

WASHINGTON'S WATER RIGHT IMPAIRMENT STANDARD: HOW THE CURRENT INTERPRETATION IMPEDES THE STATE'S POLICY OF MAXIMIZING NET BENEFITS

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*"[T]he knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge, which all the separate individuals possess."*¹

-F.A. Hayek

ABSTRACT: Washington manages water rights under conflicting goals—maximizing *net* benefits while protecting water rights from *any* impairment. Over time, the state judiciary, often at the request of the Washington Department of Ecology (Ecology), has elevated the water right impairment standard to an absolute protection. Initially, Division III of the Washington Court of Appeals held that it was proper for Ecology to require a modeled impact of 0.004 percent in river flows, finding that this was *substantial* and could not be allowed;² then, the Washington Supreme Court concluded that *any* impact constituted impairment,³ and most recently, the Court paradoxically declared that instream flows are too valuable to be submitted to a balancing test where their value would be less than other uses.⁴

The result is an absolutist application of the impairment standard that impedes the consideration of net benefits in new use or change authorizations. This strict legal interpretation occurs in contrast to the stated legislative purpose and in spite of recent legislative programs that have sought to ease the impairment requirements. In practice, this tension is acknowledged and some impairment is allowed.

This Comment outlines the impairment standard as applied, and reads recent legislative modifications to the water code as creating an agreed upon loosening of the standard. Further, the Comment argues that the current standard impedes the ability of market and regulatory forces to facilitate changes and transfers that maximize the net benefits of water use. This Comment suggests that Washington's water policy of obtaining the maximum net benefits would be better served by an impairment standard that allows for

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1. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).
 2. *Hubbard v. Wash. Dep't. of Ecology*, 86 Wash. App. 119, 126, 936 P.2d 27, 30 (1997).
 3. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 95, 11 P.3d 726, 742 (2000).
 4. *Swinomish Indian Tribal Cmty. v. Wash. Dep't of Ecology*, 178 Wash. 2d 571 n.15, 311 P.3d 6, 20 (2013).

some level of impairment of instream and out-of-stream existing uses, and suggests increasing the ability of Ecology to regulate existing rights.

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I. INTRODUCTION

Washington is experiencing a growing population, depressed fisheries, development of new industries, changing agricultural markets, the impacts of climate change, and increasing legal and financial support for instream flows.⁵ Presciently, Washington’s water policy seeks to “obtain the maximum net benefits” of water resources and puts in place tools to re-allocate water to that end.⁶ This goal of “net” benefits implicitly recognizes competing uses and an optimization that impacts other uses.⁷ Unfortunately, the current impairment framework leads to an underutilization of the resource.⁸ This occurs by restricting the ability of the State’s administrative agency in charge of water rights, the Department of Ecology, to regulate existing water rights while increasing the cost of market re-allocation resulting in maintenance of the status quo, not a process that facilitates the maximization of net benefits.⁹

5. WASH. DEPT OF ECOLOGY, *2010 Report to the Legislature and Governor: Water Resources Program Functions and Funding Structure*, at 2–4, 10-11-022 (2010). This paper uses the term instream flows to refer to both minimum instream flows set by statute and water rights issued for instream use. WASH. REV. CODE § 90.22.010 (2012); see also § 90.42.040.

6. WASH. REV. CODE § 90.03.005 (2012).

7. *Id.*

8. See *infra* Part II.

9. See *infra* Part IV.

The desire to maximize net benefits of water use is recognized throughout Washington's water code. The Revised Code of Washington (RCW) 90.03.005 states, "It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses. . . [while retaining water to protect] instream and natural values and rights."¹⁰ RCW 90.54.020(2) states that "allocation of water should be based generally on securing the maximum net benefits for the people of the state."¹¹

The Legislature recognized that this involves a tension in allocating the resource. RCW 90.42.005(1)(a) includes a legislative finding that "Washington is faced with a shortage of water with which to meet existing and future needs."¹² RCW 90.42.005(1)(b) contains a legislative finding listing acceptable methods for "reliev[ing] current critical water situations, provid[ing] for presently unmet needs, and assist[ing] in meeting future water needs."¹³

This Comment reviews the existing judicial framework regarding impairment determinations and concludes that it does not support the State's water policy of obtaining the maximum net benefit from use of public waters. It then proceeds to review exceptions, or alternatives, to the judicial impairment framework and discusses how those efforts maximize net benefits, and concludes by recommending that the judicial framework be relaxed to encourage and facilitate voluntary water transfers in order to maximize net benefits.¹⁴

II. WASHINGTON'S IMPAIRMENT FRAMEWORK IS OBTRUSIVE

Washington's impairment framework protects the status quo—not the water policy of maximizing the net benefits or water resources or the rights of existing users.¹⁵ This occurs because (A) a series of judicial rulings deferred to Ecology's

10. WASH. REV. CODE § 90.03.005 (2012).

11. *Id.* § 90.54.020(2).

12. *Id.* § 90.42.005(1)(a).

13. *Id.* § 90.42.005(1)(b).

14. This Comment presumes without further discussion that "Maximizing net benefits" refers to all benefits (economic, social, and environmental).

15. WASH. REV. CODE §§ 90.03.005 (2012), *see also* § 90.54.020(2).

definition of impairment, and (B) these rulings have been shown to create an obtrusive framework.¹⁶

A. *The Judiciary Expanded, In The Name of Administrative Deference, What Qualifies As Impairment*

Impairment is a malleable term of art. In Washington, the outcome has been a rigid interpretation intended to protect senior water rights. This has taken the form of holdings that find impairment is *substantial* when a model predicts impact of 0.004 percent in river flows,¹⁷ or has *any* impact.¹⁸ In a literal sense, this is consistent with the fundamental principles of prior appropriation that first in time is first in right.¹⁹ Also, legally, something is impaired when you diminish its value.²⁰

However, this absolutism is contrary to the state's water policy, and is not a normative part of American thought and property law, as rights are not usually seen as absolutes.²¹ Nor was it considered as such before the codification of prior appropriation schemes.²² Further, in the context of a public

16. See generally Stephen N. Bretsen & Peter J. Hill, *Water Markets As A Tragedy of the Anticommons*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 723 (2009) (describing how unbundling of property rights can increase transaction costs and lead to economic inefficiencies); Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 OR. L. REV. 861, 938-40 (2001) (discussing negative impacts of central planning as opposed to common law and resulting impacts on prior appropriation).

17. *Hubbard v. Wash. Dep't. of Ecology*, 86 Wash. App. 119, 126, 936 P.2d 27, 30 (1997).

18. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 95, 11 P.3d 726, 742 (2000).

19. See *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wash. 2d 232, 240, 814 P.2d 199 (1991) (quoting *Longmire v. Smith*, 26 Wash. 439, 447, 67 P. 246 (1901)) ("[T]he first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants."), WASH. REV. CODE § 90.03.010 (2012) ("[A]s between appropriations, the first in time shall be the first in right."), The principle that an appropriated water right is also perpetual and operates to the exclusion of all subsequent claims. *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wash. 2d 232, 240-41, 814 P.2d 199 (1991).

20. Black's Law Dictionary 819 (9th ed. 2009).

21. See e.g. Eric T. Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* 6-9, 20-24 (2007) (discussing the "partial truths" that pervade American thought and property law, such as the right of landowners to exclude all others, the protection of liberty through the protection of property rights, and the absolute nature of private property rights).

22. See *Morriss*, *supra* note 16, at 867 (describing prior common law approach as "flexible, decentralized and open").

resource like water, where water right holders only have a usufructory right, it makes even less sense.²³ Two cases outline the descent into this absolutist position.

