

Four Recent State Supreme Court Decisions and their
impacts on Washington's Water Rights Permitting
Future and on Permit Exempt Wells
And a Recently Adopted Legislative Solution



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ECOLOGY

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Four Recent Supreme Court decisions have *drastically changed the water availability landscape in Washington*

- 1) Postema v. PCHB** **October 19, 2000**
Law does not allow for the “de-minimus” impairment of existing water rights. Any effect (even modeled) on the flow or level of surface water in closed streams means impairment.
- 2) Swinomish Tribe v. Ecology** **October 3, 2013**
Overriding Consideration of the Public Interest (OCPI) cannot be used to justify allocating water (creating reservations) for domestic use or to justify water use that impairs existing instream flows.
- 3) Foster v. City of Yelm and Department of Ecology** **October 8, 2015**
Ecology cannot use “out-of-kind” mitigation to offset impairment of instream flows or use OCPI to justify permanent allocations of water.
- 4) Whatcom County v. Hirst and Futurewise** **October 6, 2016**
County has an independent obligation to ensure that new permit-exempt uses do not impair flows and closures when making water availability determinations nor can the county rely on the exclusion of permit-exempt groundwater from regulation in the instream flow rule area

These Court Decisions have to be looked at with the following added context

- **1855 Treaties between the United States** and
 - Ensuing Boldt Decision of 1974
- **Endangered Species Act of 1973**
 - Ensuing listing of Chinook, Chum, Sockeye Salmon, Bull Trout and Steelhead as threatened in 1999
- Increasing awareness of the degree of ***“interconnectedness”*** between surface water and groundwater
- **Demand for water is highest when supply is lowest**
 - About 70% of all water use in Washington is for IRRIGATION

Water Law Background

- RCW 90.03 enacted in 1917
- RCW 90.44 (including the groundwater permit exemption) enacted 1945
- Ecology adopted instream flow rules under authority of chapters 90.22 and 90.54 RCW, the Water Resources Act of 1971
- Before 1990's, instream flow rules regulated Ecology permitting of surface water and groundwater in direct (or significant) hydraulic continuity
- Under the *Postema* Supreme Court decision in 2000, the Court ruled that:

“even *de minimus* impairment could not be permitted”

Court recognized that there is some degree of connection between most all surface and groundwater

1855 Tribal Treaties and ESA-Listed Species in WA place a special emphasis on streamflow protection

Federal Court Decisions in 1975 and 1979 REAFFIRMED the reserved right of Indian tribes in Washington to act alongside the state as co-managers of salmon and other fish, and to continue harvesting them in accordance with the various treaties that the United States had signed with the Tribes in 1855.



Chinook Salmon



Chum Salmon



Steelhead



Bull Trout



Sockeye Salmon

“The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all other citizens of the Territory, and of erecting temporary houses for the purpose of curing them, together with the privileges of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.”

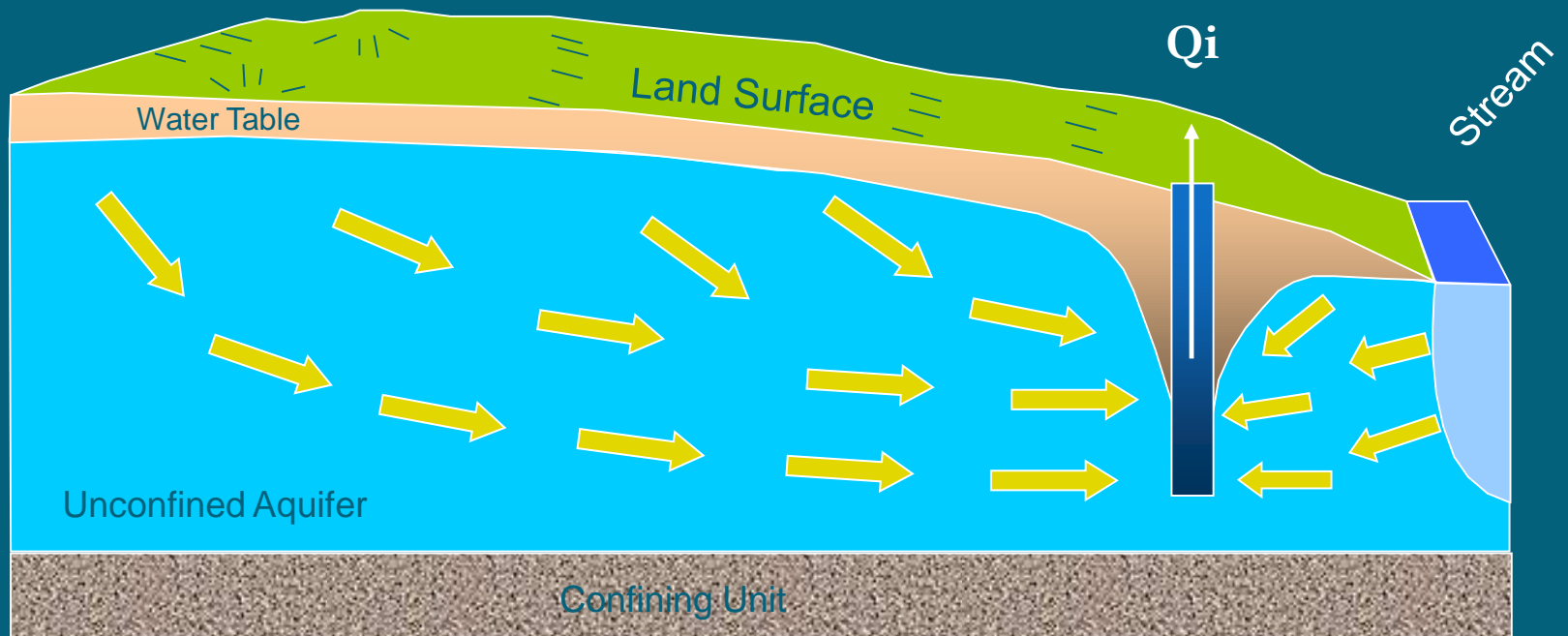
Hydraulic Continuity

- *The interconnection between ground water (aquifers) and surface water sources (rivers, streams and lakes).*
- An aquifer is in hydraulic continuity with wetlands, lakes, streams, rivers or other surface water bodies whenever it is discharging to these water bodies....
- ...continuity also exists when an aquifer is being recharged by surface water.
- Hydraulically connected ground water and surface water cannot be considered as independent resources.

