

Water Law

Water Right – A water right is a right to the *use* of water for beneficial purpose. It does not mean that water in and of itself is owned by the water right holder. It is also referred to as a usufructuary right.

Background – The right to use water in Washington is based on “western water law” principles. This is opposed to the doctrine of “riparian” theory of water rights which is based on the common laws inherited by the original thirteen colonies from Great Britain. These common laws made sense where no land is far from lake, stream, or underground aquifer. In a Riparian theory of water law, all of the “riparian” owners had an equal right to the use of any body of water adjoining more than one property, with various rules developed to handle disputes.

Western water law, on the other hand, was developed as the riparian principles used in the East proved inadequate during the settling of the arid West. In the West, many settlers turned their activities to mining and farming which required a guaranteed quantity of water, usually at a location far from any supply of water. As a result of these early activities, the principles of western water law were developed.

Basic Principles of Washington Water Law:

1. ***“Prior Appropriation” Doctrine*** – water rights are awarded to the person who first took the water and put it to beneficial use, without regard to riparian ownership.
2. ***Water Law Was Originally “Common Law” Developed by the Courts, But is Now Based on a Statutory System Enacted by the Legislature*** – In 1917, the legislature required all *surface* water users to obtain a permit from the state to use water; In 1945, the law was expanded to include *ground* water; and there are also a large number of pre-1917 water rights (mostly claims) which the legislature has periodically allowed to be valid if filed with the state. Only a judicial proceeding in the form of a general water rights adjudication can confirm or quantify the water rights represented by such claims.
3. ***As Among Competing Claims to a Water Source, the Law gives Priority Based on the Date When Water Was First Appropriated*** – The state gives seniority to those water rights which were first established through the beneficial use of water. *Junior* water right users are not allowed to impair the water needed for *senior* water right holders, regardless of whether the senior water right user is upstream or downstream from the junior user’s point of withdrawal.
4. ***Beneficial Use*** – A water right must be perfected by the actual diversion and use of water in order for it to be valid. It must then be used continuously by the water right holder in order to be preserved.
5. ***Elements or Conditions of a Water Right*** - A water rights holder may not change the place he diverts the water, the place he uses the water, or the purpose of use to which the water is put, without obtaining permission from the state. One such element is its priority date. Other elements include: The amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place where the water may be used.
6. ***Water Rights in Washington Cannot be Finally Fixed or Quantified Except Through a Judicial Proceeding*** – Since the enactment of state water codes (1917 & 1945), the state has collected information about water claims, permits, and certificates, including specific information about beneficial use, changes in place of use, changes in purpose of use, changes in land ownership or other factors which would affect the determination of the extent of individual water rights. However, this information may not be accurate or complete. To the extent that quantification or prioritization of water rights is necessary or desirable, only a court can make such a determination. This may be in the

form of a general adjudication in which all of the water rights in a particular stream or watershed are determined, or it may be determined between two or more competing claims for water in the same stream.

New Water Right Applications – The state agency charged with managing the state’s water resources is the state Department of Ecology. For a person to obtain a water right, an application must first be filed with the DOE which then makes a determination based upon a four-part test:

1. Is water available?
2. What are the beneficial uses of water that would be made under the permit?
3. Does the proposed water right impair existing water rights?
4. Does the proposed water right detrimentally affect the public welfare?

If 1, 3, or 4 are found to be problematic, DOE must reject the application.

A water permit is then issued to the person with the water right application and a time-table for constructing the infrastructure needed to withdraw water and to put it beneficial use. Once the water right holder complies with the terms and schedule of his permit, he is then issued a water rights certificate. The priority date of this water right certificate is the date in which the application was filed with the DOE.

Modifications to Existing Water Rights - Existing water rights can be modified with the approval of DOE. The terms in statute which refer to these modifications are changes, transfers, and amendments. First and foremost, any modification which is being considered can not be allowed to impair any other existing water right. This includes both junior and senior water rights. In addition, the priority date of any approved modification remains the same as the original water right.

Relinquishment – In Washington, a person who fails to use all or a part of their water right for five consecutive years relinquishes the right or the unused portion of the right to the state. Prior to this 1967 statutory requirement, case law on abandonment was the means by which a water right was relinquished. In statute, there are exemptions to relinquishment if sufficient cause can be established. In addition, there are some water rights which are exempt from relinquishment. Examples of these are trust water rights and municipal water rights. Furthermore, there are federally reserved water rights (which includes federal agencies and tribal governments) which are exempt from the state’s relinquishment statutes.

Watershed Planning - Many of Washington’s watersheds units, also known as WRIA’s (Watershed Resource Inventory Areas), of which there are sixty-two, have a watershed planning process underway or they may have recently completed their plan. This process involves local agencies and individuals who plan what the present water uses are for the watershed and what the future has in store for these watersheds.

Setting Instream Flows - Instream flows are also being set throughout the state which can be a part of the watershed planning process or the DOE can make a determination on their own as to what amount of water is needed for a stream or river. Once these instream flows are set, then they have a water right whose priority date is the date they are set into rule. All new water rights issued after this date are junior to the instream flow which is set in rule.

