

Water Rights Processing Topic Paper

*Note: Terms in **bold** are defined in the Glossary at the end of this document.*

Issues

- The backlog of **water right applications** in Island County results in delays of up to several years before applicants will have an answer from the Department of Ecology on whether their water right is approved or not.
- The successful implementation of the **Early Action Plan** has made some progress in reducing the backlog and has helped direct water rights processing to the highest priority areas of the County. Nevertheless, at the current rate it will take on the order of 5 to 10 years to eliminate the backlog. Also, Ecology staffing to support the plan implementation is subject to legislative and agency changes.

Goals

The WRAC has identified the following goals for addressing water right issues:

- *Water right processing should be timely* - the backlog should be eliminated and new water applications should be processed as they come in.
- *Water rights processing should be efficient* – Water right applicants should know that their application is being processed quickly, efficiently, and consistently. The application process, the information required of applicants, and the WDOE review time should be clear to applicants
- *Water right processing should more closely reflect the true costs* – The cost of a water right application is seriously mismatched with the cost of the application review. This cost to the applicant should reflect the true cost of review, but this must be coupled with an assurance of timely, efficient review.

Introduction

This topic paper presents a brief background on water rights, the results of the Island County water rights assessment, the Island County Early Action Plan, a discussion of how watershed planning can address water rights, and options for the watershed management plan.

Water rights are an essential component of Island County’s watershed plan for several reasons:

- It is a requirement of the Watershed Planning Act to, among other things, provide an

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estimate of water rights currently and to consider additional water allocations as a strategy for increasing water supply (RCW 90.82.070);

- Continuing available water supplies in Island County are dependent on effective water resource management, including the allocation of water through water rights;
- The Department of Ecology's (WDOE) management of water rights is an important subject in Island County and state-wide; and
- Continued processing of water rights was a critical issue during the initiation of watershed planning in Island County.

This topic paper relates to future topic papers on **exempt** (small quantity) groundwater withdrawals, seawater intrusion, alternative sources of water, and stream flows.

Background

The term “**water rights**” very generally captures a complicated set of issues contained in state water law, water rights themselves, and water right application processing. Each of these areas is explained in more detail below.

Water law

Washington water law is based on the premise that water is a natural resource held in common for the public good. Therefore, water is not owned by individuals, but individuals may have the right to use it. The right to use water is primarily based on the western water law concept of “first in time, first in right.” That is, the first individuals to put water to use have a senior right to that water and junior users may only use water after the senior users' rights are satisfied.

Washington's water codes were first established in 1917. That code affirmed the concepts above, set up a permit system for all future users of surface water, and established legal procedures for adjudicating conflicts between existing water users. The water codes were extended to groundwater in 1945, with similar permit requirements.

Notably, the groundwater code exempts small withdrawals of groundwater of less than 5,000 gallons per day for domestic use or irrigation of ½ acre or less. These withdrawals are commonly referred to as “**exempt wells**.” In 1967 a **claims** registry was created as a means for individuals to document water rights established prior to the permit systems. In 1971, in response to ever increasing conflicts between users, the water codes were expanded to emphasize the public benefits of water, protection of streams and other natural resources, and better data collection and management.

Water Rights

A **water right** is a legal authorization to use a certain amount of water for a specific

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beneficial purpose. Water rights come in the form of **permits** or **certificates**. A permit is the right to develop a water use on a specified schedule with reasonable progress and due diligence and with certain conditions such as protection of senior water right holders. A certificate is granted once the water right development schedule and all the conditions have been satisfied. Water right permits and certificates typically specify:

- the source of water,
- the point of diversion or withdrawal,
- the purpose of use,
- the quantity of water that may be used,
- how the water will be used,
- where it will be used,
- conditions such as seasonal use, and
- priority date of the water right (generally the date of **application**).

A water right typically stays with the property and is passed from owner to owner so long as the water is continuously put to use as specified in the permit. Water rights can be transferred to other properties or uses which typically requires a **change** in the permit (discussed below).

The WDOE is charged with granting **permits** and **certificates**. In order to be granted, a water right permit must pass a four part test. First, the water use must be beneficial. Second, there must be no impairment of senior water right holders. Third, the water must be available. Fourth, the granting of a water right must not be detrimental to the public interest. To answer these tests generally requires both a technical and legal review of the water right application.

A **claim** is an assertion that water was used prior to the establishment of the water codes. A claim is not a **water right** authorized by the state, rather it is a statement of belief that a water right exists. A claim can only be vested, that is determined to be valid, by a superior court in a process called an **adjudication**. Claims have been documented during several periods on the claims registry established in 1967. Between 1969 and 1974 approximately 200,000 claims were filed (2,764 claims in Island County). The state accepted the information on claims as reported by the claimants. Because adjudication is the responsibility of the courts, no efforts were made by state agencies to review the validity of the claims.

