An Overview of Water Rights and Water Law In Washington

WASHINGTON STATE DEPARTMENT OF ECOLOGY

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October 22, 2020

Presented to:
Infrastructure Assistance Coordinating Council Virtual Conference

Who Owns the Water?

In Washington and the West:

- **All water is owned in common by the people**

A water right is:

- A right to the beneficial use of a reasonable quantity of public water for a beneficial purpose during a certain period of time that occurs at a certain place.
- A water right holder uses that water to the exclusion of others.

What is a water right?

A water right is the legal authorization to use a certain amount of public water for a designated purpose. The water must be put to a "beneficial use".

3 kinds of water rights:

- **Claim:** A "claim" that water was used prior to 1917 Surface Water Law or 1945 Ground Water Law **(Can no longer can apply for)**
- **Permit:** A "permit" is permission by the state to develop a water right – but is not a final water right
- **Certificate:** Once all the permit conditions are met, a Water Right Certificate is issued as a legal record of the water right and is recorded with the County Auditor. A water right certificate is considered a property right.

Groundwater vs. Surface Water

For Groundwater:

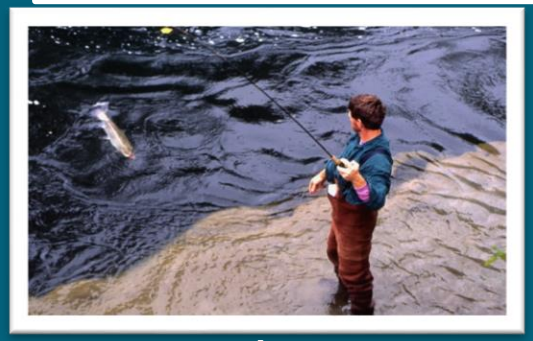
- The withdrawal of the first 5000 gallons per day is exempt from needing a water right *[There are actually 4 separate "exemptions" – more detail in a few slides]*
- **Measured in Gallons per Minute (GPM)**

For Surface Water:

- **ANY** amount of withdrawal (diversion) needs a water right
- **Measured in Cubic-feet per second (CFS)**

How is water used in Washington?

"beneficial uses"



Recreation

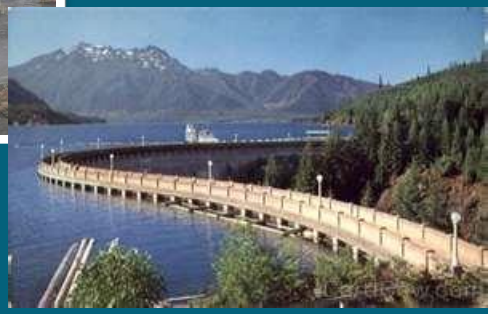
Livestock Watering

Municipal

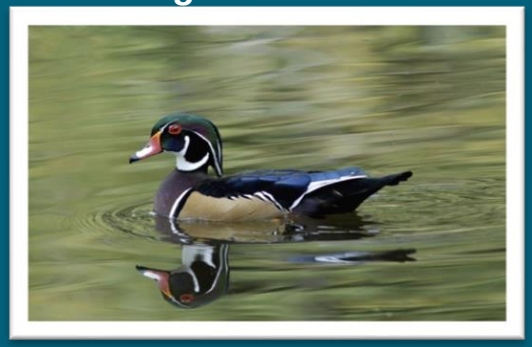
Irrigation

Fish Propagation

Industry



Power



Wildlife Propagation

How do you get a water right?

"Four Part Test"

The answer must be "yes" to all four of the following questions for each application for a water right:

1. Is the proposed use beneficial?
2. Is water is available, physically and legally?
3. Will existing water users will not be impaired?
4. Is the proposed use not detrimental to public welfare?

What does a Water Right Give You?

If the Four Part Test is met and there are no appeals, then Ecology may issue a water right permit, which specifies:

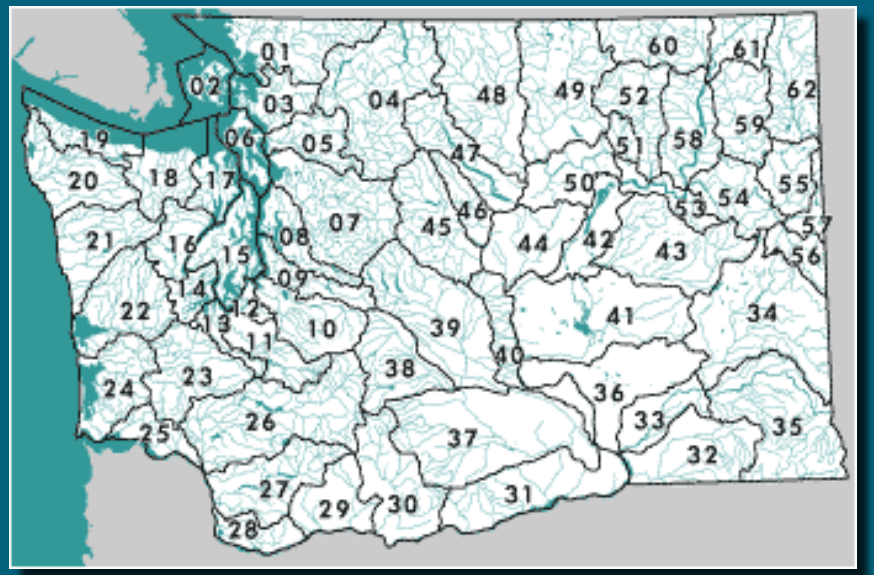
- Source of water **(e.g., Clover Creek Advance Outwash Aquifer or Deschutes River)**
- How much can be used **(e.g., 45 GPM or 0.1 CFS)**
- Purpose of use **(e.g., Multiple Domestic, Irrigation, Dust Control)**
- Place of use **(usually the legal description of property or development)**
- Conditions of use - **(e.g., seasonal, minimum flow restrictions, metering)**

And this use is at the exclusion of everyone else….

