

The background is a light blue gradient with several realistic water droplets of various sizes scattered across it. The droplets have highlights and shadows, giving them a three-dimensional appearance. The main title is centered in a large, bold, black sans-serif font.

WASHINGTON WATER LAW 101

WESTERN WATER LAW AS IT IS IMPLEMENTED IN WASHINGTON

Matt Janz, Assistant Attorney General
Presenter

DISCLAIMER

In providing these materials, I am not representing or speaking on behalf of the Office of the Attorney General or the Department of Ecology.



THE PRIOR APPROPRIATION DOCTRINE

- Washington, like most Western states, follows the doctrine of Prior Appropriation
 - First in time, first in right (RCW 90.03.010)
 - Riparian status not relevant
 - Junior appropriations can be curtailed when necessary to enable exercise of senior rights
- Prior to adoption of the water code in 1917, Washington had a mixed system of prior appropriation and riparian rights
- **Practice Tip:** In water law, dates are significant for a number of reasons. Use caution when researching your client's water right to correctly identify changes in the law that might have an impact.

WHO OWNS THE WATER?

- Water is a natural resource held in common for the public good
- The state regulates water as a public resource
- Private parties cannot take ownership of this public resource
 - Water rights are use rights (usufructuary rights)— a property interest in the use of water
 - A water right allows the holder to put water to beneficial use

WHAT IS A WATER RIGHT?

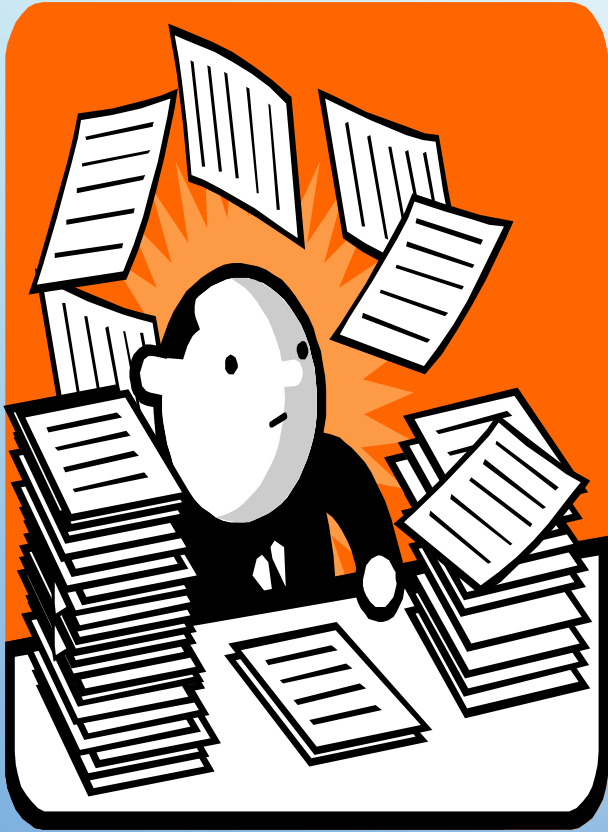
- A water right is the right to appropriate water for beneficial use
- Beneficial use can include irrigation, industrial use, mining, domestic, municipal, watering of stock, or other consumptive uses; it can also include hydropower, recreation, habitat, fisheries, and nonconsumptive uses. (RCW 90.03)
- Waste and speculation are not considered beneficial use



ATTRIBUTES OF A WATER RIGHT

- Priority date (date of permit application or first beneficial use)
 - Purpose of use
 - Place of use
 - Point of diversion or withdrawal
- Quantity of use (Q_i = instantaneous quantity, Q_a = annual quantity)
 - Dates or seasons of use
 - Any conditions on use

WATER RIGHTS BEFORE THE WATER CODE



- Before 1917: Common law water rights
- Rights could be established by notice or actual diversion
 - Demonstrate an intent to appropriate water
- Develop the water right with reasonable diligence
- A water right claim predates the water permitting system
 - Validity of a claim not officially confirmed until adjudicated

HOW CAN I GET A WATER RIGHT?