Water rights can be wholly or partially lost after five or more years of non-use, unless there is sufficient cause for the non use such as a drought. The return of the unused water to the state is called **relinquishment**. Water right holders can voluntarily relinquish their water rights. WDOE, at the prompting of a third party can initiate a non-voluntary relinquishment through an administrative order. The water right holder must then show to WDOE or via an appeal to the Pollution Control Hearings Board that the water has been used or sufficient cause for non-use. If use or sufficient cause for non-use is not

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shown then the water right will be relinquished. While **claims** may not be valid due to non-use, only a superior court through an **adjudication** can make that determination.

Water Right Application Processing

Water right **applications** come in two forms – new applications and **changes** to existing applications. The applications are processed by the WDOE generally in the order received. The applications are divided up among the four regions of the WDOE, and they are often divided up even further into batches of applications within a single source of water. In 2001 the legislature allowed WDOE to begin processing water right changes on a separate track from new application. Water right applications can also be processed on a cost-reimbursement basis where the applicant pays the WDOE's cost of the processing of their application and every other application ahead of them in the same water source. Water right changes can be processed by local **Conservancy Boards** (such as the Island County Conservancy Board) subject to WDOE review. Attachment 2 details the steps generally required to process a water right application.

There is a significant backlog of water right applications. Currently (FY 02) the water right application backlog consists of over 5,000 new applications (approximately 74 applications in Island County) and 1,500 change applications state wide (there is currently no backlog of change applications in Island County). At recent staffing levels, WDOE has processed about 150- 200 new applications per year. With recent additional staffing, WDOE has made substantial progress (over 400 applications processed) in the change application backlog.

It is important to note that the recent passage of the Municipal Water Rights Bill (E2SHB 1338, July 2003) may reduce the demand for new water rights and thus aid in reducing the water right application backlog. This bill essentially clarifies that water systems of 15 or more connections can use up to the full quantity of water reported on a **water right certificate**. This clarification likely provides some water systems with an unused (often referred to as **inchoate**) portion of existing water rights. These unused existing rights can be used to accommodate future growth rather than applying for new water rights. The extent to which these existing unused water rights can be used will be the topic of a subsequent issue paper.

The cost of a water right permit **application** is specified in state law as \$10 (not including additional permit development costs such providing technical information and public notice). It costs the Department of WDOE an average of over \$7,400 to perform the technical and legal review of the application. The cost of having a water right considered through cost-reimbursement payments to a consultant is on average about \$21,800, with no cost to the state. Conservancy board charge on average a little over \$500 per change application. WDOE's review costs an additional \$3,700. It should be emphasized that these are the costs of the review and consideration of the application. The decision resulting from that review could be an approval, a conditional approval, or a denial.

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Island County Water Rights and Claims Assessment

As part of the watershed planning assessment, the WRAC groundwater committee has made an initial estimate of the existing **water rights** and claims in Island County (April 2002). The numbers are reported in Table 1.

Table 1 – Water Rights and Claims in Island County

Type	Number	Estimated annual quantity of water represented by water rights (acre-feet)	% Total Allocation
Permits	62	28075	6%
Certificates	696		51%
Claims	2,764	22867	43%

These “paper” water rights represent approximately 50,000 acre feet per year of potential water use. This is nearly four times the estimate of actual water use contained in the Island County Early Action Plan. This paper record is of uncertain validity and precision, but must be considered when making decisions on future water allocations.

Island County Early Action Plan

In order to support the timely processing of **water rights** in Island County and to direct the efforts to the highest priority areas, the WRAC prepared an **Early Action Plan** during the first stages of watershed planning (August 2000). The Early Action plan divides the county into a number of generally hydrologically independent areas and prioritizes those areas for water rights processing based on two tracks. The first track is age of the application, with the oldest applicants getting the first priority. The second track is support of local priorities, with areas targeted for high growth and with greater water availability receiving the highest priority (this prioritization is explained further in the glossary). The early action plan was developed in cooperation with the WDOE and WDOE has used it as guidance for processing water rights. As of September 2003, water right processing in Island County pursuant to the Early Action Plan has yielded the following actions:

- WDOE has maintained the equivalent of 1 full time employee working on Island County water rights,
- 64 water right applications processed (41 new applications and 23 change applications),
- The entire backlog of change applications has been eliminated, and
- The first 9 priority areas in the EAP have been completed.

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Watershed Planning and Water Rights

Island County's watershed plan can affect **water rights** in three principle areas: (1) recommendations to the legislature and courts, (2) agreed upon state management strategies, and (3) local actions to support water rights processing.

Each of these areas and specific options within them is discussed below.

Recommendations to the legislature and courts

Changes in water law, the level of effort devoted to water rights processing, and in water rights **adjudications** are controlled mainly by the legislature and the courts. The watershed plan, while representing a strong statement of local interest, is not binding on them. The plan will necessarily be limited to recommendations in these areas.