First, Division III of the Court of Appeals in *Hubbard v. Department of Ecology* declared that it was reasonable for Ecology to condition a right with de minimis impacts.²⁴ Second, the Washington Supreme Court in *Postema v. Pollution Control Hearings Board* cemented the idea that any impact on an existing right constitutes impairment regardless of size.²⁵

1. *Hubbard Articulated a Restrictive Interpretation of Impairment*

In *Hubbard* the Washington State Court of Appeals Division III addressed the idea of impairment in the context of hydraulic continuity.²⁶ The case involved two appellants: the first had established an orchard relying upon a temporary permit and the assurance that he would probably receive a permit in a year, and the second had a permit but needed additional water for irrigation and frost protection.²⁷ During its examination, Ecology determined that the wells in question exhibited “significant hydraulic continuity” with surface flows and that their use would be conditioned on the maintenance of instream flows pursuant to Washington Administrative Code (WAC) 173–549–060.²⁸ On appeal, the issue was whether Ecology had shown that significant continuity between the wells and the surface flows existed.²⁹

Appellants argued that their permit should not be conditioned because impacts were not “significant.”³⁰ They retained an expert who modeled that their permits would only have a 0.004 percent reduction in the river’s flow, and, as such,

23. Christine O. Gregoire, James K. Pharris & P. Thomas McDonald, *An Introduction to Washington Water Law* 1:2 (2000) (discussing usufructory nature of water rights).

24. *Hubbard v. Wash. Dep’t. of Ecology*, 86 Wash. App. 119, 936 P.2d 27 (1997).

25. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 11 P.3d 726 (2000).

26. *Hubbard*, 86 Wash. App. 119, 122, 936 P.2d 27, 28 (1997). Hydraulic connectivity goes to the connection between surface water groundwater sources. WASH. ADMIN. CODE § 173-549-060 (2012).

27. *Hubbard*, 86 Wash. App. 119, 122, 936 P.2d 27, 28 (1997).

28. *Id.* at 122, 936 P.2d at 28.

29. *Id.*

30. *Id.*

was “so minuscule that it cannot be considered important or of consequence.”³¹ The Court disagreed. They read the rule to require that Ecology either reject or condition applications that will have *any* effect on instream flows.³² The significance of the impacts was not a part of the Court’s test.³³ The Court concluded by saying they would not set aside Ecology’s decision absent a clear showing of abuse of discretion and that the record before the administrative appeals board, the Pollution Control Hearings Board, below did not demonstrate that it was manifestly unreasonable for Ecology to condition the permit.³⁴

Hubbard is significant for its affirmation that groundwater permits could be conditioned on surface-water rights. Also, by relying solely on the dictionary definition of “significant” and failing to consider the state’s maximum net use policy, it made changes and transfers more difficult to implement.³⁵ The case does not, however, stand for the proposition that Ecology must condition any right if any amount impairment will result. The opinion used extremely deferential language with regards to Ecology’s decision-making authority to reach this conclusion. When this issue reached the Washington Supreme Court in *Postema* that flexibility was lost.³⁶

2. *Postema v. Pollution Control Hearings Board Adopted a Restrictive Interpretation of Impairment*

In *Postema*, the Washington Supreme Court directly addressed how hydraulic continuity plays into impairment and removed any uncertainty that remained following *Hubbard*.³⁷ *Postema* involved five consolidated cases in which applications for groundwater appropriation permits were denied because the groundwater sources were in hydraulic continuity with

31. *Id.*

32. *Id.* at 125-26, 936 P.2d at 30.

33. *Id.* at 126-27, 936 P.2d at 30.

34. *Id.* at 127, 936 P.2d at 30.

35. See Jeffrie Minier, *Conjunctive Management of Stream-Aquifer Water Rights; the Hubbard Decision*, 38 NAT. RESOURCES J. 651, 658 (1998) (describing pragmatic impacts of *Hubbard*); Melissa Ure, *Conjunctive Management and A Sustainable Future*, 14 SUSTAINABLE DEV. L.J. 132, 146 (2011) (recognizing deleterious impacts of *Hubbard* on conjunctive management).

36. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 11 P.3d 726 (2000).

37. *Id.*

surface water sources that had minimum flow rules.³⁸ As such, the permits could not be issued under the four-part test for water availability which the court summarized as: “Ecology 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.”³⁹ The Court’s analysis turned on two prongs: what impacts were allowable (to the minimum flows) and what constituted an impact.

The Court rejected appellants’ claims that a direct and measurable impact on surface water must be shown using standard stream measuring devices before the applications could be denied, or that a significant measurable effect on stream flows was required before denying the permits.⁴⁰ Interestingly, the Court also rejected the idea that the simple fact that minimum flows are unmet for a substantial part of the year equates to impairment of existing rights as a matter of law.⁴¹ Instead, the Court held that a denial is only required “where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights.”⁴² Finally, the Court said that a showing of hydraulic continuity between an aquifer and a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application.⁴³

The Court went on to clarify that the determination of hydraulic continuity is merely a factual test and not something that resolves any part of the four-part test.⁴⁴ However, if it is factually established “that the withdrawal will have any effect on the flow or level of the surface water” it must be denied.⁴⁵ This is because “[h]ydraulic continuity is not the legal standard, no impairment is.”⁴⁶

38. *Id.*

39. *Id.* at 79, 11 P.3d at 734.

40. *Id.* at 92-93, 11 P.3d at 741.

41. *Id.* at 93, 11 P.3d at 741.

42. *Id.*

43. *Id.*

44. *Id.* at 94, 11 P.3d at 741-42.

45. *Id.* at 95, 11 P.3d at 742.

46. *Id.* at 97, 11 P.3d at 743 (internal quotations omitted).

This holding brought to a head the concept of what constitutes impairment. Justice Sanders' dissent in *Postema* stated that “[b]y disallowing even an immeasurable effect on minimum flows, the majority approach injects irrationality into the equation, requiring greater specificity than the standard itself.”⁴⁷ He further quoted the definitions of “de minimis” and “impair,” making the case that Ecology has a duty under RCW 90.03.290 and RCW 90.54.020(2) to allow beneficial projects when they have no discernible impacts.⁴⁸ Justice Sanders would have imposed a requirement that applications be denied “only if it is established factually [that] the withdrawal will have an appreciable and material adverse effect on the minimum flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, other environmental values, or navigation.”⁴⁹ In contrast to Justice Sander’s proposed standard, *Postema* cements Washington’s absolutist judicial framing of impairment. While impairment must be shown, any effect will do; the magnitude does not matter.

B. Recent Developments in the Kittitas and Swinomish Basins Demonstrate the Obtrusiveness of this Framework

Ecology operates and has issued guidance in an attempt to comply with this judicial framework.⁵⁰ Ecology guidance defines impairment as:

‘Impair’ or ‘impairment’ means 1) to adversely impact the physical availability of water for a beneficial use that is entitled to protection, including earlier filed applications, and/or 2) to prevent the beneficial use of the water to which one is entitled, and/or 3) to adversely affect the flow of a surface water course at a time when the flows are at or below instream flows levels established by rule.⁵¹

47. *Id.* at 131, 11 P.3d at 760 (Sanders, J., dissenting).

48. *Id.* at 127–31, 11 P.3d at 758–60 (Sanders, J., dissenting).

49. *Id.* at 132, 11 P.3d at 761 (Sanders, J., dissenting).

50. *See, e.g.* WASH. DEP’T OF ECOLOGY, POL-1200, POLICY FOR THE EVALUATION OF CHANGES OR TRANSFERS TO WATER RIGHTS (1999) [hereinafter TRANSFER POLICY]; WASH. DEP’T OF ECOLOGY, POL-1017, POLICY REGARDING COLLECTION OF RAINWATER FOR BENEFICIAL USE (2009).

51. TRANSFER POLICY, *supra* note 50.

Ecology's definition is consistent with *Postema* and it serves to highlight the burden put on Ecology to determine if impairment will occur. Pursuant to this policy, Ecology will conduct a "tentative determination of extent and validity" of an existing right, chopping off any element of the right that cannot be substantiated.⁵² This is a stark contrast to Oregon where a perfected and developed right is not subject to partial relinquishment so long as it has the necessary "pumps and pipes" needed to use the entire water right.⁵³ Applying principles of administrative deference,⁵⁴ recent developments demonstrate an eroded ability to encourage the maximization of net benefits.

