

The Case Against a Water Right Adjudication in the Nooksack

Recently the Department of Ecology made a quiet but very momentous decision. It is requesting funds from the legislature to begin the process of adjudication in the Nooksack Basin. This action has caused huge concerns in the farming community and many other water users, while other groups welcome the process. Some have wondered why farmers are so adamantly opposed to adjudication of the water rights in the Nooksack. Let's take a look at what adjudication is, what it means for our farms and our community, and what needs to be done moving forward:

An adjudication is a lawsuit by the State against all water uses in the basin.

An adjudication examines all water rights (permit, certificates, claims, and exempt uses) and establishes a priority date for each water use based on "first in time; first in right". Whenever water is limited, the junior (newest) rights must shut off to ensure the senior (oldest) rights have their promised water.

And how does this affect current water users?

First in this line of seniority would be the local tribes. They have a senior water right claim based on the treaties with the federal government in 1855. Tribal water right claims have an on-reservation component, to fulfill the purposes of the reservation. Tribes also assert an off-reservation fishery claim. The essence of that claim is that to comply with Indian treaty obligations streams need adequate water to support a healthy fishery.

All other water rights in the Nooksack Basin are junior. This includes water rights held by cities, the Public Utility District (PUD), water associations, farmers, and thousands of individual wells supplying homes.

Further complicating the issue is what is known as the "instream flow" rule. The state established an instream flow rule for the Nooksack River in 1985. This rule specifies a required flow in the river and its tributaries throughout the year in two-week increments. This state instream flow level is also considered a water right, with a 1985 priority date.

For farmers, adjudication is complicated even more by how water rights were granted to them back when irrigation started in earnest in Whatcom County. Most were aware that a water right was needed for surface withdrawals but few understood that wells also needed a water right. In many cases the well driller filed the application for a water right but this was not consistent. We are left with a checkerboard of fields with and without water rights. Once the flow rule was imposed in 1985, and the principle of hydraulic continuity established through court actions, it became clear that there was inadequate water in the streams to allow for new water rights. Farmers were promised resolution if they would file applications to meet unmet irrigation needs in 1991. Over 300 applications from Whatcom farmers were filed at that time. These applications remain on file but have not been processed. During an adjudication those using water with no rights will be forced to stop all water use, with no opportunity to even speak into the process.

How will an adjudication affect our community and its water use?

It's important to recognize that adjudication is a strictly legal action that will make water management more contentious. It does not speak at all into the major issues our community faces in managing our natural resources. The community has been working together in various arenas on new water supply options, storage, converting surface water rights to groundwater,

streamflow augmentation, floodplain management, water quality, water conservation, and habitat restoration. Adjudications, however, have always caused water right holders to engage legal counsel to defend current rights. This will inevitably change the approach all the water users in this region are currently on, from a collaborative, positive stance on these issues to a defensive posture strictly focused on who gets water. The only winner in this scenario will be the attorneys.

We strongly believe that an adjudication, by eliminating those users who currently have no rights and putting those who have legal rights at great risk, will cause irreparable harm. It will render much of our farmland useless for producing crops and devalue local family farms to the point where farming will no longer be a viable option.

Why would farms and other users lose access to water?

First we need to understand a bit about instream flow rules. They were created to provide a baseline for fish needs in our streams. Few if any streams currently meet the instream flow rule. The law has been sporadically enforced with only occasional water shutoffs. An adjudication makes it clear that would change. Irrigators are the most vulnerable to this possibility, but the PUD and cities are also at risk. For example, the city of Roslyn had their water shut off in 2001 and 2004 in the middle of an adjudication because their 1908 water rights were junior to other users. There are thousands of Nooksack Basin water users who are junior to Ecology's 1985 instream flow rule and would be in jeopardy.

But other areas have survived an adjudication. Why would the Nooksack be so different?

The Nooksack is one of the few river systems that doesn't have reservoirs that hold water to be released in the critical summer low flow season. In the Yakima River Basin, for instance, efforts were made to increase storage so that flow needs for fish and other users could be met. Since the Nooksack doesn't have that option, the only choice is to shut off junior water users until the instream flow is met.

What is uncertain is how an adjudication of the tribal claims will affect the in-stream flow requirement. It's not clear whether a tribal instream flow right for fish would be a higher or lower flow than the state's current instream flow level. In any case, it seems clear that a tribal flow right will be senior to all other water rights.

How does this affect fish recovery?