**A withdrawal from one
will have some effect on the other.**

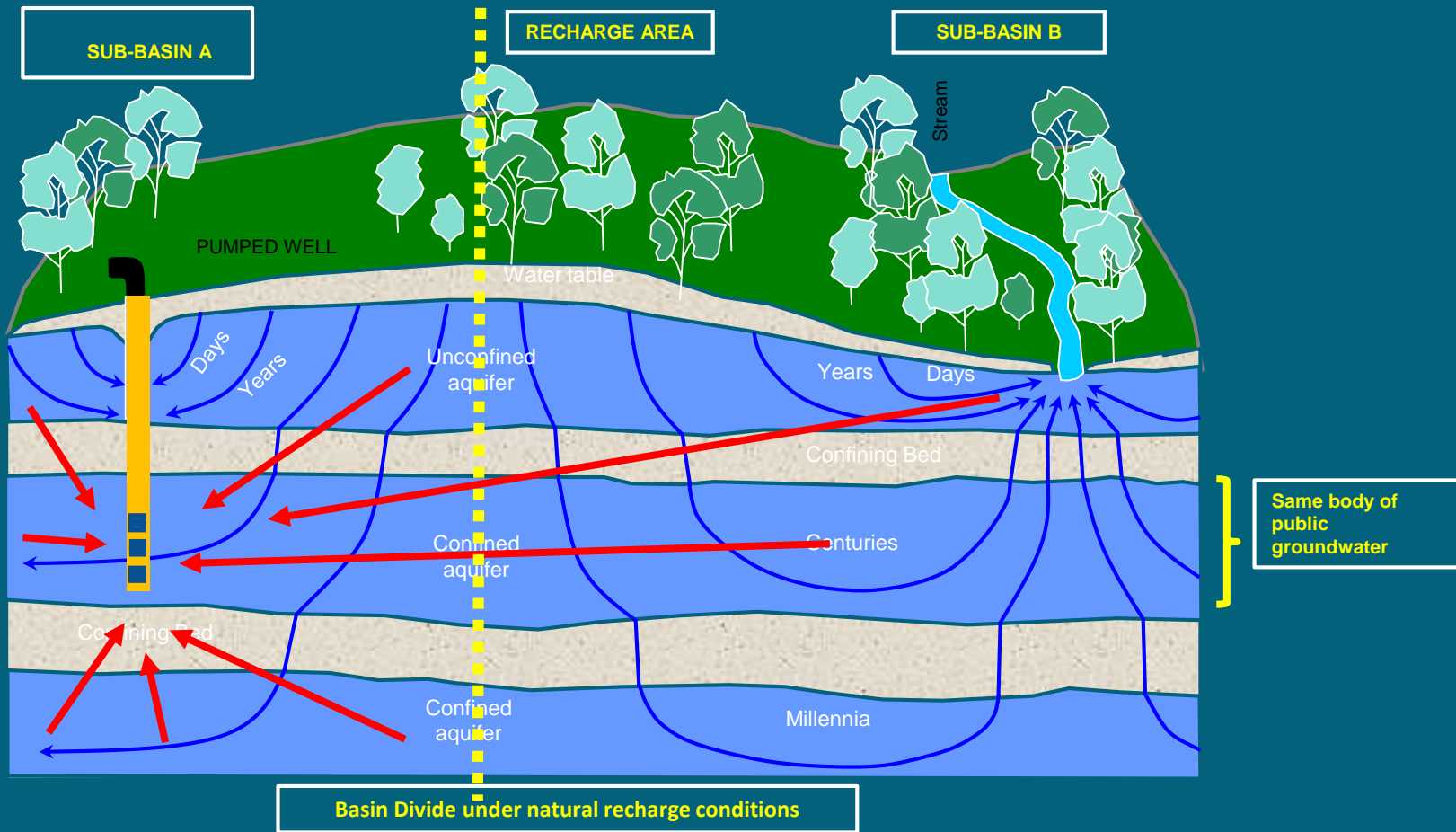
Hydraulic Continuity

Simple Example



Hydraulic Continuity

More complex example

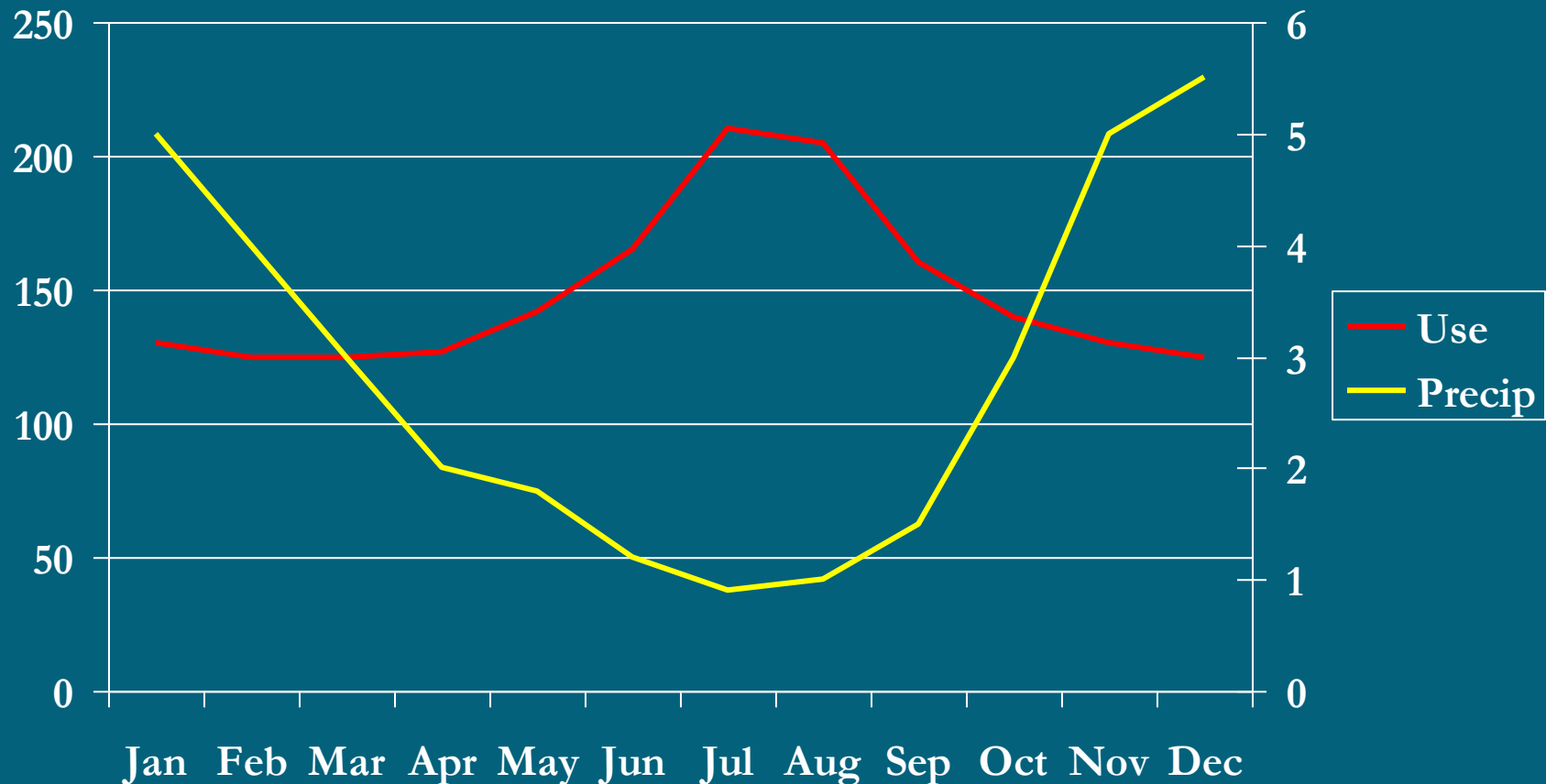


Ground-water flow paths vary greatly in length, depth, and travel time from points of recharge to points of discharge in the ground-water system

Our outdoor water use is highest when supply is the lowest

Use in gallons
per day

Precip in Inches



Postema v. Pollution Control Hearings Board

October 19, 2000

ISSUE:

What is Ecology's obligation when analyzing a water right application to withdraw groundwater that is "hydraulically" connected to surface water? Postema contested Ecology's denial of an application for a new groundwater use that was in hydraulic continuity with a closed stream (Bear Creek in Snohomish County)

Court ruled in Ecology's favor and also ruled:

- Ecology must determine impairment on a case-by-case basis.
- Hydraulic continuity between GW and SW (with unmet instream flows) is not by itself a sufficient reason to determine impairment
- "A minimum instream flow is an appropriation subject to the same protection as other water rights"
- Since the law does not allow for "de minimus" impairment of existing rights – any effect on the flow or level of the surface water in closed streams would mean impairment

This decision defined the "one molecule" standard OR de minimus impacts constitute impairment no matter whether they are observable or significant.

Swinomish v. Ecology

October 3, 2013

WAC 173-503 (Skagit Instream flow rule adopted in 2001).

Rule amended in 2006 to establish reservation of water. Ecology justified this reservation by using “overriding consideration of public interest” (OCPI) provision in state law. Swinomish Tribe appealed the 2006 rule revision – arguing that Ecology acted beyond its statutory authority by applying OCPI to create reservations and allowing aggregate uses of water to impair previously established instream flow levels.