1. *Exempt Wells Have Come Under Heightened Scrutiny in the Kittitas Basin Disproportionate to their Impact*

Between 2007 and 2010 Ecology issued nine emergency rules on the regulation of exempt wells in the Kittitas Basin.⁵⁵ (By statute an "exempt well" provides exemptions from permitting requirements for certain uses, including domestic use not exceeding five thousand gallons a day.)⁵⁶ A final rule was adopted in December of 2010 after a long and intricate process.⁵⁷ One outcome of this rule-making was *Kittitas County v. Eastern Washington Growth Management Hearings Board* where the Washington Supreme Court held that "[a] County is not precluded and, in fact, is required to plan for the protection

52. *Id.*

53. OR. REV. STAT. §540.610(3) (2005) (right not subject to forfeiture if "(a) The user has a facility capable of handling the entire rate and duty authorized under the right; and (b) The user is otherwise ready, willing and able to make full use of the right").

54. Wash. Dep't of Ecology v. Theodoratus, 135 Wash. 2d 582, 589, 957 P.2d 1241, 1244 (1998); Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 587, 90 P.3d 659, 669 (2004)(applying agency deference to complex litigation arising from airport runway construction with water resource elements).

55. See WASH. DEP'T OF ECOLOGY, *Upper Kittitas Ground Water Rule, 173-539A WAC* (Archive), http://www.ecy.wa.gov/programs/wr/cro/kittitas_wp_rulebg.html (last visited Mar. 10, 2014). The Groundwater Code contains an exemption allowing an appropriator to use a limited amount of water for certain uses. WASH. REV. CODE § 90.44.050. See also Jeremy Lieb, Comment, *A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State*, 3 WASH. J. ENVT'L. L. & POL'Y 60 (2013).

56. WASH. REV. CODE § 90.44.050.

57. WASH. DEP'T OF ECOLOGY, *Upper Kittitas Ground Water Rule, 173-539A WAC* (Archive), available at http://www.ecy.wa.gov/programs/wr/cro/kittitas_wp_rulebg.html (last visited Mar. 10, 2014).

of water resources in its land use planning.”⁵⁸ Ultimately, this has resulted in all new water uses in the Kittitas having to either acquire mitigation or transfer an existing water right.

A process was established to allow new uses to either acquire mitigation or transfer an existing water right.⁵⁹ Because of peculiarities specific to the Yakima Basin, new uses are allowed through a determination of “water-budget neutrality” by Ecology.⁶⁰ Several mitigation exchanges have been established, with assistance from Ecology, to meet demand.⁶¹ This process is expensive; *The Sequim Gazette* in 2012 reported prices of \$7500-\$12,500 per “equivalent residential unit.”⁶²

This approach is a gold standard for protecting existing rights. As of mid-2013, a typical determination was sought for approximately 0.414 acre-feet (0.392 acre-feet indoor and 0.022 outdoor) with mitigation of 0.137 acre-feet (0.118 acre-feet indoor and 0.019 outdoor).⁶³ In gallons, this represents an average use of 370 gallons per day of which only 122 gallons per day requires mitigation during the irrigation season or storage capacity to retain for later release during the non-irrigation season. For perspective, the reservoirs in the Yakima basin have a total active capacity of 1,065,400 acre-feet, and the total annual water demand in the basin is 2,950,000 acre-feet providing water for approximately 500,000

58. *Kittitas County v. E. Washington Growth Mgmt.* Hearings Bd., 172 Wash. 2d 144, 179, 256 P.3d 1193, 1210 (2011) (holding that jurisdictions planning under the Growth Management Act (WASH. REV. CODE § 36.70A.040) had to protect groundwater from detrimental land uses (i.e. permit exempt wells)).

59. WASH. DEPT OF ECOLOGY, *Frequently Asked Questions: Upper Kittitas Ground Water Rule 10-11-021*, (April 17, 2014) available at <https://fortress.wa.gov/ecy/publications/summarypages/1011021.html>.

60. *Id.*

61. WASH. DEPT OF ECOLOGY, *Yakima River Basin Water Exchanges*, available at <http://www.ecy.wa.gov/programs/wr/cro/wtrxchnng.html> (last visited Mar. 10, 2014) (“A ‘Water Exchange’ is a tool for providing the mechanism to make water available through mitigation”).

62. Mark St. J. Couhig, *Water Rule Slows Development in Kittitas*, SEQUIM GAZETTE, (Jul. 11, 2012), http://www.sequimgazette.com/news/article.exm/2012-07-11_water_rule_slows_development_in_kittitas.

63. See WASH. DEPT OF ECOLOGY, *Water Budget Neutral (WBN) Determination Archive for Upper Kittitas County*, available at http://www.ecy.wa.gov/programs/wr/cro/kittitas_wbn_archive.html (last visited Mar. 10, 2014) (listing prior WBN determinations).

irrigated acres.⁶⁴ Each new use represents approximately one-billionth of a percent (0.0000001%) of water demand.

This process does not directly address the State's policy of "seeking net benefits."⁶⁵ It does prove that an administrative process can be created to provide mitigation for exempt wells. However, given that some of these exempt wells provide water for basic human needs,⁶⁶ and that other programs have been able to place water in Trust for one-hundredth of the cost,⁶⁷ requiring full-scale mitigation of exempt wells raises serious questions about its net benefit to the State. This is especially true in light of other out-of-kind mitigation that could be utilized, potentially at a cheaper cost.⁶⁸

2. *In Swinomish the Washington Supreme Court Rejected Ecology's Use of the Overriding Consideration of the Public Interest Exception for Exempt Wells*

In *Swinomish*, the Washington Supreme Court further reduced Ecology discretion by limiting the use of the Overriding Consideration of the Public Interest (OCPI) test found in RCW 90.54.⁶⁹ The case invalidated an instream flow rule in the Skagit River and its tributaries.⁷⁰ The minimum flow rule provides that at least 10,000 cubic feet per second (cfs) of flow must be maintained in the main stem of the Skagit River, effectively precluding new water uses in the late summer and early fall when low flows generally drop below the

64. M. C. Mastin and J. J. Vaccaro, *Watershed Models for Decision Supporting the Yakima River Basin, Washington*, U.S. GEOLOGICAL SURVEY, 5 Open-File Report 02-404 (2002).

65. WASH. REV. CODE § 90.03.005, *see also* § 90.54.020(2).

66. Dena Marshall and Janet Neuman, *Seeking A Shared Understanding of the Human Right to Water: Collaborative Use Agreements in the Umatilla and Walla Walla Basins of the Pacific Northwest*, 47 WILLAMETTE L. REV. 361 (2011).

67. Washington State Conservation Commission, Irrigation Efficiencies Grants Program: 2008 Report, available at: http://www.scc.wa.gov/wp-content/uploads/2013/12/2008_iegp_annual_report.pdf (\$829 per acre-feet, or \$114 for 0.137 acre-feet). This figure does not include all transactions costs as this water is not used for mitigation of new uses.

68. Mitigating for impacts on instream flows with riparian enhancements or placement of woody debris for example.

69. WASH. REV. CODE § 90.54.020.

70. Instream Resources Protection Program—Lower And Upper Skagit Water Resources Inventory Area (WRIA 3 And 4) WASH. ADMIN. CODE §§ 173-503 (2013).

prescribed level.⁷¹ Historically average flows in the Skagit River Basin have been 16,560 cfs with low flows of 5970 cfs.⁷² In 2006, the Rule was amended to establish finite “reservations” of surface and groundwater for future out-of-stream uses.⁷³ The reservations provided uninterrupted (year-round) water supplies for new agricultural, residential, commercial/industrial, and livestock uses, distributed among twenty-five subbasins.⁷⁴ The reservation was for twenty-five cfs of which 23.79 cfs came from the main stem Skagit River, less than 0.004 percent of flows during low flow conditions.⁷⁵ The reservations were created by relying on OCPI.⁷⁶

Ecology utilized a three-step test to authorize the use of OCPI: (1) to what extent important public interests would be served by the proposed reservations; (2) to what extent the proposed reservations would harm any public interests; and (3) whether the interests in step (1) clearly overrode any harm from step (2).⁷⁷ They concluded that it did because at step one important public interests would be advanced, impacts to aquatic resources and recreation would be small, and, at step two, the benefits of the reservation clearly overrode the small potential harm.⁷⁸

a. Swinomish’s Tautological OCPI Analysis

The Court found that the amended rule was “inconsistent with the plain language of the statute and . . . inconsistent with

71. WASH. ADMIN. CODE §§§ 173-503-040 (2013); *see also* Wash. Dep’t of Ecology, Skagit River Basin — Water Management Rule, <http://www.ecy.wa.gov/programs/wr/instream-flows/skagitbasin.html> (last visited May 28, 2013).