Changes in Water Law – The WDOE, local governments, and individuals are bound by state water laws. Only the Washington State Legislature can change water law. Therefore any elements of water law that conflict with the management goals of Island County cannot be addressed by the watershed plan itself, but must come in the form of recommendations to the legislature. That said, the legislature has made a strong investment in local watershed planning and will likely be receptive to ideas that come out of the watershed plans. It is important that Island County's watershed plan identify any potential conflicts in water law and make recommendations to the legislature for correcting them. Island County's individual recommendations can influence future legislative actions on state law. Shared recommendations that come from a number of watershed planning efforts state wide will have an even greater influence.

Level of Effort – The WDOE's level of effort or rate at which it processes water rights is determined mainly by the legislature's level of funding and secondarily by staffing priorities within WDOE. In recent years, water rights processing has been called out for both increased and decreased staffing as a specific budget item in legislative appropriations. Concerns and recommendations about the level of effort directed towards water rights processing could be directed towards the appropriate decision makers.

Adjudication – An **adjudication** is a process where all those claiming the right to use water from a water source are joined in a single legal action to determine the rights and priorities for the use of the water. An adjudication confirms the validity, quantity, and priority order of every water right **certificate**, **permit**, and **claim** in the water source. Adjudications are initiated by WDOE or by water right holders and are overseen by a state superior court. An adjudication is the only means to determine with certainty the validity of claims. Also, an adjudication is necessary to confirm priority dates before WDOE can regulate between existing water right holders. Because they are difficult, time consuming, and costly, only a few areas of the state have been adjudicated. The ongoing Yakima adjudication has taken over 20 years so far.

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State Management Strategies

The watershed plan can, with state agency agreement, direct state agency actions that affect water rights. The plan can drive administrative rules or agency policies that govern the WDOE's administration of water rights. These will need to be developed in close coordination with the agency to ensure that they are legal and feasible.

Administrative Rules – The watershed management act contemplates that elements of the watershed plan will be written into state administrative rules. These rules can govern how the WDOE administers water rights in Island County within the bounds of water law. Existing administrative rules for other areas of the state include provisions for the protection of stream flows, limitations on small well exemptions, reservation of water supply for municipal and commercial uses, and priorities for water uses. Administrative rules can dictate very firm and precise administrative policies. It should also be noted that, once in place, it is difficult to change an administrative rule.

Policy Guidance – The watershed plan can make recommendations to the WDOE on how WDOE could use its administrative discretion in the processing of water rights. WDOE has limited discretion in setting priorities for water rights processing, in the technical review of water rights, and in the kinds of technical assistance it provides to applicants and local governments. The **Early Action Plan** and the **Memorandum of Agreement** on coordinating water resource planning, management, and permitting are examples of policy guidance. Policy guidance is more flexible and easily changed than rule making. It also may be seen as a less firm commitment.

Local Actions

The county and other local governments, as well as the private sector can support and facilitate water rights processing in several ways, such as technical assistance and coordination, community information and assistance, coordination with local policies and plans and local options for water rights processing.

Technical Information – Readily available technical information is of great assistance to water right applicants and WDOE in the processing of water rights. The county already provides a great deal of that information via the county hydrogeologist and the county water information database. There may be opportunities for improving this.

Community Information – Local governments and private groups such as water purveyors, consultants, and public interest groups can assist Water rights processing with by providing good information to the community on what it takes to get a water right, where the challenges lay, and other options that might be considered.

Local Policies and Plans – WDOE may consider local plans and priorities when prioritizing water right processing work load and must consider the public interest when issuing water rights **permits**. Local governments can assist WDOE in providing this

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information. The WRAC and the Early Action Plan represent current examples of this. Local options for water rights processing – As discussed above, water rights may be processed by conservancy boards and through cost-reimbursement. Island County has formed a **Conservancy Board** who has aided in clearing the backlog of water right change applications. This option can be continued. Applicants who are willing to pay can turn to cost-reimbursement for water rights processing. This has been done to a limited extent in Island County. It may be possible to encourage more cost reimbursement through information or other incentives.

Options

The WRAC has identified the following potential options for water rights. These options are conceptual. Options that the County Commissioners support can be developed in more detail.

Options for improving water rights processing (State Actions)

Option # 1: Improved WDOE Water Right Processing and Fees – WDOE should have adequate staffing to work through the water right application backlog and keep up with new applications. This could be supported through water right application fees that more closely reflect the cost of reviewing a water right. Furthermore, the cost of protesting a water right should be raised to more closely reflect the cost of addressing protests. This would be a recommendation by the BICC to the legislature to change water law and fund Ecology staff.

