Supreme Court Bruises Department of Ecology in *Foster* Opinion

Reversal of City of Yelm Water Right Permit is Wake-up Call for Reform

On October 8, 2015, the Washington Supreme Court reversed a water right permit issued by the Department of Ecology (Ecology) to the City of Yelm. Two months later, the consequences of this decision are still being sorted out by Ecology, the Attorney General's Office, and stakeholders. In the meantime, the State's water rights permitting program has gone off the rails because the Supreme Court's ruling essentially prohibits new water rights and most changes to existing water rights in basins with minimum instream flow rules, even when environmental benefits greatly outweigh impacts to minimum flows.

In *Foster v. Ecology,*[1] the Supreme Court further narrowed its already constrained interpretation of the "overriding considerations of public interest" (OCPI) exception[2] and held that OCPI cannot be used by Ecology to approve permanent water rights that would impair minimum instream flow water rights, even to the minutest degree. Coupled with the *Swinomish* decision in October 2013,[3] the Supreme Court has elevated instream flow protection to unprecedented levels, making "legal water availability" a growth limiting factor in the most populated and fastest growing areas of the state. This paper explains the *Foster* decision and its immediate impact on Ecology's water rights permitting program. A second paper by the author will explain how recent Supreme Court decisions and the unintended consequences of minimum flow rules have crippled the State's ability to balance the public's need for water for both instream and out of stream uses, and will propose solutions for both the Legislature and Ecology to make water legally available for other uses in basins with minimum flow rules.[4]

City of Yelm's Water Right Application and Regional Mitigation Plan

The City of Yelm applied for additional water rights in 1994 from a new well to supply current and future growth demands. Its well site and service areas are located between the Nisqually and Deschutes rivers, both of which have instream resource protection regulations adopted in the early 1980s. The Deschutes River and its tributaries, including Woodland Creek, were either closed year-round to further appropriation of surface water or minimum flows were established by rule.[5] In the Nisqually basin, Ecology established minimum flows for the Nisqually River and closed certain tributaries year-round, including McAllister Creek and Lake St. Clair.[6] Both regulations provided that future groundwater withdrawals in the basin "will not

[1] *Sara Foster v. Dep't of Ecology, City of Yelm and PCHB*, 2015 Wash. LEXIS 1184 (Oct. 8, 2015).
[2] *See* RCW 90.54.020(3)(a).
[3] *Swinomish Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).
[4] The second article will provide a post-*Foster* update to the paper presented at the 2015 Water Law in Washington seminar by Thomas Pors, entitled "Potential Solutions to Washington State's Post-Swinomish Instream Flow Regulation/Rural Water Supply Dilemma," (July 2015). The original paper is available at http://www.porslaw.com/category/articles/
[5] WAC 173-513-030 to 040.
[6] WAC 173-511-030 to 040.

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be affected" by its stream closures and minimum flows "unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter."[7] These regulations played a key role in the development of a regional mitigation plan by Yelm and the cities of Olympia and Lacey, which also had pending groundwater applications, and in the Supreme Court's later decision to reverse Yelm's water right.

Encouraged by the Nisqually Tribe and Ecology's Water Resources Program, the three cities jointly studied the regional impacts of their combined groundwater withdrawals and developed a regional mitigation plan that covered both watersheds. The cities collaborated on the purchase and relinquishment of existing water rights and provision of water reclamation and groundwater recharge systems. The regional mitigation plan provided both "in-kind" mitigation of impacts, using purchased water rights and water reclamation, and "out-of-kind" mitigation through riparian protection and habitat improvements. The plan was negotiated with the Nisqually Tribe and reviewed for adequacy by the Squaxin Island Tribe, neither of whom appealed any of the new water right permits.

Ecology determined that the out-of-kind mitigation for certain shoulder season (late fall and early spring) streamflow impacts that could not otherwise be mitigated required an OCPI finding to authorize what would otherwise be an impairment to streams and lakes protected by the Deschutes and Nisqually basin rules. Ecology found that the regional mitigation plan provided environmental benefits that substantially outweighed the impacts to surface waters and approved water right permits for all three cities.

Foster Appeal and Impact of *Swinomish* Decision

Sara Foster, a resident of Yelm and holder of a water right she claimed would be impaired by the Yelm permit, appealed. Water right permits issued to the cities of Olympia and Lacey were not appealed, and remain in effect. The Pollution Control Hearings Board criticized Ecology's simple three-part balancing test for the OCPI finding, but nevertheless upheld the Yelm permit based on twelve factors in the record that were considered by Ecology in approving the mitigation plan.[8] Foster appealed the Board decision, after which the Supreme Court issued a landmark decision in a different case, *Swinomish Tribal Community v. Ecology*.