Supreme Court ruled in favor of Swinomish Tribe and:

- Invalidated the 2006 Skagit Instream Flow Rule that had the reservation,
- Ruled that Ecology cannot use OCPI to justify water use that impairs existing instream flows,
- Clarified that OCPI cannot be used to justify allocating water for domestic use
- Said that OCPI is a very narrow exception and requires extraordinary, circumstances before minimum flows can be impaired.

This decision directed Ecology NOT to use OCPI in the context of rulemaking to justify establishing reservations for future uses of water that would impair instream flows.

Foster v. City of Yelm and Dept. Of Ecology

October 8, 2015

- In the Foster v. City of Yelm and Department of Ecology decision, the State Supreme Court ruled that Ecology erred in approving a water right permit for the city of Yelm that would have provided water for future growth – a supply for about 2800 homes.
- The court canceled the permit, determining that it would impair minimum stream flows in the Deschutes and Nisqually basins. Ecology had conditioned approval on an extensive “in-kind” (water-for-water) and “out-of-kind” (not “water-for-water”) mitigation package to offset water use from the water right and used OCPI to justify this decision*.
- Washington State Supreme Court ruled that:
 - Ecology cannot use OCPI to justify permanent allocation of water
 - No impairment of instream flows are permissible, regardless of magnitude or ecological impact (reaffirming their 2000 decision in Postema)
 - Ecology cannot use out-of-kind mitigation (i.e. habitat improvements) to address impairment of instream flows

This decision directed Ecology NOT to use OCPI as a balancing tool or offset for any permanent appropriation of water and emphasized that mitigation must be in-kind, in-time and in-place – this also limits Ecology’s ability to approve change applications that do not perfectly match the season and place of use.

