

Washington State Water Law

A Primer



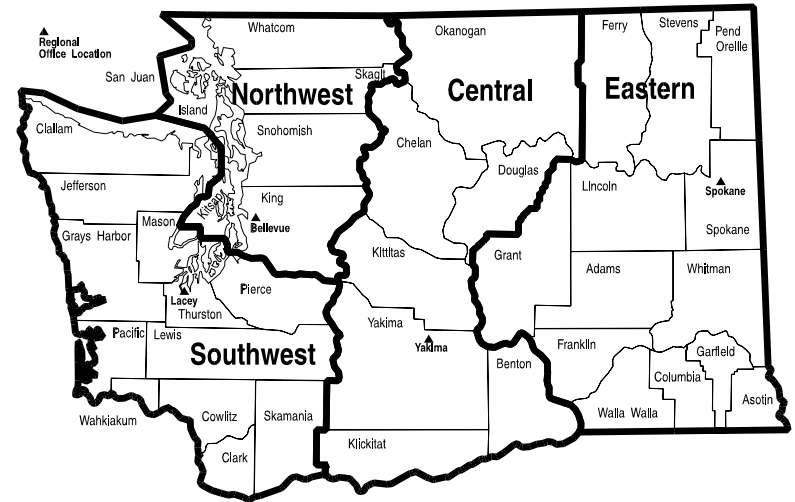
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Subject areas and corresponding Washington Administration Code (WACs) and Revised Code of Washington (RCWs)

Administration and regulation of surface and ground water codes

Chapter 508-12 WAC
Chapter 90.03 RCW
Chapter 90.44 RCW

Appropriation Procedures

Chapter 508-12 WAC
Chapter 90.03 RCW

Beneficial Use

Chapter 90.14 RCW
Chapter 90.54 RCW
Chapter 90.44 RCW

Construction of Water Wells and Driller Licensing

Chapter 173-160 WAC
Chapter 173-162 WAC
Chapter 18.104 RCW

Fundamentals of Water Resources

Chapter 90.54.020 RCW

Minimum Water Flows and Levels

Chapter 90.22 RCW
Chapter 90.54 RCW

Unauthorized Use of Water

Chapter 90.03.010 RCW
Chapter 90.44.110 RCW

Water Right Relinquishment

Chapter 90.14.130 RCW

Water Rights Transfer or Change

Chapter 90.03.380 RCW
RCW 90.44.100
RCW 90.44.105

Washington water law is constantly evolving. In recent years, Washington State has enacted and implemented new laws addressing a range of water resource-related issues, including water resource planning, conservancy boards, trust water rights and reclaimed water. State law is likely to continue changing in the near future in light of rapid population growth (much of the available water is already being used), changes in priorities for water, the difficulty and cost of new water development, and demands to improve the health of streams through such means as the Statewide Strategy to Recover Salmon.

The state Department of Ecology (Ecology), under whose auspices the state's water resources are managed, is bound by numerous laws, regulations, agreements and case law. The *Revised Code of Washington (RCW)* is the compilation of all permanent state laws (also referred to as statutes) now in effect. It is a collection of laws enacted by the Legislature and signed by the Governor, or enacted via the initiative process.

Under the authority of statutes, Ecology (and other executive branch agencies) may write administrative rules or regulations, in order to implement state law. These rules go through a prescribed process that includes public hearings and outreach. Once passed, these rules become part of the *Washington Administrative Code (WAC)*.

Legal cases also have an effect on water resource management in Washington. The Courts interpret statutory law and in doing so, create *case law*. Case law is binding on Ecology, as is statutory law.

This primer describes how contemporary state water law evolved, and summarizes the major water laws of Washington State and significant case law. It does not discuss the numerous rules and ongoing activities to implement these laws. A set of commonly used state water laws and rules is available from Ecology (contacts listed inside back cover). They may also be acquired through Ecology's website: <http://www.ecy.wa.gov/programs/wr/rules/rul-home.html>.

