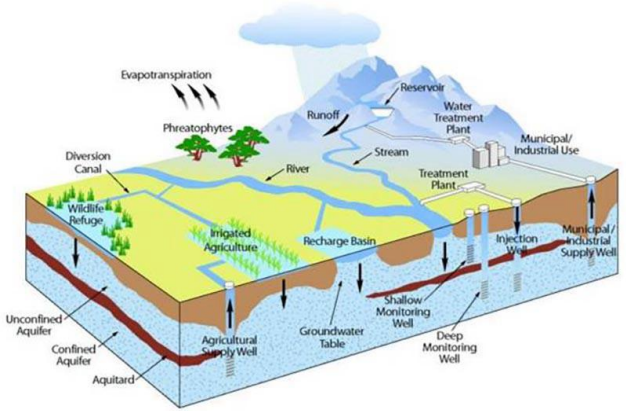
- Instream flow rights are rights subject to the same protection as other water rights
- No impairment to existing instream flow rights are permissible, including *de minimis* impairment
  - Impairment may be from modeled "*de minimis*" impacts that cannot be physically measured
  - Impairment must be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



Hydraulic Continuity

The Water Code recognizes the connection between surface water and groundwater





Water Resources Policy and Rulemaking

Current focus and challenges

Mitigation

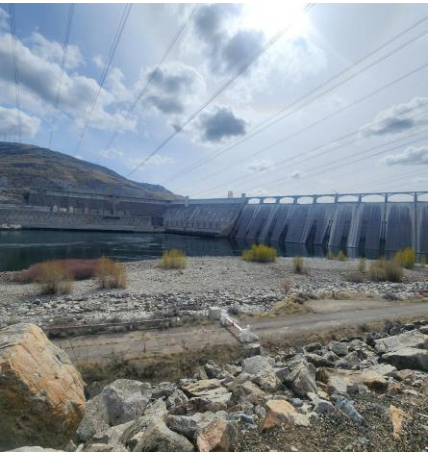
Foster Task Force (RCW 90.94.090)

- 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



Consumptive Use Policy





POL-1020 Consumptive and Nonconsumptive Water Use

Current Policy states, “Some of the above described projects may cause an increase in bank storage, evaporation rate, or preclude other uses of the water body in the vicinity of the project. The Department recognizes the consumptive nature of these factors. However, due to the complexity of quantifying these factors, it is the Department’s policy to classify the project’s water use as nonconsumptive.”

Development Schedules for Changes, POL-1280

- 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



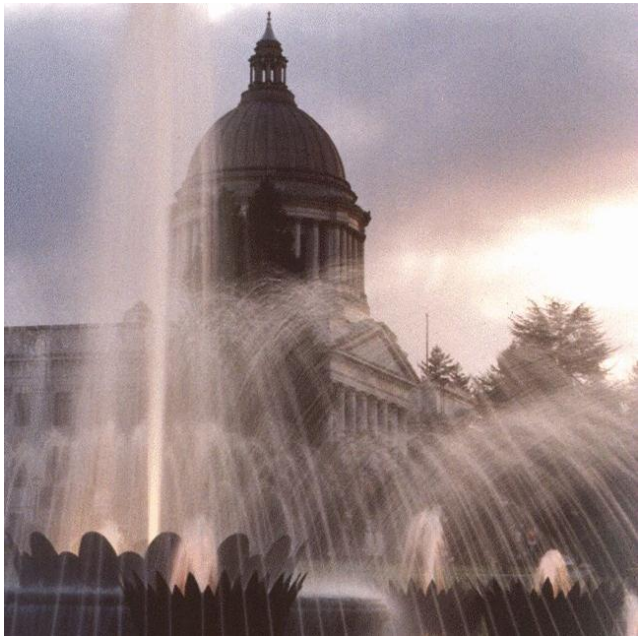


Columbia Basin Project Policy

- Describes how Ecology will implement recent statutory change to RCW 90.03.380(1)
- Affects US Bureau of Reclamation water rights in the Columbia Basin Project
- Implications from the State Supreme Court ruling in *Ecology v. Bureau of Reclamation*
- Public comment on draft ended April 17th
- Adopted policy anticipated in May 2026



Rulemaking Priorities



Current Rulemaking

- Rules required under the Streamflow Restoration Law (RCW 90.94.030)
- Drought (chapter 173-166 WAC)
- Pasco Basin (chapter 508-14 WAC)

Potential future rule amendments

- Wenatchee River Basin (chapter 173-545 WAC)
- Reclaimed Water (chapter 173-219 WAC)

Adjudication

Adjudication in general

- Fundamental aspect of Western Water Law
- Procedures in 1917 WA water code
- Washington is FAR behind other states, with less than 25 percent adjudicated (CO = 80 percent; OR = 70 percent)
- Largest (geographical) area adjudicated in Yakima Basin
- Most adjudications happened in WA before 1950

Nooksack (WRIA 1) Adjudication

- The case was filed in May 2024 in Whatcom County Superior Court
- Service of summons on water users began in March 2025
- Court claim forms due on June 1, 2027
- About 3,000 court claim forms filed
- A period of up to three years for water users to file evidence after claim is filed
- Ecology's focus has been on outreach and providing technical assistance

Emergent Issues

Key issues to watch for regulated entities

Ongoing and Future Challenges

Climate Change

Changing weather patterns and the effect on water resources create strain on pro-rated water basins and all water users.

Instream vs. Out-of-Stream

Balancing agricultural, municipal, and industrial uses against minimum instream flows for fish is increasingly contentious and litigated.

Postema and Foster

Continued challenges with updated Ecology policies, including the updated consumptive use policy.

Tribal Reserved Rights

Ongoing general adjudications (Lummi, Yakima) quantifying tribal reserved rights will reshape seniority structures across major basins.

Adjudications

Current and future adjudications will present courts with many of the issues discussed today, and test Ecology policies.

Municipal Water Law

Upcoming and ongoing adjudications will raise issues on growth and future use of inchoate water for municipalities.

Questions?

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