* *Yelm’s mitigation package is actually a joint mitigation package shared with Lacey and Olympia*

Whatcom County v. Hirst (and Futurewise)

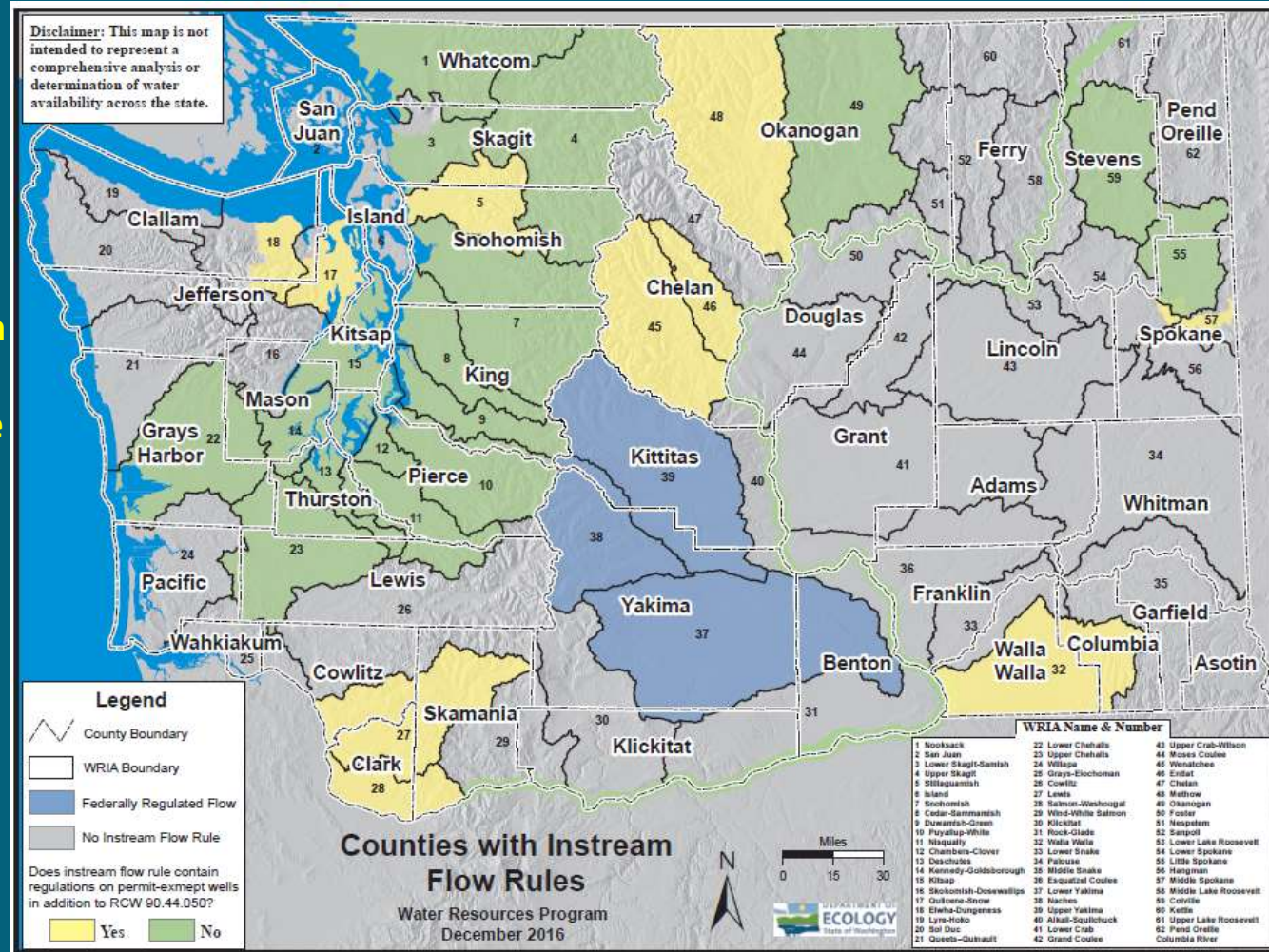
October 6, 2016

- In the [Whatcom County vs. Hirst, Futurewise, et al. decision](#), the Supreme Court ruled that the county failed to comply with the Growth Management Act's (GMA) requirements to protect water resources. **It asks the county to go beyond Ecology's instream flow rule for the Nooksack River when proving legal availability of water for rural development.**
- Court ruled that **Whatcom County's comprehensive plan and zoning code fail to comply with the GMA requirements to protect water resources-**
 - because they allow the approval of subdivisions and issuance of building permits for homes that would rely on permit-exempt wells for water supply in areas that are closed to new water uses under the Nooksack rule.
 - court held that **GMA provisions requiring protection of water resources in land-use planning and permitting by counties requires protection of instream flows from impacts of permit-exempt wells -- even though the Nooksack rule does not expressly subject permit-exempt groundwater use to the rule's minimum instream flows and stream closures.**

This decision created rural land use decision making impacts in many WA counties with regards to the 'legal' availability of groundwater for permit exempt wells.