Processing of New Water Right Applications By DOE

It is under these circumstances that DOE must manage our state’s water resources. Generally, the DOE is reluctant to issue new water rights. Even though there are approximately 5,400 new water right

applications with the DOE, they have only processed a small percentage in the past twelve months. The following are some of the reasons for this slow processing of new water rights:

1. The watershed planning process is presently underway; let the planners determine if new water is available.
2. Instream flows levels are being determined or have already been set and there is no new water available.
3. Some basins have already been closed to new appropriations of water as in the Colville basin.
4. Ensuring that no existing water right holder will be impaired on account of a new water right takes time.
5. DOE needs funding for more staff to review new water right applications.

Amending, Transferring, or Changes to Existing Water Right Applications By DOE

DOE is also responsible for permitting any modifications to existing water rights. As part of this process, DOE goes at great length to make sure the water right has never been voluntarily abandoned or relinquished under the state's "use it or lose it" provision. Prior to 2001, the permitting process for both new and existing water rights were being processed as if they were in a single line. The 2001 legislature created two processing lines so as to allow DOE to work with already existing water rights and speed up this process. This legislative change and additional funding has allowed DOE to reduce their backlog of these water rights considerably.

Water Resource Difficulties in Washington

Water management of our state's water among water holders becomes very complicated as there is a tremendous number of historical claims (these predate the 1917 surface code and the 1945 ground water code) which have never been confirmed as being valid in a general adjudication. The number of registered historical claims in our state is estimated to be 170,000. Sometimes these claims are referred to as "paper water rights" and are used to express concern that certain streams/ivers are over appropriated even though water is not being used by the claimants.

In Washington there have been eighty-two adjudications which represent about 10% of the land base. But most of these adjudications were done in the 1920's and 1930's. Many more water rights have been issued since that time for these basins and information on whether these earlier established rights have been abandoned or relinquished is unknown.

Presently, the state's only current general adjudication, *Acquavella Adjudication*, appears to be coming to a close. This adjudication in the Yakima Basin was filed in 1977 and involved the Yakama Indian Nation. It has been ongoing for the past 37 years. Once the decree becomes final, then the court has no provision to ongoing updates of these adjudicated basins.

Some Problems Confronting Water Right Holders

1) In the past, many water right holders have attempted to make modifications to their water rights, but the process has taken years. Many cannot afford this drawn out process as they may want to use their existing water for the processing of produce, or even the moving or replacement of an existing well on the same property.

2) Many producers are practicing good conservation measures and using much less water. They may have also planted crops requiring large amounts of water such as potatoes and replanted their fields in vineyards which use much less water. If these farmers attempt to modify their existing water right, the DOE will reduce their original water right in the amount they have conserved water under the relinquishment statutes.

3) A number of dairies in the state have been using waterwells for their operation under the stockwatering statute which allows any amount of water for livestock. The state DOE believes the operation of a dairy is a commercial operation which is limited to only 5,000 gallons of water per day. If these dairies do not have a water right certificate, they could be considered to be in violation of state law. Many lending institutions are requiring dairymen to show proof of certificated water or else they do not qualify for a loan to run or expand their operation.

4) Instream flows are being set into rule by the DOE and as such they are a water right. Some streams and rivers have instream flow levels which are not being met which have closed off these waterways to all new appropriations of water.

5) Watershed planning process is underway throughout much of the state. DOE is not issuing any new appropriations of water while this process is underway in these watersheds.

In general, water right holders do not have the flexibility to use their existing water rights in order to diversify their operations, while at the same time the state DOE is reluctant to appropriate any new water for out of stream uses.

RECENT WATER LAW ISSUES

Stockwatering – Attorney General Opinion

Legislative frustration over the department of Ecology's limitation of 5,000 gallons per day for a stockwater right caused Rep. Holmquist and Senator Morton to solicit a formal attorney general opinion from State Attorney General, Rob McKenna. The opinion was very clear in articulating the 1945 statute concerning stockwatering rights which is the amount of water needed for livestock is unlimited. The effect of this opinion has proven very beneficial to the livestock industry and removed the uncertainty of their stockwatering rights. The director of the department of Ecology has publicly stated his department will implement department policies and actions which reflect this interpretation of state law. The following is the web link of the text of the attorney general opinion:

http://www.atg.wa.gov/opinions/2005/2005_17.htm

Brewery Water Rights – Olympia, WA

An example of the lack of available water for growing communities can be seen with a recent legal action executed by the city of Olympia against one of the largest water right holders, All American Bottled Water Company, in the Puget Sound. Since April of 2004, when All American purchased the former Olympia Brewery, including its 7,420 acre feet of water, the company has not put to beneficial use any of its water. In order to protect this water right from relinquishment, the city of Olympia filed a lawsuit to condemn the water right based on a higher public good which is allowed under an obscure state law. This legal action brought All American and the cities of Olympia, Tumwater and Lacey into a contractual agreement for the purchase of this large water right. (Note: the cities of Tumwater and Lacey reached an agreement with Olympia to jointly purchase the water rights after Olympia initiated the lawsuit). The amount of the purchase agreement is \$1,750 for every acre-foot which the state department of Ecology determines is valid, i.e. not been relinquished. This maneuver was very important to the city of Lacey as it is rapidly reaching the upper limits of its water right. It is projected that Lacey will reach its water right within 5 to 10 years. Since the department of Ecology has virtually stopped issuing new water rights, the City of Lacey would soon have been forced to place a moratorium on all new construction within its city limits and its urban growth area. Other cities around the state are currently experiencing similar problems with growth and an inability to obtain new water rights from the department.