72. Brief for Respondent at 9, *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d. 571 (Case 87672-0).

73. Wash. Dep’t of Ecology, Skagit River Basin — Water Management Rule, <http://www.ecy.wa.gov/programs/wr/instream-flows/skagitbasin.html> (last visited May 28, 2013).

74. *Id.*

75. Brief for Respondent at 9, *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d. 571 (Case 87672-0).

76. *Id.* at 18.

77. *Id.* at 10.

78. *Id.* at 10–12.

the entire statutory scheme.”⁷⁹ The Court made the following four points.

First, the Court held that instead of properly construing the OCPI exception as a narrow exception as required by *Postema*, Ecology improperly used the OCPI exception “as a broad grant of authority to reallocate water committed to existing minimum flow water rights when an appropriation could not [otherwise] be granted.”⁸⁰

Second, the Court held that Ecology’s balancing test provided undue weight to economic interests inconsistent with the requirement that “‘rivers and streams. . .shall be retained with base flows’ and withdrawals that would conflict with base flows are allowed only when ‘it is clear that overriding considerations of the public interest will be served.’”⁸¹ In addressing the maximum net benefit criteria under RCW 90.54.020, the Court held that it was not solely based on economic benefits and that the many of the benefits of instream uses cannot be quantified.⁸² The Court did not clarify why Ecology was unable to balance these costs.⁸³ Rather, the Court stated that OCPI was inapplicable, and this situation could only be remedied by legislative action.⁸⁴ The Court dismissed Ecology’s argument that “allowing limited quantities of water for some modicum of rural development is more than just a matter of economics,” and that the agency had “considered the benefits of allowing some limited growth in rural Skagit and Snohomish Counties in accordance with local land use plans and regulations, so that citizens who prefer a rural lifestyle can choose to live and work there.”⁸⁵

Third, the Court found the aggregation of future uses to be “contrary to the basic principle of the prior appropriation doctrine that first in time is the first in right,” greatly narrowing the potential scope of future reservations under the

79. *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d 571, 602, 311 P.3d 6, 21 (2013).

80. *Id.* at 589–90, 311 P.3d 6 at 15.

81. *Id.* at 586–87, 311 P.3d 6 at 13 (citing WASH. REV. CODE § 90.54.020(3)(a)).

82. *Id.* at 600–01, 311 P.3d at 20.

83. *Id.*

84. *Id.* at 601, 311 P.3d at 20.

85. Brief for Respondent at 33, *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d. 571 (Case 87672-0).

OCPI exception by effectively foreclosing the aggregation of water uses.⁸⁶

Fourth, the Court also rejected what it viewed as Ecology's conflation of "beneficial use" with the "public interest."⁸⁷ The court held that "beneficial uses may be uses that public benefits only in the sense that any useful end to which water is put benefits the public," and called out exempt wells as an example of "a private use, generally speaking, not a public use."⁸⁸ Under the Court's logic, it is unclear what private uses are in the public interest if the provision of water for domestic supply does not qualify.⁸⁹ It is also unclear why Ecology cannot incorporate the value of "being in the presence of crystal clear water coursing down a steep slope through a rock-lined, moss-edged stream bed among evergreen trees" into an OCPI analysis.⁹⁰

b. *The Swinomish Dissent Outlines Why the Majority's OCPI Analysis is Obtrusive*

The partial dissent in *Swinomish* chastised the majority's reasoning for being tautological in that it never addresses when the OCPI exception might apply.⁹¹ Specifically, the dissent asserts that the legislative history indicated OCPI was appropriate for rural and exempt well users.⁹²

The dissent argued that one of the exemptions, the 1.5 cfs reserved for exempt well users and rural public water systems, "would avoid significant costs on behalf of these underserved communities and would have little if any impact on environmental and aesthetic interests," with the net benefit unequivocally comporting with the plain reading of the term "overriding."⁹³ The dissent would further have remanded to

86. *Swinomish*, 178 Wash. 2d at 585-86, 311 P.3d at 15.

87. *Id.*

88. *Id.* at 587, 311 P.3d at 13.

89. See Marshall & Neuman, *supra* note 66.

90. *Swinomish*, 178 Wash. 2d at 600 note 15, 311 P.3d at 20.

91. *Id.* at 603, 311 P.3d at 21 (Wiggins, J., dissenting in part).

92. *Id.* at 603-06, 311 P.3d at 22-23 (also noting that "There is no evidence that the legislature intended the water statutes to work as a one-way ratchet, and such an interpretation flies in the face of the legislature's clearly expressed intent to treat minimum flows and other beneficial uses equally.>").

93. *Id.*

give Ecology a chance to assess the 1.5 cfs reservation for exempt well users and rural public water supplies as an independent exercise of the OCPI exemption.⁹⁴

The dissent also calls out the error in the majority's logic that has its roots in *Postema*. "[T]he fact that minimum flows constitute vested appropriations of water does not make them immutable."⁹⁵ Under the majority's logic, "Ecology's statutory authority to modify minimum flows is really only statutory authority to increase the minimum," and "[t]here is no evidence that the legislature intended the water statutes to work as a one-way ratchet. . . .the legislature[] clearly expressed intent to treat minimum flows and other beneficial uses equally."⁹⁶

It is unfortunate that the exempt well issue was not remanded in *Swinomish*. OCPI is one of the best tools Ecology has available to "maximize" benefits in a way that explicitly allows impacts to existing rights.⁹⁷ The Court invalidated Ecology's use of OCPI to consider the out-of-stream use of 0.04 percent of a stream with a low flow of 5970 cfs without providing clarity on where OCPI is appropriate.⁹⁸ Even the most compelling component of the reservation, provision of water for domestic use, was paradoxically rejected as a private, not a public, use.⁹⁹ *Swinomish* is an affirmation that instream rights must be taken seriously, but more importantly, it continues to elevate the impairment principle into an absolute entitlement that inhibits Ecology's ability to administer the water code, discouraging transfers that facilitate the allocation of water to meet demand.

94. *Id.* at 610, 311 P.3d at 25.

95. *Id.* at 605, 311 P.3d at 22 (2013) (citing Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Wash. Dep't of Ecology, 146 Wash. 2d 778, 81718, 51 P.3d 744 (2002) (finding that Ecology may impinge on extant water rights in the course of setting minimum flows)).

96. *Id.* at 606, 311 P.3d at 22–23.

97. Another unused option is that water rights may be condemned. WASH. REV. CODE § 90.03.290(4) (2012) (by court proceeding to determine greatest public benefit).

98. *Swinomish*, 178 Wash.2d at 571, 311 P.3d at 6.

99. *Id.* at 586, 311 P.3d at 13 (exempting well component).

III. THE LEGISLATURE AND THE DEPARTMENT OF ECOLOGY HAVE IMPLICITLY REJECTED THE JUDICIAL IMPAIRMENT FRAMEWORK

The Judiciary, sometimes at the request of Ecology, has constructed a black and white definition of impairment that limits market reallocation. However, in some programs Ecology has utilized discretion based on long-standing and/or new statutory authority from the Legislature to operate programs with a less exacting interpretation of impairment.