Early water law

Early in Washington's history, acquiring the right to use water was a fairly simple process. If water was available, anyone could make reasonable use of it. Because water is essential to life, most settlement and human activity occurred close to water. The *riparian doctrine* of water law allows for the historic reasonable use of water on land adjacent to a water source. The priority of water rights established under the riparian doctrine was based on the date that action was first taken to separate the land from federal ownership. In times of water shortage under the riparian doctrine, all users were to curtail their water uses proportionally.

Even after the colonization of America, and subsequent United States independence, the riparian water laws continued to work quite nicely throughout the eastern portion of this country, where water was plentiful. Settlers who moved west discovered that the old water laws did not work as well in the drier climates west of the Mississippi River. The early westerners used water in new ways and on land that was distant from the water source. Western water use didn't always fit under the earlier riparian doctrine water laws.

These westerners stopped water flow and stored it, moved it to new locations, and even found new water uses. They discovered that it was necessary to bring the water to where they needed it, rather than use the water at its site. This new practice of removing water from the stream and conveying it to remote places of use became recognized in law as the *appropriation doctrine*. The priority date (that is, the effective date) on an appropriation doctrine water right is based on actual beneficial use of water, rather than the date that land was separated from federal ownership. *Beneficial use* is the application of a reasonable quantity of water applied to a specific non-wasteful use, such as domestic water supplies and irrigation.

In the earliest years of Washington statehood, two legal doctrines were available to secure a water right. Under the appropriative doctrine, one posted a notice on a tree or post near the proposed point of diversion (a *diversion* is the means of directing the water away from its natural course, such as a pipe, dam or pump) and applied the water to beneficial use. If the neighbors did not protest, all that remained

- In PUD Dist. 1 of Pend Oreille v. Ecology (2002, commonly known as the Sullivan Creek decision), the State Supreme Court ruled that Ecology has the authority to condition a water quality certification (under the Clean Water Act) to maintain specified instream flow levels, even where such conditions affect existing water rights. The Court also concluded that Ecology, when acting on surface water change applications, may not deny an application based upon public interest considerations. In addition, the Court ruled that Ecology lacks authority to approve changes to inchoate surface water rights (rights that have not been put to continuous beneficial use; that are not "perfected"), absent a statutory exception permitting such a change.

- Ecology v. Campbell & Gwinn, LLC, et al. (2002) raised the question of how the ground water exemption applies to a residential subdivision (in this case, 20 lots). The State Supreme Court ruled that if you wish to develop land and supply the development with domestic water from several wells, and each well will pump less than 5,000 gallons per day but all

the wells together will pump more than 5,000 gallons per day, the project is considered a single withdrawal of ground water and is not exempt from permitting requirements.

- Joo Il Kim and Keum Ja Kim v. Ecology (2003) raised the question of whether commercial nurseries that withdraw less than 5,000 gallons per day were considered an industrial use and therefore exempt from water right permitting requirements. The terms "commercial garden" and "industrial purposes" appeared to be in conflict with a now commonly-used term "agricultural industry." The State Court of Appeals ruled that the reading of a statute may not be altered to meet the changing conditions of society, and if the plain meaning is no longer in line with today's societal conditions then it is the legislature's job to amend the statute.

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Supreme Court also held that only the quantity of water that has been put to actual beneficial use is valid for change under an existing water right. In reviewing change applications, Ecology must first determine the quantity that has been put to historical beneficial use under the existing water right, and then determine whether the right was ever relinquished or abandoned.

- In Department of Ecology v. George Theodoratus (1998) the State Supreme Court ruled that Ecology is authorized to place new conditions on extensions for water right permits. In addition, the Court ruled that Ecology is authorized to issue certificates of water rights only when--and to the extent--that the water is put to actual beneficial use.
- In R.D. Merrill Co. v. Pollution Control Hearings Board (1999) the State Supreme Court ruled on several issues related to water right changes. Exceptions to a law are to be narrowly construed; the exemption from relinquishment for legal proceedings is limited to instances when those proceedings actually prevent the use of water. A determined future development must be in place within five

years of the most recent beneficial use of the water right, and pursued with diligence. Ground water permits that have not been put to use (inchoate rights) can be changed for point of withdrawal, place of use, or manner of use, but not for purpose of use.