In *Swinomish*, the Supreme Court declared the amended Skagit Basin instream flow rule invalid because Ecology used the OCPI exception to create reservations of water for future uses that would otherwise impair minimum flows adopted in the original basin rule several years earlier. The Court interpreted OCPI as a "narrow exception" to be used "only in extraordinary circumstances," but the *Swinomish* decision applied to Ecology's adoption of reservations by rule, not to granting water right permits under the Water Code. In the Foster appeal, Ecology and Yelm argued that *Swinomish* did not apply because Yelm's "gold-plated mitigation plan" complied with the purpose and intent of the narrow OCPI exception as determined by the

[7] WAC 173-511-050; WAC 173-513-050.
[8] *Foster v. Ecology*, PCHB No. 11-155 (2013).

Board's thorough 12-factor test. Foster argued that *Swinomish* required reversal of the Board ruling, but the Board decision and its 12-part standard for approving OCPI were upheld by the Thurston County Superior Court. Foster's appeal to the Supreme Court followed.

"Withdrawals" Interpreted by Supreme Court as Temporary Uses

In its 6-3 decision, the Supreme Court first interpreted the term "withdrawals" in the Water Code and related statutes as temporary uses of water, while in contrast the term "appropriations" is used by the Legislature when it refers to permanent water rights. Therefore, the Court determined, the use of the word "withdrawals" in the OCPI exception must mean that only temporary uses of water can be authorized by OCPI, such as drought year emergency authorizations, and not permanent water rights such as Yelm's permit. The minority opinion by Justice Wiggins sharply disagreed, pointing out multiple uses in the Water Code of the term "withdrawal" in reference to permanent water rights, including vested groundwater "withdrawals" at RCW 90.44.090, the groundwater change statute at RCW 90.44.100 ("*the holder of a valid right to withdraw public groundwaters may, without losing the holder's priority of right, construct wells or other means of withdrawal at a new location*"), and the groundwater permit and exemption statute, RCW 90.44.050, which provides: "*no withdrawal of public groundwaters of the state shall be begun … unless an application to appropriate such waters has been made to the department and a permit has been granted ….*" This latter statute also uses the term "withdrawal" in reference to exempt groundwater uses for stockwater, domestic and other purposes, and is the source of tens of thousands of water rights in the state that have heretofore been considered as permanent as any other water right created under state law. Ecology and Yelm have filed motions for reconsideration, claiming that "withdrawal" has been used synonymously with "diversion" in numerous water rights statutes and regulations, and is not a term of art designating only temporary uses. It remains to be seen whether the Supreme Court will alter this portion of its decision. If not, a great multitude of water rights issued for ground water "withdrawals" and all exempt groundwater uses in the state may face future uncertainty as to the permanent or temporary nature of such rights.

It was probably unnecessary for the majority opinion to make its "withdrawal" interpretation or to base their decision on it, although the majority was clearly focused on burying the OCPI exemption as a means of bypassing minimum flow regulations. The Court could simply have found that the exemption was not properly applied to Yelm's permit, perhaps based on its dependence on out-of-kind mitigation. In any case, this questionable statutory interpretation makes the *Foster* decision ripe for legislative clarification of the meaning of terms used in the Water Code (and perhaps also regarding the scope of the OCPI exemption or even the nature of instream flow water rights and impairment standards to be applied to them).

Mitigation Plan "Irrelevant" to "Legal Injury"

Another significant aspect of the *Foster* decision with statewide implications is the final paragraph before the conclusion of the majority's opinion, in which the Court essentially held that the Yelm-Olympia-Lacey mitigation plan was "largely irrelevant" to the analysis of

impairment of minimum flow water rights. First, the Court essentially ignored the breadth and depth of the mitigation plan and its environmental benefits by finding that any municipal water right application designed to meet the needs of a growing population was not the "extraordinary circumstances" meant to justify use of the OCPI exemption. The Court found that municipal water needs are "far from extraordinary," they are "common and likely to occur frequently as strains on limited water resources increase throughout the state."[9] It is worth noting to the Legislature that "extraordinary circumstances" is the Court's interpretation of OCPI, not the language used in the statute. Municipal water supply is synonymous with public water supply, the adequacy and quality of which is a fundamental human right and economic need that the Legislature sought to protect as much as minimum flows.[10] Thus, if the balancing of interests and conflicts between public water supply and environmental protection is not a legitimate subject for the OCPI exemption, it is hard to imagine a scenario that is.

Second, the majority in *Foster* protected the minimum flow water rights from any type of mitigation plan that involves out-of-kind habitat or environmental mitigation by concluding that the Water Code and the OCPI exemption are concerned only with the "legal injury" caused by impairment of senior water rights, not with any notion of "ecological" injury.[11] This conclusion no doubt stems from the Court's view that minimum flow water rights are not limited water rights and that they function in most respects like any other appropriation when it comes to the "first in time, first in right" approach to water law.[12] The prior appropriation doctrine, according to the majority opinion, "does not permit any impairment, even a de minimus impairment, of a senior water right."[13] However, comparison of minimum flow water rights to water rights that must be diverted for their beneficial use is questionable. Just as their uses and legal nature differ, so should the impairment standard that applies to protect them.