- Since adoption of the water code, you must file an application with the Department of Ecology and obtain a permit to develop a water right
 - Surface water code (adopted 1917), RCW 90.03
 - Groundwater code (adopted 1945), RCW 90.44
- The groundwater code incorporates all procedural elements of the surface water code, so groundwater permits are subject to all substantive and procedural requirements for surface water, with a few differences. (RCW 90.44)
- The permit system generally involves a number of sequential phases

PERMIT APPLICATION

- Ecology issues water permits under RCW 90.03.290
- Before issuing a permit, Ecology applies a four-part test to the application, and must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.
- A decision whether to grant a permit to appropriate water is within Ecology's exercise of discretion. [Hillis v. Dep't of Ecology, 131 Wn.2d 373 \(1997\)](#)
- Ecology can include permit conditions to ensure that the four-part test is met. [Dep't of Ecology v. Theodoratus, 135 Wn.2d 582 \(1998\)](#)

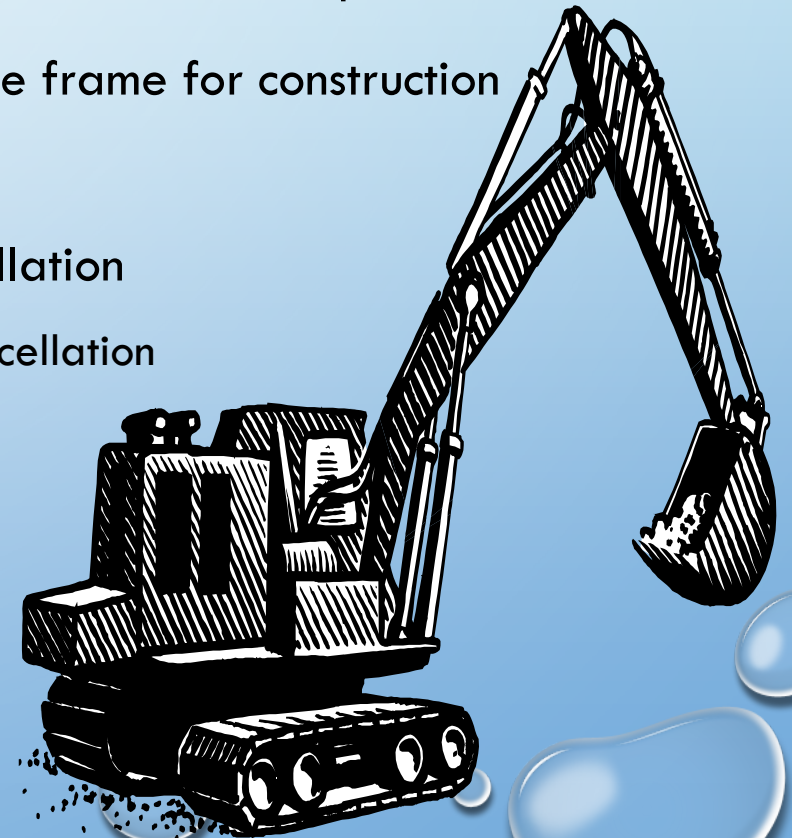
PERMIT ISSUANCE



- Once issued, a permit's priority date is the date of application
- The priority date of a water right is a critical element in evaluating a water right's seniority
- After the permit has been issued, but before the water has been put to beneficial use, it is considered an inchoate water right

DEVELOPMENT SCHEDULE

- Washington water law anticipates a period of time for project construction and completion
- Ecology generally includes a development schedule outlining the time frame for construction
 - Extensions are granted “for good cause shown” (RCW 90.03.320)
- When water is not put to beneficial use, a permit is subject to cancellation
 - If some but not all of the water is put to use, it is subject to partial cancellation



PROOF OF APPROPRIATION

- To demonstrate that a water right has been put to beneficial use, a permit holder files a proof of appropriation with Ecology. RCW 90.03.330.
- Proofs of appropriation can be completed by the Certified Water Rights Examiner Process, RCW 90.03.665, or via cost reimbursement, RCW 90.03.265.
- Water that has been put to beneficial use is legally perfected (no longer inchoate)

WATER RIGHTS CERTIFICATES



- Upon approving a proof of appropriation, Ecology issues a water right certificate. RCW 90.03.330.
- The certificate adopts the reference number of the original permit and retains the priority date of the original permit application. Certificates also import conditions of use and other attributes specified on the permit.
- Certificated water is no longer inchoate—it is a perfected right. It becomes appurtenant to the land and constitutes a vested property right (although still a limited usufructuary right).

RELINQUISHMENT

- When certificated water is not used for five years, it is subject to relinquishment. RCW 90.14.140.
 - USE IT OR LOSE IT
- The unused water reverts to the public and is available for appropriation by subsequent users (many of whom are often waiting in line until water becomes available for pending permit applications).
- Once water rights relinquish, the original right (with the original priority date) cannot be revived.
- **Practice Tip:** Water rights may be transferred to the state Trust Water Rights Program on a temporary or permanent basis. A trust water right is not subject to relinquishment as long as it remains in trust.