A. *Ecology Exempts Rain Barrels from Requiring a Water Right*

One example of Ecology's exercise in discretion is their Rain Barrel Policy.¹⁰⁰ This interpretative policy states that rain barrels and guzzlers do not require a water right.¹⁰¹ Under the policy, Ecology only regulates rain barrels when there will be a "cumulative impact" that is "likely to negatively affect instream values or existing water rights."¹⁰² Technically, *Postema* declined to address cumulative impacts.¹⁰³ *Postema*, however, clearly held "that [if] the withdrawal will have *any* effect on the flow or level of the surface water[,]" it must be denied.¹⁰⁴ *Postema* did not imply an exemption for uses that are in vogue within the environmental movement. Rain barrels in areas where instream flows are not met would fail the four-part test,¹⁰⁵ which does depend on the magnitude of impact.¹⁰⁶

Ecology's rain barrel policy may represent good public policy choices, but unless there is a revival of deference to Ecology in interpreting the water code; the policy's ability to withstand a legal challenge is questionable. Courts have been careful to differentiate a showing of continuity from impairment, but

100. WATER RESOURCES PROGRAM, WASH. DEP'T OF ECOLOGY, POL-1017, POLICY REGARDING COLLECTION OF RAINWATER FOR BENEFICIAL USE (effective 10/9/09).

101. *Id.*

102. *Id.*

103. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 98-100, 11 P.3d 726, 744-45 (2000) (emphasis added)

104. *Id.* at 95, 11 P.3d at 742.

105. *See supra* Part II.B.2.

106. *See supra* Part II.A. *See also* *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 178, 256 P.3d 1193, 1209 (2011) (exempt wells).

that has largely involved cases of groundwater rights and instream flows.¹⁰⁷ The connection between rain and a nearby stream or aquifer is clear. Therefore, the rain barrel exception is in conflict with the principles identified in *Postema*.

B. Ecology Has Used RCW 90.54 to Allow Projects That Have Public and Private Benefits

RCW 90.54 authorizes Ecology to consider the OCPI when making water right decisions.¹⁰⁸ This capacity is of the utmost importance in basins where water is either physically unavailable or legally unavailable.¹⁰⁹ In this situation, OCPI functions as a legislatively provided relief valve to ensure projects that “maxim[ize] net benefits for the people of the state” can move forward.¹¹⁰

In *Postema*, the court considered OCPI, describing it as a “narrow exception,” and stated that “[w]ithdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”¹¹¹ Courts have been eager to narrow this exception.¹¹² A quick example demonstrates that the OCPI exemption is a valuable tool that allows Ecology to achieve the State’s water policy goals of maximizing net benefits through harmonizing competing needs. In the Walla Walla Basin, a recent project eliminated a push-up berm diversion in favor of a modern fish-friendly diversion, which required the use of OCPI.¹¹³ The project moved points of diversion upstream approximately one mile.¹¹⁴ Although the project increased stream flow for a larger stretch of river than it impaired, and removed the last gravel push up berm (a major impediment to the migration of endangered fish

107. *E.g.*, *Postema*, 142 Wash. 2d at 97, 11 P.3d at 743 (internal quotations omitted).

108. WASH. REV. CODE § 90.54.020(3) (2012).

109. *Id.* § 90.54.010.

110. *Id.* § 90.54.020(2).

111. *Postema*, 142 Wash. 2d at 81, 11 P.3d at 735 (2000); Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology, 178 Wash. 2d 571, 311 P.3d 6, 8 (2013) (re-affirming *Postema*).

112. *See supra* Part II.

113. WASH. DEPT OF ECOLOGY, SEPA MDNS BERGEVIN-WILLIAMS/OLD LOWDEN CONSOLIDATION PROJECT 3 (Apr. 6, 2012), on file with author.

114. *Id.*

species) on the mainstream Walla Walla, Ecology determined that the water right change application process did not allow for consideration of net benefits outside of an OCPI analysis.¹¹⁵ Thus, an OCPI process was utilized to allow these rights to be transferred. Restricting the use of OCPI to situations with solely public benefits, as suggested by the Washington Supreme Court in *Swinomish*, would prevent a project like this from occurring.

C. RCW 90.42 Encourages Voluntary Transfers and Modifies Incentives to Claim Impairment

The State Trust Water Rights Program (TWRP) was created to hold and protect water rights so water can be available for other uses.¹¹⁶ This can include either simply holding a right instream for environmental purposes or holding a right instream as mitigation.¹¹⁷ Trust Water Rights (TWRs) are not allowed to involuntarily impair existing water rights.¹¹⁸ The success of this program is in part due to its willingness to allow impairment of the TWRs in order to avoid challenges to the right.

Consider the interim mitigation for a groundwater permit for the cities of Richland, Kennewick, Pasco, and West Richland (Quad-cities). Between 2003 and 2011, rights that had been previously used for seasonal irrigation were entered into the TWRP and used to mitigate for year-round impacts of the permit.¹¹⁹ This arrangement was required by a settlement agreement with a party that had challenged the permit.¹²⁰ In 2011, the Quad-Cities and Ecology entered into a

115. *Id.*

116. WASH. REV. CODE § 90.42.010 (2012); WASH. DEPT OF ECOLOGY, 12-11-054: FOCUS ON TRUST WATER RIGHTS PROGRAM at 1 (2012), *available at* <https://fortress.wa.gov/ecy/publications/publications/1211054.pdf>.

117. WASH. REV. CODE § 90.42.010 (2012).

118. *Id.* § 90.42.010.

119. Stipulation, Settlement Agreement and Order of Dismissal, Ctr. for Env'tl. Law and Policy v. Wash. Dep't of Ecology et al., P.C.H.B. No. 02-216 (Pollution Control Hearings Bd. Jun. 4, 2003), <http://www.eho.wa.gov/searchdocuments/2003%20archive/pchb%2002-216%20summary%20judgment.htm>.

120. *Id.*

Memorandum of Agreement, deciding to process a change to modify these rights back to seasonal mitigation.¹²¹

The TWRP provided a solution that smoothed over the impairment analysis without covering *Postema* levels of impairment. During the interim period, a water right that had been used historically for seasonal irrigation on a tributary to the Columbia River was used to mitigate year-round municipal use.¹²²

D. RCW 90.90 Is a Political Solution to Water Re-Allocation on the Columbia River

In 2006, The Washington State legislature created the Columbia River Water Management Program (CRWMP) to address pressing water right issues in the Columbia Basin.¹²³ The Act began with a finding that “[a] key priority of water resource management in the Columbia River basin is the development of new water supplies that includes storage and conservation in order to meet the economic and community development needs of people and the instream flow needs of fish.”¹²⁴ The Act, codified in RCW 90.90, directs Ecology to “aggressively pursue the development of water supplies to benefit both instream and out-of-stream uses.”¹²⁵ Under the CRWMP, Ecology is directed to provide new water supplies while providing a “one-third/two-thirds” allocation of new supplies between instream and out-of-stream uses.¹²⁶

In addition to having bonding authority,¹²⁷ the CRWMP accomplishes its goals by relying on statutory provisions that streamline review of water rights for mitigation and consultation purposes.¹²⁸ Special authority is also provided to enter into “voluntary regional agreements” that allow rights to

121. MEMORANDUM OF AGREEMENT: SECURING NEW WATER SUPPLIES FOR THE CITY OF KENNEWICK, CITY OF PASCO, CITY OF RICHLAND, AND CITY OF WEST RICHLAND (2011), *available at* <http://www.ecy.wa.gov/programs/wr/cwp/images/pdf/QuadCityMOA.pdf>.

122. *Id.*

123. WASH. REV. CODE § 90.90 (2012).

124. *Id.* § 90.90.005.

125. *Id.*

126. *Id.* § 90.90.020.

127. *Id.* § 90.90.010.

128. *Id.* § 90.90.020.

be issued from the Columbia River main stem under a reduced impairment test that focuses on impacts to the Columbia River main stem during July and August.¹²⁹

The Lake Roosevelt Incremental Storage Release Program is an example of how this program operates.¹³⁰ The project allows for 55,000 acre-feet of water for new water supplies for out-of-stream uses targeted by the legislation in non-drought years (27,500 acre-feet to enhance streamflows).¹³¹ An additional 50,000 acre-feet is also provided during drought years for interruptible water right holders (33,000 acre-feet for out of stream use and 17,000 acre-feet for instream use).¹³² Other impacts of the program are mitigated by total payments of six million dollars (adjusted annually for inflation) and other consideration to the Confederated Tribes of the Colville Reservation and the Spokane Tribe of Indians.¹³³

The CRWMP is a political solution to provide water for new uses. A “two-thirds/one-thirds” allocation of water combined with large cash payments is not a precise tool that protects against *Postema* level impairment. It is however an effective scheme that encourages out-of-kind mitigation and utilizes a preset in-kind mitigation of fifty percent; in lieu of requiring precise modeling of impacts and exacting mitigation over time and space.