Option # 2: Order and Priority of Water Rights Processing – The Island County **Early Action Plan** has expressed a priority order for processing water rights. This currently exists as policy guidance for WDOE. The guidance could be updated based on emerging information from the watershed planning process. The guidance could also be written in to state rule to provide more surety.

Options for improving water rights processing (County Actions)

Option # 3: Move Conservancy Board in to County Government – The **Conservancy Board** is an important tool in ensuring that the water rights changes are processed in a timely manner. While there is little current demand, it is important to maintain this capacity in the county. The conservancy board could be moved from an independent institution in to county government to reduce the liability insurance costs.

Option # 4: Local Facilitation of Water Rights – Island County has demonstrated track record of sound management of water resources. In particular, the county has established water availability review requirements for exempt withdrawals in areas of seawater intrusion. The county develops and maintains excellent technical capacity to support local and state water resource management. The county's capacity could be used to assist **water right** applicants in the development of technical information required to

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obtain a water right. Work that the county is able to accomplish in advance of the WDOE review would reduce WDOE time required for water right review. The county could also screen complete applications that are ready to proceed, identify alternative water supplies, and provide applicants with an early indication of their likelihood for approval. This might be accomplished through a negotiated management strategy with the WDOE. A negotiated strategy could include specific tasks to be performed by the applicant, the county and WDOE, and timelines for each of the tasks (Attachment 2 details the steps generally required to process a water right application). It may also be possible through state rule making for WDOE to give county-reviewed water right applications priority processing. Options for supporting the county's additional workload include: fees, state watershed plan implementation funds, or a request to the legislature to fund county efforts. Water right applications could still be made directly through WDOE.

Option # 5: Facilitate Cost Reimbursement - The Island County Watershed Plan could develop and recommend a county administered approach to encouraging and facilitating cost reimbursement. **Water right applicants** may elect to pay for the full cost of Ecology processing their water right application. They must also pay for the processing of any senior application in the same water source. By paying for the processing, the applicant is not subject to the long waits typically associated with water right applications. Under this option Island County would work as a proponent, facilitator, and broker of water right applicants pursuing cost reimbursement. This might entail preliminary technical and legal analysis to determine water sources, the applicants within those sources, and likelihood of water availability. It may also entail the county actively encouraging groups of applicants to collectively fund water right review within their water source. This could be done within the existing water law and the approach developed independently or in consultation with Ecology. Options for supporting the county's additional workload include: fees, state watershed plan implementation funds, or a request to the legislature to fund county efforts.

Glossary

Adjudication – The process where all those claiming the right to use water from a water source are joined in a single legal action to determine the rights and priorities for the use of the water.

Application – A request to the state for a new water right or change to an existing water right. Applications must contain information such as intended place of withdrawal or diversion, place of use, purpose of use, and number of people to be served or acres irrigated.

Certificate – Documentation of a fully developed water right where all water has been put to use and all permit conditions have been satisfied.

Change – A change in how or where water is used by a water right or claim holder often

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requires WDOE review and approval. Changes include moving the place of withdrawal or place of use, different uses for the water, and different quantities of water.

Claim - An assertion that water was used prior to the establishment of the water codes

Conservancy Board – A local board established to process water right change applications and issue initial decisions on the change requests. Conservancy Board decisions are subject to WDOE review. The Island County Conservancy Board consists of three members appointed by the County Commissioners.

Early Action Plan – A plan prepared by the WRAC in August 2000 during the first stages of watershed planning that makes recommendations on the timely processing of water right applications and a regional priority order for processing those applications. The plan recommends that WDOE direct its work in two priority areas. First, those areas with the oldest applications. Second, in high priority areas as determined by a ranking of:

- agricultural demand,
- undeveloped parcels,
- urban growth area,
- evidence of seawater intrusion,
- relative availability of water

Exempt Well - Small withdrawals of groundwater of less than 5,000 gallons per day for domestic use or irrigation of ½ acre or less exempted from permitting requirements.

Inchoate – The unused portion of a water right permit or certificate that the water right holder is legally entitled to use in the future. For example, water rights for community water systems are often issued with a schedule under which they may develop their water system. As the community grows, a portion of the permitted water is put to use and a portion remains as an inchoate right to serve future growth subject to the terms of the permit.

Memorandum of Agreement – A 1990 Memorandum of Agreement between the Department of Ecology, Water Resources Program and Island County that relates to the coordination of water resource planning, management, and permitting activities.

Permit - The right to develop a water use on a specified schedule with reasonable progress and due diligence and with certain conditions such as protection of senior water right holders.

Relinquishment - The return of the unused water to the state because the water has not been used for five or more years without sufficient cause for the non-use such as a drought.

Water Right - a legal authorization to use a certain amount of water for a specific beneficial purpose. Water rights come in the form of permits and certificates. The term

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“water right” is also often used more generally to include claims.