RELINQUISHMENT EXCEPTIONS AND EXEMPTIONS

- The water code contains a number of statutory exceptions and exemptions to relinquishment that excuse nonuse of water. RCW 90.14.140.
- Exceptions excuse the non-use if you can show a nexus between the exception and the non-use of water.
- Exemptions require only a showing of the exemption to excuse the non-use.
- In an enforcement action concerning relinquishment of water, Ecology bears the burden of proving non-use. Water right holders bear the burden of proving any applicable exceptions or exemptions.

RELINQUISHMENT CONT.

- Common exceptions include:
 - Drought or other unavailability of water, RCW 90.14.140(1)(a)
 - The operation of legal proceedings, RCW 90.14.140(1)(d)
- Common exemptions include:
 - Determined future developments, RCW 90.14.140(2)(c)
 - Municipal supply purposes, RCW 90.14.140(2)(d)

CHANGES AND TRANSFERS

- Most attributes of a water right may be changed
- The law provides for the change of existing rights to a new point of diversion or withdrawal, place of use, or purpose of use
- The quantity of a water right will never increase and the priority date does not change
- In order to decide whether to approve a change under RCW 90.03.380, the Department must tentatively determine the existence (validity) and extent of the beneficial use of a water right.
[*Okanogan Wilderness League, Inc. v. Twisp*, 133 Wn.2d 769 \(1997\)](#)
- This determination is “tentative” because it could change in a superior court adjudication

GROUNDWATER RIGHT CHANGES

- Groundwater right changes to change point of withdrawal, manner of use, or place of use occur under RCW 90.44.100.
- Inchoate groundwater can be changed if it is in good standing
- A change to a groundwater right requires “findings as prescribed in the case of an original application [of RCW 90.03.290].” RCW 90.44.100(2); [Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology, 146 Wn.2d 778 \(2002\)](#)
- Groundwater changes require a finding that the new use will not be a detriment to the public welfare

SURFACE WATER RIGHT CHANGES

- Surface water right changes occur under RCW 90.03.380
- Unlike a groundwater change, complete RCW 90.03.290 findings are not required
 - A public welfare finding is not required
- Surface water cannot be changed if it is inchoate

ANNUAL CONSUMPTIVE QUANTITY

- Certain changes are subject to an analysis of “annual consumptive quantity” (ACQ).
- Washington law provides for changes that allow “spreading” (irrigating a greater acreage without increasing the quantity of water) only after a determination is made about the actual consumptive use of water in the five years before the water right.
- ACQ is required for all changes “in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses.” RCW 90.03.380.
- **Practice Tip:** If a relinquishment exception or exemption applies to excuse nonuse of water, the ACQ calculation will also be affected. See RCW 90.03.615.

WATER CONSERVANCY BOARDS

- In many counties, water right changes and transfers initiate in the local conservancy board process. RCW 90.80.
- Conservancy boards complete an initial Report of Examination and issue a Record of Decision that is sent to Ecology
- Ecology then has 45 days (with an additional 30 days available by extension) to affirm, reverse or modify the decision. RCW 90.80.80.
- Ecology's decision is an administrative action appealable to the Pollution Control Hearings Board

PERMIT-EXEMPT WELLS

- Certain groundwater uses are exempt from the permit process. RCW 90.44.050. This includes:
 - Domestic water for individual homes limited to 5,000 gpd
 - Stock water without limitation as to quantity
 - Smaller industrial (including agricultural) uses, limited to 5,000 gpd
 - Watering a lawn or noncommercial garden less than 1/2 acre
- These appropriations are exempt from the permit process, but are not exempt from the water code.

INSTREAM FLOWS

- Ecology is authorized to protect instream resources by identifying minimum stream flows and adopting rules that establish instream flow levels to protect instream values. RCW 90.54.
- Ecology rules are adopted to correspond with Water Resource Inventory Areas (WRIA), corresponding with drainage basins and associated aquifers.
- The rules set minimum flows for different levels and different seasons and can completely close streams. The instream flow rules are adopted at WAC 173-501 *et seq.*
- An instream flow is a water right with priority as of the date of the rule adopting the instream flow.

APPEALS OF ECOLOGY DECISIONS

- Ecology's water right decisions are appealable to the Pollution Control Hearings Board, including decisions to issue or deny a permit, issue a relinquishment order, the granting or denial of a permit extension, or a water right change and transfer.
- The Board decides legal issues, conducts hearings to determine factual issues, and weighs the value of expert testimony.

GENERAL ADJUDICATIONS

- A general adjudication under the water code, RCW 90.03, determines the rights of all those claiming water rights in a given body of water, and the priority of each right is determined relative to all others.
- The adjudication is a sort of “quiet title” action for water rights.
- Claims may be based on pre-code common law rights, alleged riparian rights, rights acquired under the water code or rights from some other possible source.



QUESTIONS?