



Navigating Washington's water rights process

Obtaining a water right has gotten difficult due to environmental awareness, court cases and federal laws.

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If you have a physical project, you most likely need water. If you are in the service area of a water purveyor, this is a simple process of getting a water availability certificate, paying a connection fee and paying a regular water bill. If you are outside of such service areas, you may get a water right.

This article briefly describes the outcome of recent water lawsuits, options for getting water, and finally, the water right permitting process.

Recent lawsuits

Obtaining a water right has gotten very difficult due to environmental awareness, court cases and federal laws like the Endangered Species Act. Two court cases in 2013 and 2015 have severely limited the discretion of the Washington Department of Ecology to find solutions and the availability of water for out-of-stream uses.

In both cases, Ecology tried to use regulatory allowances that allowed discretion if the decisions were determined to be in the "over-riding consideration of the public interest" (OCPI). In both cases, the Supreme Court determined that Ecology overstepped its authority, made the OCPI standard unattainable, and ended discretion Ecology may have had in applying the law. The implications of these two decisions are discussed in the following sections.

- **Loss of exemption for small wells.** The 2013 Supreme Court decision eliminated an exemption from the water right permitting process for small groundwater wells in most of Skagit County because of potential impacts on streamflows. Rural housing development depends on getting water through exempt wells and the court decision has made it very difficult to get a water availability certificate, causing an effective building moratorium.

The exemption has also been eliminated in portions of Kittitas, Clallam, Nooksack and other counties. More information is here: <http://tinyurl.com/Ecology-exemption>.

- **No alternative mitigation allowed for new water rights.** Getting a new water right typically requires mitigation of impacts such as reduced streamflows. This has historically been interpreted as being drop-for-drop or in-kind/place/time, meaning if groundwater pumping causes a reduction of streamflow, that streamflow must be replaced in the place and time the reduction occurs.

State policy has recently considered other forms of mitigation called out-of-kind/time/place that could provide more stream benefits, such as conservation easements.

A water right was issued to the city of Yelm in 2011 using a complex mitigation package with out-of-kind type mitigations. However, the 2015 Supreme Court decision allowed only in-kind type mitigation and canceled Yelm's water right. This has reverted all mitigation options to be of the in-kind type.

These restrictions have made obtaining a new water right ever more difficult. More information is here: <http://tinyurl.com/Ecology-water>.

How to get water now

Water banks. Water banks owned and operated by public, private or not-for-profit entities have developed in some parts of the state to serve rural development needs. Water banks acquire water rights and take care of the administrative processes of transferring portions to new owners.

A water bank usually only serves a well-defined geographic area that can be very limited. Therefore, banks are not the solution for all needs. After obtaining a water right through a bank, the applicant must still develop a source by installing their own groundwater well.

More information is here: <http://tinyurl.com/Ecology-waterbank>

Acquiring an existing right. If there is no water bank or you wish to avoid the costs of a water bill, you could acquire a water right — if one is available. A right might be found by searching the state-wide database, purchasing a property-associated water right, or hiring a well-connected agent to find one for you.

Water rights are usually attached to the land, so getting the land also gets you the water right. However, an application is needed to change the place, purpose and/or period of use of the water right — or if you wish to acquire the water right from the owner without buying the land.

Changes are best processed through county water conservancy boards, of which there are now 17, or through Ecology's cost reimbursement program.

Before making any commitment to acquiring a water right, a complete audit should be conducted to ensure you are buying a valid water right and that you can use it in the way you wish.

Obtaining a new water right. Getting a new water right has been increasingly difficult, and recent court decisions have made it ever more difficult. It is generally a long shot, but there are special circumstances in which a new water right might be obtainable. One example is where a groundwater withdrawal affects only marine waters, not streams.

Processing applications

Applications submitted to Ecology for routine processing are unlikely to be processed in a timely manner, with some taking more than a decade. However, exceptions and alternative pathways have been created, which are discussed below. Ecology encourages applicants to conduct a pre-application meeting to ensure the applicant understands the processes involved before they incur significant costs.

Priority processing. Applications meeting the criteria for priority processing by Ecology include: a public health emergency or providing significant environmental benefit; and having no adverse impacts on other water users or the environment. The bar for meeting these criteria is very high, and unlikely to be met for typical projects.

Water conservancy boards. Boards have been set up by counties to process change applications (not applications for new rights). It is strongly advised that applicants retain a consultant to assist the board in processing the applications by preparing analysis, drafting decisions for their consideration, and moving the application through the process.

Cost reimbursement agreement. A CRA is the only reasonable option if there is no board in your project area to change a right, or if you are applying for a new right. In a CRA, Ecology hires a consultant to process the application, and the applicant reimburses Ecology. The applicant typically also retains their own consultant for advice and guidance, thereby ending up paying for two consultants.

Streamlined CRA process. The streamlined CRA process allows an applicant to hire a consultant directly, instead of Ecology. This reduces costs by paying one consultant instead of two. The applicant must first obtain Ecology's approval of a qualified consultant.

Safeguarding your rights

The ever-increasing constraints on water rights highlight their value. Holders of existing water rights should fully understand and protect their water right assets by getting an internal audit done. For example, any portion of a water right can be lost if it is not used for five years, and provisions are written into many water rights that must be met to maintain their rights in good standing.

The information presented in this article is greatly simplified and the direction for each project is dependent upon the specifics. Water right processes are becoming so complex that obtaining professional help is advised in all cases.

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Coho changed water rights for Sundale Orchards in Eastern Washington, allowing it to expand its irrigated acreage by 40 percent.