- Postema v. Pollution Control Hearings Board, et al. (2000) raised issues as to what Ecology's obligations are when analyzing an application to withdraw ground water that is interconnected to surface water ("hydraulic continuity"). The Supreme Court ruled that the legal test of impairment (i.e., whether the withdrawal of ground water affects the volume of surface water that it is connected with) is "no impairment." Hydraulic continuity between ground water and a stream where instream flows are not met part of the year is not sufficient to find impairment; impairment must be determined on a case-by-case basis. And finally, the Court also ruled that an application for a withdrawal from ground water in hydraulic continuity with a closed stream must be denied if that withdrawal will affect the flow or level of the surface water.

was to construct the diversion and put the water to use. (Anyone establishing a claim to an appropriative right after 1891 had to file a copy of the notice with the county auditor.) Alternatively, under the riparian doctrine, one merely started to use the water on land near the stream.

It was through appropriative use that the legal concept of water right *priority* emerged. In times of shortage, senior right holders have their water needs satisfied first, rather than all users sharing water proportionally. Thus the concept of "first in time, first in right" became a new component of water law in the western United States.

Washington State was one of only a few states with the "dual system" of water law: riparian and appropriation. This fragmented water right process had many problems. There was no follow-up requirement to determine whether any or all of the water claimed through a notice of appropriation actually was put to beneficial use. In some areas, several different property owners would claim the entire flow of a stream numerous times. Conflicts between water users resulted in individual lawsuits to settle disputes. Most early court cases dealing with disputes over water rights failed to identify all

water users on a problem stream, unless they were named as plaintiff(s) or defendant(s). The courts also failed to sort out the legitimate rights of other water users or to comprehensively settle rights to waters of an entire water source. Clearly, the water right process had become unreliable.

Key Water Laws

Water Code of 1917 (Chapter 90.03 RCW)

In 1913, the Governor formed a commission to study the water management problem, resulting in the passage of the Washington Water Code of 1917. The Water Code made a number of significant changes to water management, including:

- The declaration that all unclaimed water belongs to the public.
- The appropriation doctrine as the exclusive way to create a water right.
- The formation of a centralized water right administration by the state.
- The establishment of an adjudication system through the courts.

Adopting the prior appropriation doctrine and creating a centralized water right administration system required individuals to

file an application for a permit to establish surface water rights, subject to any existing rights. (*Surface water* is water located above the ground, such as in lakes, rivers and streams.) Public notice was required for all applications, with the opportunity for protest if someone claimed an earlier right might be impaired or harmed by a new applicant's water use.

Further, the Water Code required that new water rights meet four criteria prior to a water right being granted:

1. beneficial use (not wasteful);
2. water is available;
3. no impairment to existing rights; and
4. not detrimental to the public interest.

The Water Code also established procedures for adjudicating all existing water rights. A *general water right adjudication* is a legal process conducted through the State Superior Court that determines the validity and extent of existing water rights in a given area.

The 1917 Water Code did not affect existing rights, but made securing the use of water ("appropriation") through a

state permit system the exclusive way to establish new rights. The state initially considered that riparian water rights not perfected (secured) through actual use were terminated by the passage of the Water Code. However, a later State Supreme Court case recognized a 15-year period after 1917 for riparian rights to be put to beneficial use. For a riparian water right to be recognized by Ecology or confirmed in an adjudication, steps must have been taken to remove the riparian land from federal ownership prior to June 6, 1917, and water must have been put to beneficial use prior to December 31, 1932.

Much of Washington State's current water law, practices, and uses are based upon this 1917 law. Law written in the early 1900's is still the primary governance of water use in our state, a century later.

The 1945 Ground Water Code (Chapter 90.44 RCW)

By 1945, many people in the state were using wells to access ground water (that is, water located under the ground). The legislature enacted the Ground Water Code, extending the surface water code and its permitting process to ground water.

levels resulting from a construction project constitutes "pollution." This case was subsequently appealed to the United States Supreme Court and resulted in a landmark opinion regarding the relationship of water quantity and quality. The Court said that water quality and water quantity are inseparably linked and must be managed together.