Instream Flow Regulations

- There are 62 Water Resources Inventory Areas (WRIA's) in the state
- 27 of these have instream flows set by rule, and there are 3 that have a de facto instream flow dues to an adjudication
- If minimum flow levels not met for > 7 consecutive days, basin is considered CLOSED
- Some of the instream flows rules have a reservation of water and some rules do not



Challenge(s) Faced as a Result of these Court Decisions

- Under Postema: an impact to a closed stream, or one that isn't meeting flows regularly, **is impairment**
- It's virtually impossible for a well within any given watershed to not have any impact on surface water (lake, stream or river)—the exception being marine water discharges. Groundwater and surface water is connected in some (however small and indirect) way.
- It's virtually impossible to manage “on-off” schemes for wells to address periodic instream flow exceedances (different flow paths, timing of impacts to streams, enforcement issues).
- As a result for the Hirst decision, it would be difficult to do a hydrogeological evaluation that will **not show at least a “de-minimus” impairment to the stream.** While in some cases, based on location and well depth, this could be possible, it will be a costly evaluation to conduct.
- In watersheds with an existing reservation, such as the Dungeness, Quilcene-Snow, Lewis and Salmon-Washougal, water is legally available (for a fee in the Dungeness) to offset impacts from future wells (until the reservation is used up).

ESSB 6091 – a New Law Adopted

Washington state adopted a new streamflow restoration law in response to the “Hirst decision.” The law, [Engrossed Substitute Senate Bill 6091](#), was passed on Jan. 18, 2018, and signed by Gov. Inslee the next day.

The law helps protect water resources while providing water for families in rural Washington.

Summary of the new law

- Focuses on 15 watersheds that were impacted by the Hirst decision and also establishes standards for rural residential permit-exempt wells in the rest of the state.
 - The law divides the 15 basins into those that have a previously adopted watershed plan and those that did not.
- Allows counties with those 15 watersheds to rely on our instream flow rules in preparing comprehensive plans and development regulations and for water availability determinations.
- Allows rural residents to have access to water from permit-exempt wells to build a home.
- Lays out these interim standards that will apply until local committees develop plans to be adopted into rule:
 - Allows a maximum of 950 or 3,000 gallons per day for domestic water use, depending on the watershed.
 - Establishes a one-time \$500 fee for landowners building a home using a permit-exempt well in the affected areas.
- Retains the current maximum of 5,000 gallons per day limit for permit-exempt domestic water use in watersheds that do not have existing instream flow rules.
- Creates a Joint Legislative Task Force to address the Foster v. Yelm Supreme Court Decision of 2015 and identifies 5 water right applications a “Foster pilots” (Bertrand Cr WID, Port Orchard, Sumner, Spanaway and Yelm) eligible for processing.
- Invests \$300 million over the next 15 years in projects that will help fish and streamflows.

Watersheds with previously adopted plans

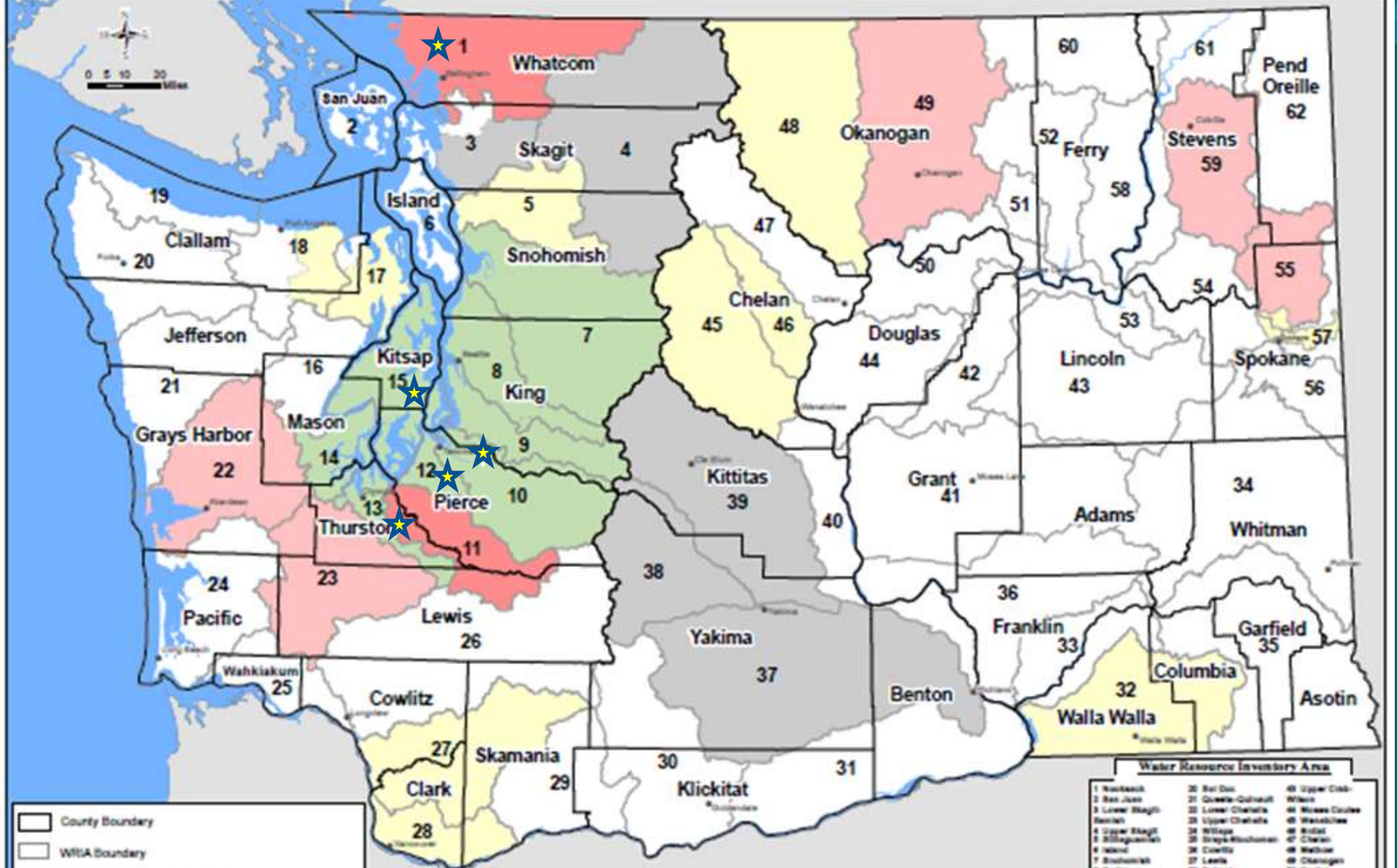
- Watersheds with previously adopted watershed plans are the Nooksack (1), Nisqually (11), Lower Chehalis (22), Upper Chehalis (23), Okanogan (49), Little Spokane (55), and Colville (59).
 - For these seven basins, local watershed planning units are to update the watershed plan. We are obligated to assess if the plan results in a net ecological benefit.
- The law identifies the Nooksack and Nisqually basins as the first two to be completed.
 - They have until February 2019 to adopt a plan; if they fail to do so, we must adopt related rules no later than August 2020.
- Planning units in the Lower Chehalis, Upper Chehalis, Okanogan, Little Spokane, and Colville basins have until February 2021 to develop their plans.
- For these seven watersheds, the **maximum annual average withdrawal is 3,000 gallons per day per connection.**