129. *Id.* § 90.90.030.

130. See generally *Lake Roosevelt Incremental Storage Releases*, WASH. DEP'T OF ECOLOGY, http://www.ecy.wa.gov/programs/wr/cwp/cr_lkroos.html (last visited May 30, 2013) (background information).

131. *Id.*

132. *Id.*

133. WATER RESOURCE MANAGEMENT AGREEMENT FOR LAKE ROOSEVELT BETWEEN THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AND THE STATE OF WASHINGTON (2007), available at http://www.ecy.wa.gov/programs/wr/cwp/images/pdf/colville_agmt.pdf (\$3,750,000); WATER RESOURCE MANAGEMENT AGREEMENT FOR LAKE ROOSEVELT BETWEEN THE SPOKANE TRIBE OF INDIANS AND THE STATE OF WASHINGTON (2008), available at http://www.ecy.wa.gov/programs/wr/cwp/images/pdf/spokane_agmnt.pdf (\$2,250,000).

E. RCW 90.92 is a Legislatively-Created Exemption That Allows Changes To Water Rights With A Less-Restrictive Impairment Analysis

The Walla Walla Basin is currently home to a pilot program that calls for local water management.¹³⁴ The key aspect of the program with regard to impairment is the “local water plan” provision.¹³⁵ This provision allows for the modification of water rights without having to undergo a traditional impairment analysis.¹³⁶ Local Water Plans must leave a portion of their “baseline” (historic) water use in-stream in return for flexibility in the exercise of their water right.¹³⁷

This program gives substantial discretion to the local board to determine what baseline water use is and to create win-win solutions to changes in water use in a way similar to the CRWMP. An example of this program is the Gardena Farms Irrigation District No. 13 Local Water Plan.¹³⁸ The Plan added a purpose of use (aquifer recharge), added additional points of diversion (downstream and wells in order to provide enhanced stream flows for endangered fish species), and allowed the water right holder to voluntarily bypass a portion of their water right in order to provide fish passage without fear of relinquishment.¹³⁹ In doing so, the project went through an impairment analysis, administered through the pilot process, that looked at the net benefits of the project from multiple perspectives.¹⁴⁰ This program is another clear example of a legislative attempt to facilitate voluntary transactions amongst water users by loosening the impairment standard.

134. WASH. REV. CODE § 90.92 (2012).

135. *Id.* § 90.92.080.

136. *Id.*

137. *Id.*

138. GARDENA FARMS IRRIGATION DIST.#13 LOCAL WATER PLAN AGREEMENT (2011), Walla Walla Watershed Mgmt. P'ship, LWP 10-01.

139. *Id.* at 4–5.

140. *Id.* at 2–3.

IV. THE JUDICIAL FRAMEWORK IS CONTRADICTORY TO LEGISLATIVE POLICY AND FIRST PRINCIPLES OF WATER RESOURCE MANAGEMENT

Washington's judicially created impairment regime comes at great cost. It undermines the State's policy objectives of maximizing the net benefit of water use, reduces transfers, and is implementable in theory only. The standard relies on false assumptions about the sanctity of impairment. A large number of programs circumvent the most restrictive elements of the framework, and under-enforcement due to limited data or funding limits the effectiveness in all situations.¹⁴¹ The result is that water rights are treated differently based on their adjudicatory status or their access to legislatively created exemptions like the CRWMP or the pilot program in the Walla Walla Basin.

Functionally, Washington's judicial impairment standard inhibits the maximization of net benefits by protecting the status quo. This section extrapolates from the examples in Part III and argues that the current judicial impairment standard is in conflict with the State's water policy of maximizing net benefit of the State's water resources.

A. *The Current Standard Protects the Status Quo; Not Senior Rights, Instream Flows, or the State's Water Policy*

A standard that truly implemented the State's water policy would balance protection of right holders from impairment, provide them with clarity as to what their rights were, and facilitate transfer or changes that maximized the net beneficial use of water.¹⁴² Unfortunately, the judicial framework derived from *Postema* prevents this by dictating that there is no such thing as a "de minimis" impact of a water right.¹⁴³ The Court forcefully stated this as: "piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other

141. Whether this is due to short-term budgetary constraints, long-term legislative resistance to funding enforcement, or may be more attributable to the high cost of adjudication, stream-measurement, and administrative enforcement is beyond the scope of this Comment.

142. See Bretsen & Hill, *supra* note 16.

143. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 89, 11 P.3d 726, 739 (2000).

environmental resources. . . . [In fact] all senior rights in a stream could be impaired by incremental impacts.”¹⁴⁴

Absent mitigation, all water right actions have secondary impacts.¹⁴⁵ An overemphasis on this discourages changes and transfers and fails to protect existing rights. Because the impairment framework is largely symbolic, it has little practical impact in meeting Washington's current water demands or protecting existing uses.

1. *The Standard Discourages Changes or Transfers*

Changes or transfers can meet important water policy objectives.¹⁴⁶ They can be used to address climate change.¹⁴⁷ They can be used to facilitate protection and restoration of instream flows.¹⁴⁸

Because impacts do not have to be direct and measurable the impairment analysis is quite burdensome. Professors Bretsen and Hill have recognized this in their article *Water Markets As A Tragedy of the Anticommons*; there they describe the anti-commons as a place where exclusion rights are separated from use rights.¹⁴⁹ Economically, it is the opposite of the tragedy of the commons which creates an overutilization of a resource.¹⁵⁰ The tragedy of the commons involves use rights,

144. *Id.*

145. Of course even the mitigation then has impacts.

146. James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 434 (1994) (arguing that the environment will suffer if free market environmentalism based on common law systems is not allowed).

147. Jonathan H. Adler, *Water Rights, Markets, and Changing Ecological Conditions*, 42 ENVTL. L. 93, 112 (2012) (arguing for use of water markets to address climate change is better than central planning).

148. Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 433 (2004) (discussing the use of water markets to protect and restore instream flows in Oregon).

149. See Bretsen & Hill, *supra* note 16, at 727 (contrasting to the tragedy of the commons which occurs when there are multiple use rights); see also Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445 (2008) (discussing how “fugitive” nature of water makes efforts to modulate and quantify water rights using typical exclusion strategies difficult); Andrew P. Morriss, *Real People, Real Resources, and Real Choices: The Case for Market Valuation of Water*, 38 TEX. TECH L. REV. 973, 1008 (2006) (declaring that property rights must be “definable, defensible, and defeasible” in order to function).

150. See Bretsen & Hill, *supra* note 16, at 727.

while the tragedy of the anti-commons involves exclusion or veto rights.¹⁵¹

Professors Bretsen and Hill describe how exclusion rights, veto rights, and veto processes raise costs and decrease transactions.¹⁵² Specifically, they explain how statutory transfer requirements can discourage transfers.¹⁵³ The Washington impairment standard imposes many of the downsides identified by Professors Bretsen and Hill.¹⁵⁴

The statutory transfer process creates exclusion rights in two ways. First, Ecology is prevented from approving a change or transfer if it would be detrimental to the public interest.¹⁵⁵ Determining what is in the public interest necessitates an administrative process that increases costs and is legally appealable.¹⁵⁶ What the “public interest” is can be difficult to ascertain; in *Swinomish* the Washington Supreme Court split 5-4 on whether exempt wells were by nature a public or a private use.¹⁵⁷ Second, environmental groups can appeal changes, with the costs falling on the applicant.¹⁵⁸ Because impairment has to be determined to a high level of precision, the statutory transfer process has high transaction costs derived from attorneys, expert witnesses, negotiations, hearings, appeals, and the opportunity cost of time these costs are borne by those who would like to transfer a right.¹⁵⁹ This functions as a de facto tax on the transfer of water rights that has a chilling effect on transfers.¹⁶⁰ While some of these costs are at least in part necessary an “expanded public interest standard. . . creates new exclusion rights separate from use

151. *Id.*

152. See Bretsen & Hill, *supra* note 16, at 730–56.

153. See Bretsen & Hill, *supra* note 16, at 742–50.

154. See *supra* Part II.

155. TRANSFER POLICY, *supra* note 50, at 4.

156. See Bretsen & Hill, *supra* note 16, at 727.

157. See *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d 571, 311 P.3d 6, 13 (2013) (private), *but see id.* at 571, 311 P.3d at 22 (2013), (Wiggins, J., dissenting in part) (public).