The major difference between minimum flow water rights and other senior water rights is that minimum flows are environmental rights, not legal rights, and do not derive their value from diversion of a specific quantity of water from a stream for a use that has economic value to its owner. The value of minimum flow water rights is the ecological value provided to the public by being left in the stream. It is therefore paradoxical that the Supreme Court would reject an environmental injury/mitigation test for minimum flows in favor of a legal injury test, especially where the existence of any legal right or legal injury to minimum flow water rights is purely theoretical. Even if minimum flow water rights were appropriately regarded as legal rights, the question should turn to the authority to manage those rights, and Ecology should be presumed to have authority as the state's delegated manager of minimum flows (and public water resources generally) to accept mitigation proposals from applicants or to impose conditions on new appropriations that prevent impairment of the ecological values attributed to minimum flow water rights. Ecology essentially chose to do just that for Yelm's permit

[9] Slip opinion at p. 11.
[10] See footnote 15.
[11] Slip opinion at p. 12.
[12] Slip opinion at p. 5; *see Postema v. PCHB*, 142 Wn.2d 68, 82, 11 P.3d. 726 (2000).
[13] *Id*.

through use of the OCPI exemption, which has been used by Ecology as a proxy for avoiding impairment of instream values since the *Postema* decision.

Denying OCPI authority to Ecology by characterizing impairment of an environmental right as a "legal injury" rather than an environmental injury will lead to the proliferation of absurd results and economic injuries to communities throughout the state. Thus, for instance, the removal of a single molecule of water from a stream with a 1000 cubic foot per second minimum flow would be considered a legal impairment that cannot be mitigated, despite the fact that it cannot injure any environmental values attributed to that flow. On the other hand, a robust habitat restoration program that insures no net loss or even improvement of fish survival would be off the table as a means of approving a new groundwater right with miniscule effects on surface flows, regardless of the need for or value of water for a proposed beneficial use.

Another difference between minimum flows and all other water rights created since the adoption of the Water Code is that the latter had to pass the Water Code's four-part test (is the use beneficial, is water available, will the new use impair existing rights, and will it be detrimental to the public welfare).[14] Ecology never used this test for the adoption of minimum flow water rights in its instream protection rules, which may ultimately affect their validity.[15]

Ultimately, there is an unsustainable disconnect between the purpose of minimum flow water rights and the manner in which they are being protected by Ecology and the Supreme Court. Common sense has been eliminated in the water rights permitting process as a result. This disconnect signals the need for Legislative clarification of how minimum flow protection can be accomplished without eliminating the States's ability to allocate water for other public purposes and beneficial uses. Some proposed strategies for this will be explored in an update to the author's Swinomish solutions article.[16]

How the Yelm Permit and Foster Appeal Missed the Real Issues

Somehow lost in the litigation over the meaning and use of the OCPI exemption in the *Foster* appeal was the fundamental problem with Ecology's instream flow regulations to begin with – that they exceeded Ecology's statutory authority by failing to balance the public's need for water for other purposes. These minimum flow rules have been interpreted after the fact in a manner that closes groundwater to further appropriation without any public notice or rulemaking. That was not the original intent of these early minimum flow rules or of the legislation authorizing instream flow protection as one of several concurrent goals of the state's

[14] RCW 90.03.290.

[15] See footnote 19. Minimum flow water rights never passed a public interest evaluation or proof of water availability, and in all cases minimum flows have been set at levels in excess of what is commonly available in the stream. This insures that in virtually all situations, a new appropriation would "impair" the minimum flow water rights because actual flows are, by design, already lower than the regulatory minimums. An action is pending in Thurston County Superior Court (Bassett v. Ecology) that challenges the validity of the Dungeness River minimum flow rule on this basis and other theories.

[16] See footnote 4.

water allocation policy.[17] Ecology could have side-stepped the OCPI issue for Yelm's application by interpreting the Nisqually and Deschutes instream flow rules and their groundwater exemption language[18] as a flexible impairment standard, one where not all future uses of groundwater are subject to the minimum flow water rights or stream closures. Instead, all parties to the appeal agreed that there was an "impairment" of the minimum flows and the narrow issue became Ecology's authority to sidestep that impairment with the OCPI exemption.