Watersheds without previously adopted plans

- Eight other watersheds do not have previously adopted watershed plans. They are Snohomish (7), Cedar-Sammamish (8), Duwamish-Green (9), Puyallup-White (10), Chambers-Clover (12), Deschutes (13), Kennedy-Goldsborough (14), and Kitsap (15).
 - For these eight basins: Ecology to establish and chair watershed committees and invite representatives from local governments, tribes, and interest groups.
- The plans for these watersheds are due June 30, 2021.
- The maximum annual average withdrawal is 950 gallons per day per connection. During drought, Ecology may curtail this to be 350 gallons per day per connection for indoor use only.
- Counties in these areas have to ensure that building permit applicants adequately manage stormwater onsite.

What about the rest of the State's watersheds?

- Watersheds with instream flow regulations and a reservation for permit exempt wells – those rules apply for future permit exempt wells.
 - [WRIAs Quilcene-Snow (17), **Dungeness only (18)**, Lewis (27), Salmon-Washougal (28), Walla² (32), Wenatchee (45), Entiat (46) and Methow (48)]
- The Upper and Lower Skagit Watersheds (WRIAs 3 and 4) have “additional requirements” and the Lower Yakima (37), Naches (38) and Upper Yakima (39) may have additional requirements imposed to satisfy adjudicated water rights.
- All the rest of the WRIAs in the state have no instream flow regulations and the 4 exemptions under RCW 90.44.050 apply:
 1. Providing water for **livestock (no gallon per day limit or acre restriction)**
 2. Watering a **non-commercial lawn or garden one-half acre** in size or less **(no gallon per day limit)**
 3. Providing water for a **single home or groups of homes (limited to 5,000 gallons per day)**
 4. Providing water for **industrial purposes, [including commercial irrigation] (limited to 5,000 gallons per day but no acre limit).**



Domestic Permit-exempt Withdrawals: New Regulations (2018 Legislation: ESSB 6091)

- County Boundary
- WRIA Boundary
- Watershed plan: update due 2019
- Watershed plan: update due 2021
- Watershed restoration and enhancement plan: due 2021
- Existing rule that regulates permit-exempt uses
- Other requirements apply
- No Instream Flow Rule (See page 2 for details)

★ Foster Pilot locations

Water Resource Inventory Area		
1 Whatcom	20 Bell	49 Upper Cowlitz
2 San Juan	21 Grays Harbor	50 Lower Cowlitz
3 Lower Skagit	22 Lower Chinook	51 Lewis & Clark
4 Upper Skagit	23 Upper Chinook	52 Wahkiakum
5 Snohomish	24 Willapa	53 Chelan
6 Island	25 Grays-Rochester	54 Walla Walla
7 King	26 Cowlitz	55 Okanogan
8 Pierce	27 Lewis	56 Chelan
9 Pierce	28 Bell	57 Douglas
10 Pierce	29 Willapa	58 Franklin
11 Lewis	30 Willapa	59 Adams
12 Pierce	31 Klickitat	60 Whitman
13 Pierce	32 Rock-Silver	61 Garfield
14 Mason	33 Walla Walla	62 Asotin
15 Kitsap	34 Franklin	
16 Mason	35 Walla Walla	
17 Island	36 Franklin	
18 Clallam	37 Benton	
19 Clallam	38 Yakima	
20 Clallam	39 Kittitas	
	40 Grant	
	41 Grant	
	42 Douglas	
	43 Lincoln	
	44 Douglas	
	45 Chelan	
	46 Chelan	
	47 Douglas	
	48 Okanogan	
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Jan. 24, 2018



What is domestic use?

- Legislature did not define “domestic use” in the new law.
- Legislature chose to specify that during a drought, only 350 gallons per day (GPD) may be used for “indoor domestic use” in selected basins.
- This distinction leads Ecology to interpret that the larger quantities authorized in non-drought years (950 or 3,000 GPD, depending on which basin) include indoor and outdoor uses for a household (including watering of a lawn and noncommercial garden).

Also...