- In Hubbard v. Department of Ecology (1994) the State Court of Appeals ruled that the connection between ground water and surface water (referred to as hydraulic continuity) may exist even when the point of withdrawal of the ground water is located several miles from the affected stream. It upheld Ecology's condition on a new ground water right that water could only be withdrawn when instream flows in the Okanogan River were being met. The ruling was based on continuity between the aquifer (that is, underground water body) and river, even if the effect of pumping would result in only small and delayed effects on the flow of the river. The decision also affirmed that where surface and ground water is connected, instream flows established by rule are treated as water rights and should be protected from im-

pairment by any subsequent ground water withdrawals.

- In Hillis v. Department of Ecology (1997) the State Supreme Court ruled that Ecology must involve the public when making broad policy decisions on setting priorities for water right permit decisions. That opportunity is provided through Ecology's rule-making process. The court refused to invalidate individual water right decisions Ecology made on the basis of an existing watershed assessment process. The court also found that Ecology may conduct watershed assessments, but must adopt rules before making the completion of an assessment a requirement or prerequisite to making decisions on applications.
- In Okanogan Wilderness League v. Town of Twisp and Department of Ecology (1997), the State Supreme Court ruled that Ecology's decision granting a change in the point of diversion for the town of Twisp's surface water right was in error because the water right had been abandoned and was therefore no longer valid. Municipal water rights, while not subject to relinquishment, remain subject to loss through abandonment. The State

1998 Watershed Planning Act (Chapter 90.82 RCW)

Watershed planning provides a framework and locally driven process to collaboratively solve water issues. This framework is based on geographic areas known as Water Resource Inventory Areas (WRIAs), or watersheds. The act is designed to allow local governments and citizens to join together with advice from state agencies to develop watershed management plans. These planning units at a minimum will assess each WRIA's water supply and use, recommend strategies for satisfying existing rights, and meet current and future water supply needs.

The planning units may, at their choice, develop strategies for setting instream flows, improving water quality and protecting or enhancing fish habitat. The legislature supplied funding for grants to support these local planning efforts. The first six watershed plans, covering eight different WRIAs, were adopted by county governments in 2004.

Case Law Affecting Water Rights

Case law is created when the Courts interpret statutory law. Case law is binding on Ecology, as is statutory law. Some of the significant court cases are described as follows:

- In Rettkowski v. Department of Ecology (1993, commonly known as Sinking Creek) the State Supreme Court ruled that Ecology lacked the authority to determine the validity of a pre-code water right. Therefore, Ecology may not attempt to resolve disputes among conflicting water uses if one or more of them is based on an unadjudicated vested claim to a water right.
- In Grimes v. Department of Ecology (1993) the State Supreme Court set down important case law regarding the obligations of water users to maintain efficient water delivery and use systems that are not wasteful. The opinion also provides important criteria relating to beneficial use.
- In Department of Ecology v. PUD No. 1 of Jefferson County (1993, commonly known as the Elkhorn case) the State Supreme Court ruled that Ecology has authority through section 401 of the Clean Water Act (water quality certification) to include a minimum streamflow requirement as a condition. For purposes of issuing a water quality certificate under section 401, an alteration of streamflow

The Ground Water Code provided a three-year opportunity for anyone claiming an existing ground water right to declare that they had already put the ground water to beneficial use. The state then reviewed the declarations that were submitted and issued certificates to ground water rights to those who qualified.

The Ground Water Code does allow **an exemption** (often referred to as “the ground water exemption”) from the permitting requirements. On November 18, 2005, the state Attorney General's Office issued a formal opinion regarding how the ground water exemption, especially for watering livestock, should be applied.

There are four types of ground water uses exempt from the state water-right permitting requirements:

- Providing water for livestock (no gallon per day limit or acre restriction).
- Watering a non-commercial lawn or garden one-half acre in size or less (no gallon per day limit).
- Providing water for domestic uses (limited to 5,000 gallons per day).