158. WASH. REV. CODE § 43.21B.110(1)(d) (2012).

159. See Bretsen & Hill, *supra* note 16, at 744-45 (describing statutory transaction costs).

160. *Id.*

rights, thus leading to the tragedy of the anticommons in the transfer of rights.”¹⁶¹

2. *Rettkowski and the Adjudication Backlog Prevent the Standard From Protect Existing Rights*

Even if the disincentives to transfer were accepted as unavoidable, the standards do not even effectively protect existing rights from impairment. Currently there are eighty petitions on file requesting general adjudications and only one adjudication is active.¹⁶² Since *Rettkowski v. Department of Ecology* the only remedy for excluding rights that are impairing senior rights is a judicial adjudication.¹⁶³ In *Rettkowski*, Ecology made a factual showing of impairment based on three decades of data¹⁶⁴ and sought to regulate the junior rights through its regulatory power.¹⁶⁵ Pursuant to *Rettkowski*, Ecology can only conduct “tentative determinations” when it is granting permits to new rights or authorizing changes and cannot regulate a non-adjudicated right.¹⁶⁶

This leaves water right holders without any practical options and highlights the absurdity raised by Judge Guy’s dissent in *Rettkowski* where he noted that if Ecology were to discover impairment of a senior right a week after issuing a permit they would be powerless to protect that senior right because to do so would constitute an adjudication.¹⁶⁷

161. *Id.*

162. Of the eighty adjudications on file only discussions on the Spokane-area adjudication are moving forward, and they are subject to awaiting the completion of work on the Yakima adjudication because of funding. *Frequently Asked Questions: Water rights adjudication will protect water rights in Spokane Area*, WASH. DEPT OF ECOLOGY, <https://fortress.wa.gov/ecy/publications/publications/0911017.pdf> (last visited Mar. 11, 2014); see also *Water Right General Adjudications*, WASH. DEPT OF ECOLOGY, <http://www.ecy.wa.gov/programs/wr/rights/adjhome.html> (last visited Mar. 11, 2014) (background resources).

163. *Rettkowski v. Wash. Dep’t of Ecology*, 122 Wash. 2d 219, 238, 858 P.2d 232, 243 (1993) (Guy, J. dissenting) (summarizing majority opinion).

164. *Id.* at 221–22, 858 P.2d at 233–34.

165. WASH. REV. CODE § 43.21A.064 (2012).

166. *Rettkowski v. Wash. Dep’t of Ecology*, 122 Wash. 2d 219, 227–28, 858 P.2d 232, 237 (1993) (en banc).

167. *Id.* at 238, 858 P.2d at 242.

3. *The Standard Over-enforces Symbolic Actions, Ignoring Internal Inconsistency*

Washington has recently taken a number of steps to restrict exempt wells, which use small quantities of water, but enforcement of existing rights vis-à-vis other existing rights remains infrequent because of procedural and technical difficulties.¹⁶⁸ Exempt wells can be seen as a form of symbolic enforcement that placates certain interests while failing to address the more pressing matter of preventing impairment between existing rights.¹⁶⁹ This symbolism can be compared by contrasting the absolute restriction on exempt wells that would individually have a small impact on instream flows (in many instances) with the difficulty of regulating an existing trust water right for instream flow.

Consider a trust water right (TWR) that was transferred from an out-of-stream use. When the right needs protection the burden is on Ecology to demonstrate that it is appropriately curtailed.¹⁷⁰ Imagine a TWR for one cfs with stream flows near that level. The right in question is downstream and can divert one cfs. Regulation would entail a number of steps. First, a measurement of flows at both points would be needed. Accuracy would be crucial and would be difficult at these levels. Ignoring the practical barrier, assume the measurements were 1.3 cfs at the point of TWR and 1.1 cfs at the point in question. How much of the 1.1 cfs is a result of the 1.0 cfs TWR? Stream losses and gains should be factored in because only the TWR can be protected and Ecology has that burden.¹⁷¹ In light of *Postema*, the impairment would not even have to be measureable and would need to be calculated through time and space.¹⁷² In the end, Ecology could go to great effort but might not be able to prove that they were not

168. See *supra* Part II.B. See also Jeremy Lieb, Comment, *A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State*, 3 WASH. J. ENVTL. L. & POL'Y 60 (2013).

169. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990) (discussing how legislators enact "symbolic legislation" that sidesteps difficult policy choices in a politically expedient manner, and discussing the process by which administrative agencies resist such policies).

170. WASH. REV. CODE § 90.42.040 (2012).

171. *Id.* § 90.040(4)(a)(b).

172. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 11 P.3d 726 (2000).

impairing other rights. The difficulty of proving a negative makes the regulation of an existing junior right difficult while the ease of prohibiting new rights allows for a symbolic gesture of protecting senior rights from impairment.

4. *The Standard Assumes the Existence of Data That May Not Exist*

A new water use authorization can only be issued if water is available.¹⁷³ Intuitively, impairment involves calculating the future use patterns of all existing valid rights and subtracting that from the amount of water that will exist; the difference being water available for new permits. Unfortunately, the very nature of water, and its differences from land or personal property, makes this difficult to measure.¹⁷⁴

The most commonly used data, historical records of stream flows, groundwater levels, and water usage, are of varying availability and quality and make large assumptions.¹⁷⁵ The largest assumptions are that the future will be like the past (i.e. factors like climate change, changes in irrigation practices, changes in crops, urbanization, or other variables will be non-factors), that other withdrawals are legal, and that conditions placed on the authorization will be enforced.¹⁷⁶

Data accuracy issues are compounded by financial costs and legal difficulty in regulating to prevent impairment. In addition to the costs borne by the applicant, discussed in Part IV.A.1, *supra*, the conditions placed on the permit require enforcement. Even a simple limitation based on calendar days will not achieve 100 percent voluntary compliance. A more complex limitation based on streamflows or model outputs further increases cost and complexity. However, enforcement is

173. WASH. REV. CODE § 90.03.290(1) (2012).

174. Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 448 (2008).

175. Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L.J. 409, 414–31 (2009) (discussing hydrological and climatic changes).

176. *Id.* (explaining impacts of climate change on water resources).

currently limited.¹⁷⁷ Non-compliance with existing requirements is the norm.¹⁷⁸ The result is that new water use authorizations must pass a very high level of review to prevent impairment, while existing right holders may never be held to the terms of their authorization.

What is the end result? A passive status quo, not an active policy, of seeking to “maximize net benefits.”¹⁷⁹ The effectiveness of the impairment framework is limited to symbolic enforcement over new rights, with limited capacity to enforce existing rights. As Justice Wiggins noted in his *Swinomish* dissent, “the fact that minimum flows constitute vested appropriations of water does not make them immutable.”¹⁸⁰ Ascribing immutability to the impairment standard allows Washington courts to speak as the protectors of the sanctity of the water code, when in reality they are only solidifying the status quo with symbolic gestures.