It will force an end to current cooperative efforts at improving habitat and restoring fish runs. Losing farmland will certainly cause an increase in urbanization, an inevitable loss of habitat and an increase in toxins and pollution known to harm fish. The Puget Sound Partnership and the Salmon Recovery Council have declared protecting viable farming as one of the most important actions to take for the environment and fish recovery. Ecology's action directly contradicts the position of the Partnership.

What does this mean for our community?

When flows are not adequate for fish in the river, or any tributary, the law requires shutting off diversions. In the most likely scenario, no current right beyond the tribal rights would be secure. For farmers, this is a doomsday scenario. No water means no crops. Even the threat of losing

current legal water rights during dry seasons causes enough uncertainty to threaten even the most secure farms.

This will lead to changes in how farmers and others work on water supply issues. Since 1990, farmers have organized to work together on resolving water supply issues and other natural resource needs. An adjudication will require farmers to change their current priorities to spending resources on legal counsel, rather than investing into their local Watershed Improvement Districts, where much of the energy behind these natural resource projects exists. Individual farmers and other water right holders will most likely spend hundreds of millions in legal fees during an adjudication. Economic realities will force the farmers who operate the WID's to make a decision to fund the immediate threat of adjudication by pouring all of their funds into legal advice before investing into longer term solutions.

The other very distinct possibility for farmers is to sell to real estate developers who are willing to take the risk on holding the valuable asset of land. As our population booms and land prices skyrocket, they will be more able to afford what is most likely to be a bidding war for what few available water rights senior holders are willing to lease out. The amount of saleable residential lots in the middle of agricultural land will skyrocket as landowners will have no other choices but to convert farmland into rural residential sprawl.

This will also delay the good work being done under the management of the Watershed Management Board (WMB). The WMB (the local coordinating water management board – Lummi, Nooksack, PUD, Bellingham, County, small cities, and the Ag Water Board) is advancing several actions that work holistically on natural resource management issues that encompass fish needs, supply, quality, habitat, floodplain management, and land use. A 20 or 30-year water rights lawsuit will cripple the growing energy in this work, as all parties involved will apply their resources toward the small slice of natural resource management that is water rights.

While Ecology suggests this process might take 10 to 20 years, experience in the Yakima adjudication suggests this isn't likely. In Yakima, only surface water rights were adjudicated, but in the Nooksack, Ecology is proposing that both surface and groundwater rights will be included. That significantly complicates the situation. Attorneys estimate each water right holder will need to spend between \$10,000 to \$100,000 in legal fees. That means as a group, private water right holders will likely spend a half-billion to as much as a billion dollars in a likely futile effort to protect their access to water. The state may also spend as much as that of taxpayer dollars to pursue a course that conflicts with the state's obligation to protect the interests of its citizens. That money could be much better spent in pursuing a negotiated settlement and enhanced habitat and fish recovery efforts. The Yakima adjudication was finally resolved through negotiations which resulted in an Integrated Water Plan.

So what can and should be done?

All parties, including farmers, agree that current water rights are a mess. New clarity only helps if it creates a water supply structure that supports our goals as a community. There are multiple ways our community can reach its water resource goals without the cost and contention of an adjudication. For example, the Nooksack basin has the ability to create a live water storage system, as proposed by Lummi Nation, to recirculate water from the mouth of Nooksack River as it reaches the Salish Sea. We support this and other innovative solutions, many of which the ag community has already demonstrated to effectively increase flows and habitat. Good

resource management is not accomplished through the enforcement of disparate, antiquated laws governing water rights, water quality, land use, and drainage. These laws often work against each other. We need a holistic approach, not one that divides the community by creating winners and losers.

Farmers have been advancing the concept of Drainage Based Management (DBM) for over 20 years. The Watershed Management Board has adopted this strategy and work is underway in three pilot drainages. All crucial parties to water management have committed to work on the full specter of natural resource issues to propose how we will manage our abundant resources into the future. A change of focus to adjudication will stop positive ideas like trading a development right for a water right or allowing for periodic flood storage in return for drainage permits.

We can do so much better than relying on the state and courts to conduct an expensive, contentious 20-30 year adjudication of water rights. The disruption and dissension that this process will inevitably cause can be easily avoided. The farming community supports a legal binding mechanism to memorialize all agreements reached between the various water users in our community. An adjudication of water rights falls short of this goal. We support agreements of all relevant parties on multiple natural resource management issues as the desired path forward. An adjudication of water rights without agreement from all parties on a path forward to protect our natural resources is not the answer. We are encouraging all water users to make this case to Ecology, the Governor and the Legislature and stop movement towards a Nooksack adjudication.