- **New fees.** The law imposes a \$500 fee, which is paid to the local government at the time of applying for a building permit. The new fee is not required to be paid at the time a well is drilled. The new \$500 fee is separate and in addition to existing well drilling fees required under chapter 18.104 RCW.
- **County obligations for recording.** Under Sections 202(5)(a) and 203(4)(a)(i), counties must record relevant water use restrictions, which would be either limits to 950 GPD or 3,000 GPD, depending on the specific watershed. In addition, under Section 203(4)(b), counties would need to record the potential for curtailment to 350 GPD during a declared drought, where applicable.
- **Low-impact development.** In basins identified in Section 203 ([Green-colored WRIs on map](#)), building permit recipients are required to employ low-impact development techniques. For counties or cities that do not have local low-impact development standards, [guidance is available on our website](#).

Impacts on Ecology water right permitting

- Ecology's approach to water right permit decisions will not change.
- The law does did not modify sections of statute affecting our permitting decisions, authority, and approach **EXCEPT** as it relates to processing permits under the "Foster Pilot" in Sections 301 and 302.
- We are evaluating how best to provide procedural guidance for the five identified projects.

Two Metering Pilots

- The law directs Ecology to initiate a metering pilot program in the **Dungeness Basin** and in **Kittitas County**.
- Ecology to work with the entities that are implementing existing programs (the Washington Water Trust in the Dungeness Basin and with Kittitas County) to implement this section.
- Currently developing a process to purchase and provide meters.
- We anticipate paying for new meters once we have this process in place; we do not intend to reimburse homeowners who bought meters before we launch the new process. Landowners wanting to build immediately using a permit-exempt well in these basins may purchase their own meter through the existing program, or wait until we have our new process in place to obtain a meter free of charge.

Section 301 – the “Foster” Fix

Joint Legislative task force created to develop and recommend a mitigation sequencing process and scoring system to address such appropriations and to review the Foster v. Department of Ecology Supreme Court Decision.

Task Force to include:

- **2 members of House**
- **2 members of Senate**
- **Ecology**
- **Dept. of Fish and Wildlife**
- **Dept. of Agriculture**

ONE representative from each of the following groups, appointed by consensus of the co-chairs of the task force:

- **Organization representing the farming industry**
- **Organization representing Washington cities**
- **Organization representing municipal water purveyors**
- **Organization representing business interests**

AND

- **Two representatives from an environmental advocacy organization(s)**
- **Representatives of two federally recognized Indian Tribes, one invited by recommendation of NW Indian Fisheries Commission and one invited by recommendation of the Columbia River Intertribal Fish Commission**