B. The Current Standard Creates a One-Way Ratchet Discouraging Voluntary Transactions

A second argument against the current standard is that it creates a “one-way ratchet.”¹⁸¹ A downstream transfer will always be easier because of the required impairment analysis.¹⁸² Downstream transfers create an instream flow

177. *State Water Use Laws: Compliance and Enforcement*, WASH. DEP’T OF ECOLOGY, http://www.ecy.wa.gov/programs/wr/comp_enforce/comp_enfor.html (last visited Mar. 11, 2014) (enforcement is focused on 16 fish critical basins and occurs only after attempts to induce voluntary compliance); *see also* Thomas Perkow, *Columbia River Watermaster Duties and First Year Progress*, WASH. DEP’T OF ECOLOGY, PRESENTATION TO THE COLUMBIA RIVER POLICY ADVISORY GROUP, May 6, 2009, *available at* http://www.ecy.wa.gov/programs/WR/cwp/images/pdf/ppt_files/pag_5-09_wtrmstr.pdf (portraying limited geographic distribution of watermasters and describing initial efforts taken in 2009 to seek compliance on the Columbia River).

178. *Measuring Water Use*, WASH. DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wr/measuring/measuringhome.html> (last visited Mar. 11, 2014) (metering required by statute since 1993 and by court order since 1999 (for failing to comply with statute)).

179. *See* WASH. REV. CODE § 90.03.005 (2012); *see also* § 90.54.020(2).

180. *Swinomish Indian Tribal Cmty. v. Wash. Dep’t of Ecology*, 178 Wash. 2d 571, 311 P.3d 6, 22 (2013) (Wiggins, J, dissenting in part).

181. *Id.*

182. This is less true for upgradient transfers of groundwater rights, but can be similar when the transfer will have impacts on streamflows. *See generally* TRANSFER POLICY, *supra* note 50.

benefit between the old point of diversion and the new diversion. Conversely, upstream transfers have a negative effect causing impairment.¹⁸³ This effectively prohibits upstream transfers where streamflows fall below those set by rule.

The impacts of this one-way ratchet have two important implications: they can cause negative impacts to upstream communities and they complicate upstream transfers that have net environmental benefits.

The downstream transfer of water to municipal use is also a concern for many rural Washington counties.¹⁸⁴ The legislature became involved over concerns that the impacts to local communities from out-of-basin transfers are not being appropriately considered.¹⁸⁵ Apart from the societal impacts, which are not the focus of this Comment, the technical impact of a transfer out of a subbasin forecloses future opportunities to use water in that subbasin. Ecology requires that “[t]he net effect on streamflows and instream values [of a change/transfer] must be neutral or positive. A reduction in streamflows during part of the year may be allowed if . . . the overall net effect on instream resources is positive.”¹⁸⁶ Upstream transfers in almost every scenario will fail this test.¹⁸⁷

An upstream transfer can also have environmental benefits. In Washington instream flows have been set in twenty-six of sixty-two basins,¹⁸⁸ including fifteen of sixteen “fish-critical

183. *Id.*

184. Andrew P. Morriss, *Real People, Real Resources, and Real Choices: The Case for Market Valuation of Water*, 38 TEX. TECH L. REV. 973, 997 (2006) (stating that the externalities related to concerns about the impacts on agricultural communities of large scale water transfers to urban users are less than they initially appear).

185. LAWRENCE J. MACDONNELL, PROTECTING LOCAL ECONOMIES: LEGISLATIVE OPTIONS TO PROTECT RURAL COMMUNITIES IN NORTHEAST WASHINGTON FROM DISPROPORTIONATE ECONOMIC, AGRICULTURAL, AND ENVIRONMENTAL IMPACTS WHEN UPSTREAM WATER RIGHTS ARE PURCHASED AND TRANSFERRED FOR USE, OR IDLED AND USED AS MITIGATION, IN A DOWNSTREAM WATERSHED OR COUNTY (2008) (legislative report on impacts of transfers on five northeastern Washington counties).

186. TRANSFER POLICY, *supra* note 50, at 5.

187. *See supra* Part III.B.

188. Introduction to Instream Flows and Instream Flow Rules, WASH. DEP'T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html> (last visited Mar. 11, 2014) (explaining that an additional three basins have a federal flow rule and three currently have a proposed rule).

basins.”¹⁸⁹ In these instances, an upstream transfer will necessitate an OCPI ruling whenever the transfer will involve a reach where the instream flows are not met.¹⁹⁰ However, the result is patently undesirable.

Consider a closed basin with set instream flows and one surface right in each of two subbasins. The rights are for one cfs and the stream flows are consistently one cfs lower than the minimum stream flows set by rule. If a right is transferred out of either subbasin it will be difficult to impossible to re-establish use in that basin. Now, imagine a change request before Ecology to transfer the remaining diversion to the opposite basin. Further, imagine that the project creates a net benefit to the environment. Ecology cannot approve this transfer without resorting to OCPI because it will decrease instream flows in a closed basin.¹⁹¹ As demonstrated by the Walla Walla examples in Part III.B, there are circumstances when an upstream transfer is desirable. The legislative policy is clear—maximize the net benefits of water use.¹⁹² The current impairment standard inhibits that goal.

V. CONCLUSION

The current impairment standard that prohibits *any* impairment from new, or change, authorizations without consideration of a cost-benefit analysis conflicts with the State’s water policy of achieving maximization of net benefits. Perversely, this standard also limits Ecology’s ability to address impairment amongst existing rights.¹⁹³ If the State is to achieve maximization of net benefits, their policies need to allow Ecology and water users to utilize market forces.

The current standard was intended to guard against “piecemeal impairment,”¹⁹⁴ and it does that effectively against the cumulative impacts of new rights. However, it creates problems for the effective protection of existing rights and

189. WASH. DEP’T OF ECOLOGY, SIXTEEN CRITICAL BASINS, *available at* <http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/16basinsmap.pdf>.

190. *See supra* Part III.B.

191. WASH. REV. CODE § 90.03.380 (2012).

192. *Id.* § 90.03.005.

193. *See supra* Part IV.A.

194. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 89, 11 P.3d 726, 739 (2000).

discourages voluntary changes and transfers. A more effective alternative would focus on maximization of net benefits, allow de minimis impacts, and consider how market incentives and decentralization could improve the management of water rights.¹⁹⁵

In *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, Professor Morriss identified the downsides of centralized planning schemes.¹⁹⁶ He found two main advantages to a common law system: first, individuals were free to innovate, putting the burden on those who object to an innovation to show they were harmed by the change, and second, Coasian bargaining around common law decisions allowed parties to correct mistaken official decisions through private action.¹⁹⁷

The examples in Part III of this Comment identified these impediments. Efforts like the Columbia River Water Management Program and the Pilot Local Water Management Program in Walla Walla can be seen as attempts to decentralize water management while providing allowance to bargain and create solutions.¹⁹⁸ The Trust Water Right Program also encourages transactions by obscuring impairment through facilitating mitigation and limiting regulation of trust water rights.¹⁹⁹ These efforts modify the impairment analysis that makes a typical water use authorization difficult by structurally modifying it to limit analysis, allow out-of-kind mitigation, and encourage additional flexibility.²⁰⁰

A restrictive interpretation of impairment protects nothing more than the status quo in a changing world. The current standard, while internally consistent with prior appropriation, is inconsistent with today's demands and impedes the State's interest in providing the maximum net benefits from its water resources. Changing demands and water availability demand flexibility. The strict impairment standard imposed by *Postema*, and the hostility towards Ecology discretion present

195. See *supra* note 16 and corresponding text.

196. See Morriss, *supra* note 16.

197. *Id.* at 905.

198. See *supra* Part III.

199. *Id.*

200. *Id.*

in *Swinomish* despite ambiguous statutory language, constrains market re-allocation of rights to achieve these goals. Despite these obstacles, Washington has created a number of successful and innovative efforts to facilitate voluntary transfers and mitigation within individual basins or areas of the State that demonstrate how the impairment standard could be relaxed state-wide.²⁰¹

Washington can better achieve its policy of encouraging voluntary transfers through judicial or legislative action to interpret impairment that: (1) allows for some de minimis impacts when justified under a balancing test overseen by Ecology and (2) simplifies the impairment analysis by encouraging and facilitating the availability and use of mitigation, both in-kind and out-of-kind, to mitigate impairment concerns.

201. *See supra* Part III.