- Providing water for industrial purposes, including irrigation (limited to 5,000 gallons per day but no acre limit).

Water use of any sort is subject to the “first in time, first in right” clause, originally established in historical western water law and now part of Washington state law. This means that a senior right cannot be impaired by a junior right.

As in the case of the 1917 Water Code and surface water, the Ground Water Code is the basis for Washington's current water law, practices and uses of ground water.

1967 Water Rights Claims Registration (Chapter 90.14 RCW)

By the 1960's, the Legislature realized that records for water rights established before the 1917 surface water code and the 1945 ground water code were incomplete and needed better organization. There were also insufficient records of ground water use that fell under the permit exemption. As a result, the state had an inadequate accounting of the amount of water being used statewide.

The 1967 Water Right Claims Registration Act directed the then Water Resources Department to record the amount and location of pre-code water rights and exempt ground water uses, by authorizing the state to accept and register water right claims. A *water right claim* is a statement of claim to water use that began before the state Water Codes were adopted, and/or is not covered by a water right permit or certificate. (Pre-code water rights are also known as *vested rights*, that is, a water right established by the continuous beneficial use of water.) A water right claim does not establish a water right. A water right claim is simply that—a claim to a water right for a beneficial use which pre-dates the state water permitting system. The validity of a claim can only be confirmed through judicial processes.

This law also provides that water must be used during a specific period of time or the water right is returned to the state through relinquishment. (*Relinquishment* of a water right means that you are no longer authorized to divert or withdraw that water.) The law does provide for certain circumstances under which a water right would not be subject to a relinquishment, including active military service, drought

conditions, or court proceedings that directly affect the use of water.

The initial statewide opening for filing water right claims ended June 30, 1974. The legislature has opened the Water Rights Claims Registry three times since then, most recently from September 1, 1997 through June 30, 1998. When Governor Locke signed the 1997 law re-opening the claims registry, it was expected to be the final opening and would put an end to the ongoing uncertainty about water use statewide. To date, Ecology has a total of about 166,000 claims recorded in the claims registry and about 70% reflect uses of ground water under the permit exemption. Only a small portion of those claims have been adjudicated and there is no current timeframe set for adjudicating the remaining claims.

1969 Minimum Water Flows and Levels (Chapter 90.22 RCW)

This act provides a systematic approach to stream flow protection. Under this law, Ecology shall, upon request of the Department of Fish and Wildlife, establish minimum flow levels by administrative rule to protect fish, wildlife, water quality, and other instream

resources. (*Instream resources or values* are the ways water is used in the stream.)

The Water Resources Act of 1971 (Chapter 90.54 RCW)

The legislature passed the Water Resources Act of 1971 “to set forth fundamentals of water resource policy for the state to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state. . . .” This act became necessary because of increasing conflicts over water use and applications for larger amounts of water. Earlier water laws were not equipped to handle these new problems. The Act mandates comprehensive water resource planning through regional planning processes, and a state water resource data program to support that planning.

This Act allows Ecology to set stream flows by administrative rule, referred to as *instream flows*. Ecology is then required to ensure that sufficient stream flows be maintained “to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” Instream flows adopted as rules are considered water rights and have the date of rule adoption as their priority date.

1971 Water Well Construction Act (Chapter 18.104 RCW)

Today, some 5,000 water wells are drilled each year in Washington. This legislation regulates well drilling to protect public health and safety. Water well contractors must pass a test to obtain the required license. Once licensed, Ecology must be notified before a well can be drilled or dug. Well construction can not begin unless a water right permit has been issued (if required for the quantity and use proposed). A driller must submit a water well report to Ecology following construction of a well. By rule, Ecology may limit or prohibit well drilling in areas requiring intensive control of ground water withdrawals.

Growth Management Act (Chapter 36.70A RCW)

Growth management legislation, passed in 1990 and 1991, included provisions providing a clearer link between the development of land and water availability. Under these laws, when applying for a building permit for a structure that will require drinking-quality water, one must provide evidence of an adequate water supply for the intended use of the building. The same concept applies to the subdivision of land.