First task force meeting is by June 30, 2018

Recommendations to Legislature from Task Force by November 15, 2019

Foster Pilot Projects

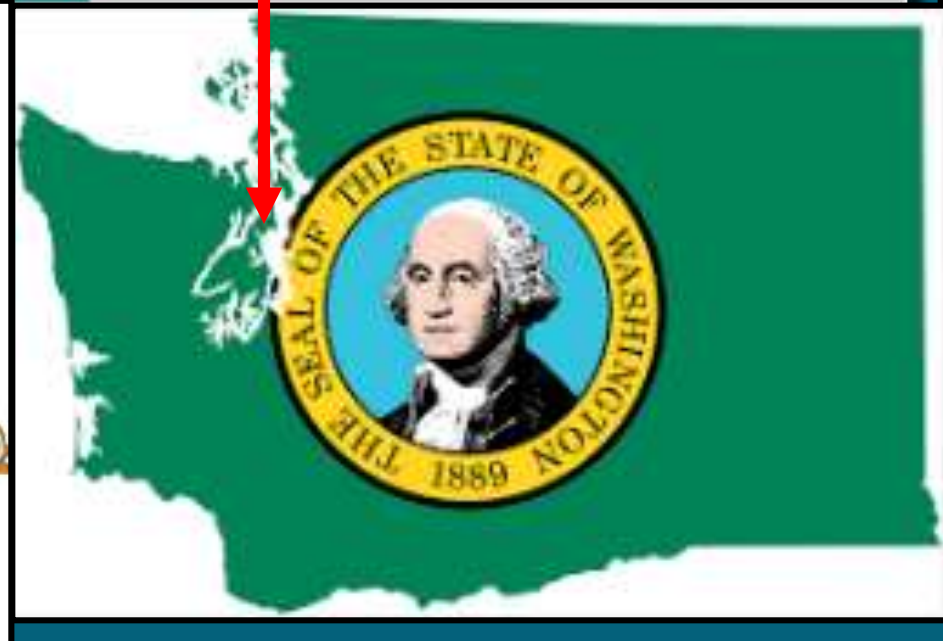
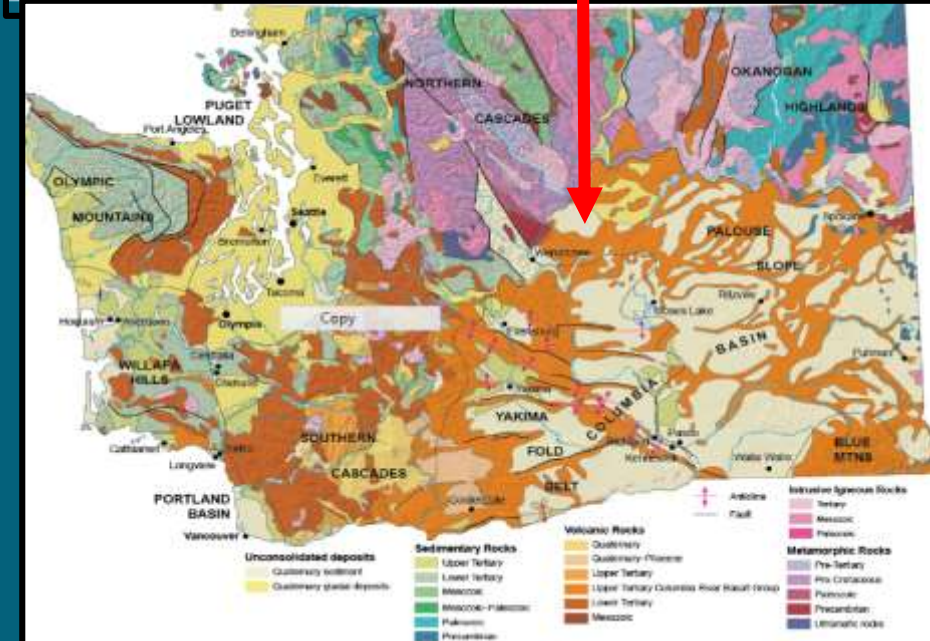
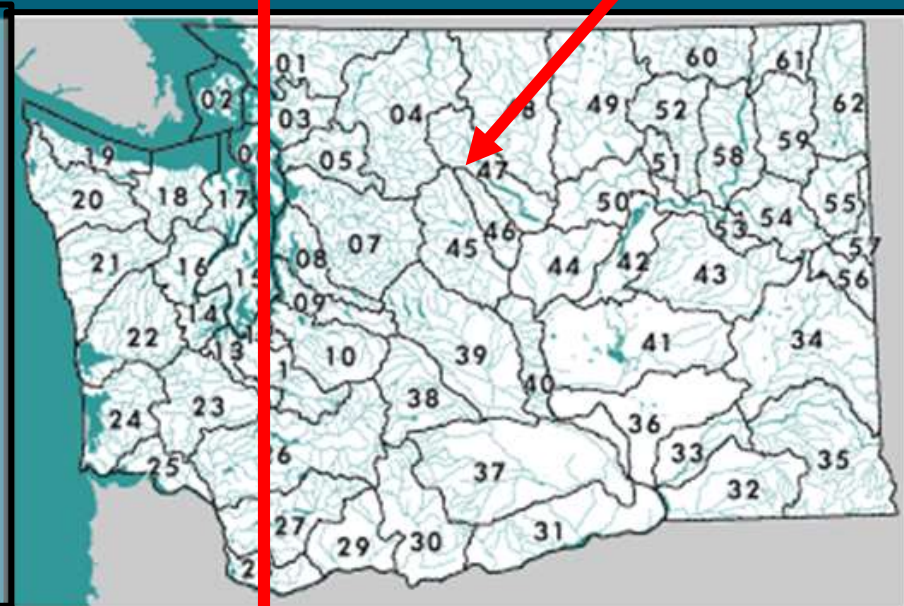
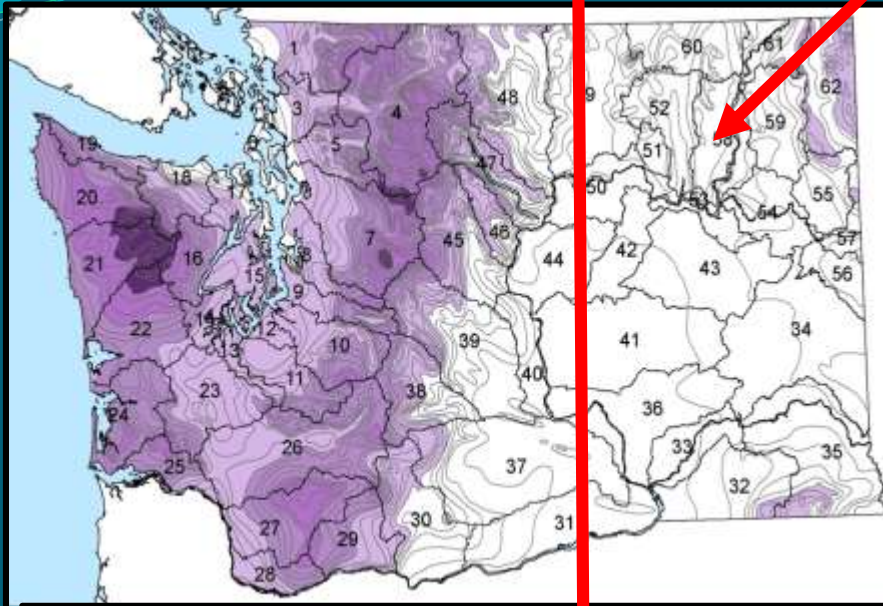
Five Foster Pilots Projects identified in the new law:

1. City of Sumner – WRIA 10
 2. City of Yelm – WRIA 11
 3. Spanaway Water District – WRIA 12
 4. City of Port Orchard – WRIA 15
 5. Bertrand Creek Watershed Improvement District – WRIA 1
- Entities to notify Ecology by July 1, 2018 of their interest (and willing to do under the Cost Reimbursement Agreement approach.
 - Ecology to furnish task force by November 15, 2018 information on conceptual mitigation plans for each pilot project
 - Joint legislative task force expires on December 31, 2019

Conclusions

- Allows rural growth to continue ahead of the water for water solutions
- Primarily impacts future permit exempt wells and building permits in the 15 “pre-2000 rule” watersheds:
 - WRIAs 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, 22/23, 49, 55 and 59
- Lays out following interim standards that will apply until local committees develop plans to be adopted into rule:
 - Allows a maximum of 950 or 3,000 gallons per day for domestic water use, depending on the watershed.
 - Establishes a one-time \$500 fee for landowners building a home using a permit-exempt well in the affected areas.
- Retains the current maximum of 5,000 gallons per day limit for permit-exempt domestic water use in watersheds that do not have existing instream flow rules.
- Invests \$300 million over the next 15 years in projects that will help streamflows and fish.

Big Challenge: Fitting the wide variation in precipitation/recharge, surficial water supply and complex hydrogeological conditions with legal and Court directed statutes/decisions...



Thank you



Ecology Water Resources Website:

<https://ecology.wa.gov/Water-Shorelines/Water-supply>

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