The City of Yelm could have challenged Ecology's impairment standard and argued that its groundwater withdrawals were not subject to the Deschutes and Nisqually basin minimum flows and stream closures, especially after consideration of the regional mitigation plan under RCW 90.44.055 (consideration of water impoundment or other resource management techniques). Yelm could also have challenged the instream flow rules as violating legislative directives to balance the public's need for water for both instream and out-of-stream uses according the maximum net benefits, or for establishing minimum flow water rights without the four-part test findings required by RCW 90.03.290.[19] Instead, the minimum flow water rights and steam closures in the Deschutes and Nisqually rules prevented Ecology from approving Yelm's groundwater applications through any means other than OCPI, and Yelm's opportunity to supply their community's future water demands with a new well and water right has ended.

Lessons from the *Foster* Case

The *Foster* decision is a lesson in the consequences of delaying the inevitable and avoiding reality. The current collision between instream flow protection and water rights permitting is a result of multiple administrative errors and legislative indifference over the last four decades. Neither the Legislature nor Ecology could have foreseen this mess when Ecology began adopting minimum flow regulations in the 1970s and early 1980s, like those involved in the *Foster* case. At the time these rules were adopted, Ecology officials believed that most groundwater remained open for appropriation and was unaffected by the instream flow rules.[20] When years later Ecology officials improved their knowledge of hydraulic continuity between surface and ground waters, they expanded the reach of existing instream flow protection rules to all groundwater without any new rulemaking, public notice, or public interest findings. The Supreme Court blessed Ecology's use of new scientific methods and the treatment of minimum flows as water rights in *Postema v. PCHB*, which then shifted the focus of Ecology's Water Resources Program to mitigation for instream flow impairment, a work-around for the

[17] The multiple fundamentals for water allocation policy are enumerated in RCW 90.54.020, including the "maximum net benefits" directive at RCW 90.54.020(2) and 90.03.005.
[18] See Footnote 7.
[19] Instream flows adopted by regulation have the status of water rights with priority dates per RCW 90.03.345. The Supreme Court determined in *Swinomish* that RCW 90.03.345 requires reservations to meet the four-part test, and there is no legislative distinction that would lead to a different result for minimum flows. See *Swinomish,* 178 Wn.2d 571, 588-89.
[20] Thomas Pors, "How Messed Up is Washington's Water Allocation System After Swinomish Indian Tribal Community v. Ecology?" at http://www.porslaw.com/wp-content/uploads/2015/01/Pors-Swinomish-Article.pdf or by request to the author.

accidental closure of groundwater without public notice. Instead of challenging the validity of instream flow rules or their expansion to groundwater without new rulemakings, water right applicants went along with the supposedly easier approach of funding hydrologic computer modeling and providing mitigation for the conservatively modeled and often theoretical impacts to minimum flow quantities, instead of mitigating the environmental values they represented. Ecology stood by their older instream flow rules despite their unintended closure of groundwater, and used OCPI to authorize out-of-kind mitigation as a safety valve to make water available for other uses. At the same time, politically powerful environmental groups and native American tribes pressured Ecology to increase the protection of instream flows rather than repair a faulty regulatory system. After *Swinomish* and *Foster*, this was all clearly a failed strategy and water managers and water users in the state are left scratching their heads to find ways to allocate water for any new uses. This now includes the use of exempt wells for single family homes in sparsely populated rural areas, which even drought stricken Southwestern states do not regulate – a consequence that will likely surprise and dismay most legislators and rural residents.

In hindsight, it is obvious that Ecology's minimum flow rules have unintended consequences, overreached Ecology's statutory authority, and failed to anticipate later Supreme Court decisions that have now virtually shut down the State's water rights permitting function. The result has created the problem of "legal water availability" and immediately shifted its costs to counties, rural landowners, and municipalities with inadequate water rights. Even though Ecology officials were probably surprised by these court decisions eliminating its OCPI authority, the beleaguered Water Resources Program is now faced with a no-win situation. In order to fix the minimum flow/water availability train wreck Ecology must now either repeal and rewrite its minimum flow regulations or substantially modify its "one molecule" impairment standard relating to groundwater effects on surface water. Specifically, this could be done by interpreting their own minimum flow regulations and acknowledging that not all groundwater withdrawals are subject to the minimum flow rules, instead of assuming that all groundwater withdrawals will automatically impair minimum flow water rights.

If Ecology's Water Resources Program does nothing, it will be up to the Legislature to fix this mess, which will not be easy given the general lack of knowledge concerning these complicated issues, not to mention the presence of so many other legislative priorities set for them by the Supreme Court (education funding) and the Governor (climate change, budget, transportation). Powerful interest groups are fighting hard to preserve the status quo of protecting minimum flows ahead of allocating water for communities. This is a time to examine the alternatives, including the means to protect and enhance instream values while permitting some appropriate new water uses that are consistent with the public interest. If both the Water Resources Program and the Legislature fail to act, the State must be prepared to face the financial and other costs for physical workarounds to the legal water availability problem, unfunded mandates to local government, and litigation between the State and its impacted communities.