Stages of a Water Right

Stage	Purpose
Application	Establishes intent to appropriate
Permit	Authorization to develop
Proof of Appropriation	Water put to beneficial use
Certificate	Perfection of water right

How many Water Rights in WA?



Water Rights: 53,000

- 50,000 "Certificates" issued
- 3,000 "Permits" in development

Claims - 170,000

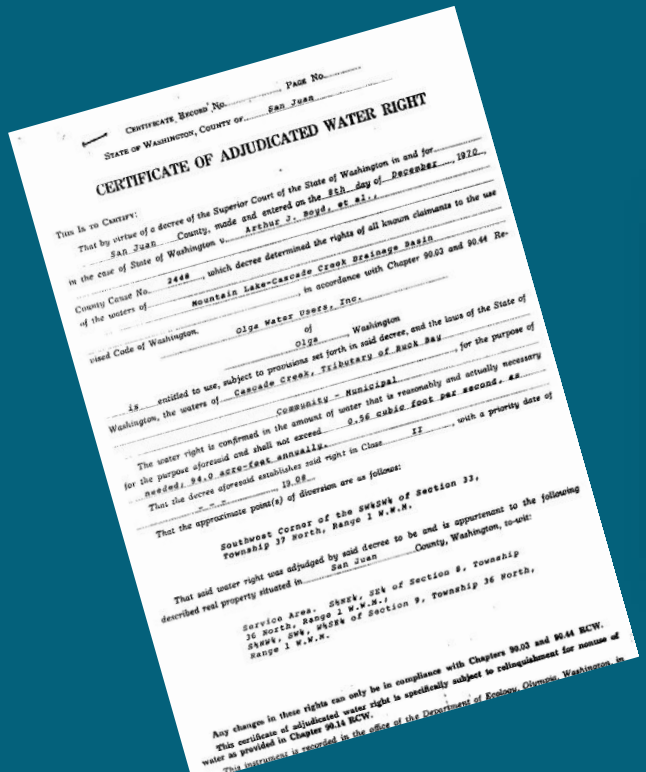
- "Claims" to use surface water and groundwater pre-date modern water law and are called claims – not water rights.

- **Permit exempt individual wells**: 400,000 +

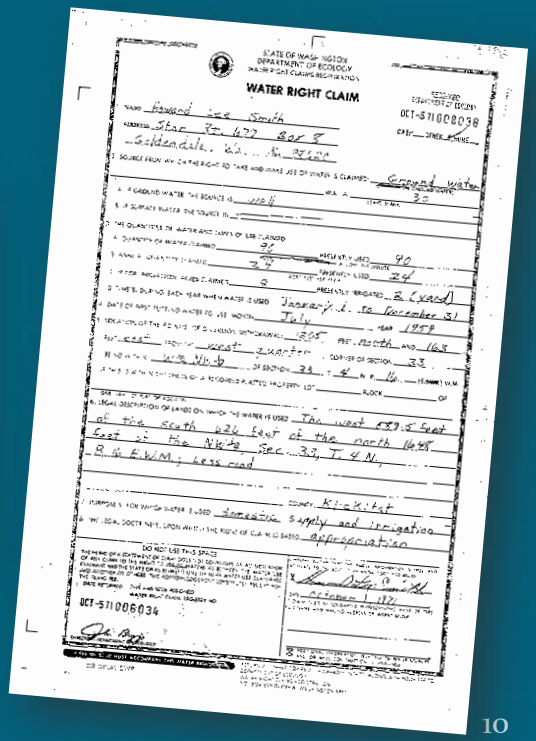
What are the Key Laws relating to Water Rights?

RCW 90.03 – Surface Water Code of 1917

RCW 90.44 – Ground Water Code of 1945



CERTIFICATE OF ADJUDICATED WATER RIGHT



WATER RIGHT CLAIM

Water Rights – Do I need one?

For Surface Water – YES!!

- **ANY** amount of withdrawal (diversion) needs a water right

For Groundwater - Only if withdrawal > 5000 GPD

- The withdrawal of the first 5000 gallons per day for domestic use, irrigation of up to ½ acre, up to 5000 gallons per day of industrial use is exempt from needing a water right – ***More details in Slide 13***

NOTE – state water laws are based on "first in time-first in right" premise – older rights have seniority over junior rights

Does my property have a water right?

Need to check Ecology's statewide Water Rights Database at:

http://www.ecy.wa.gov/programs/wr/rights/tracking-apps.html

Most rural properties have an exempt well, which does not need a water right

What can I use water from an exempt well for? [Exempt Well = 4 conditions below]

1. Providing water for **livestock** **(no gallon per day limit or acre restriction)**
2. Watering a **non-commercial lawn or garden one-half acre** in size or less **(no gallon per day limit)**
3. Providing water for a **single home or groups of homes** **(limited to 5,000 gallons per day)**
4. Providing water for **industrial purposes, [including commercial irrigation]** **(limited to 5,000 gallons per day but no acre limit).**

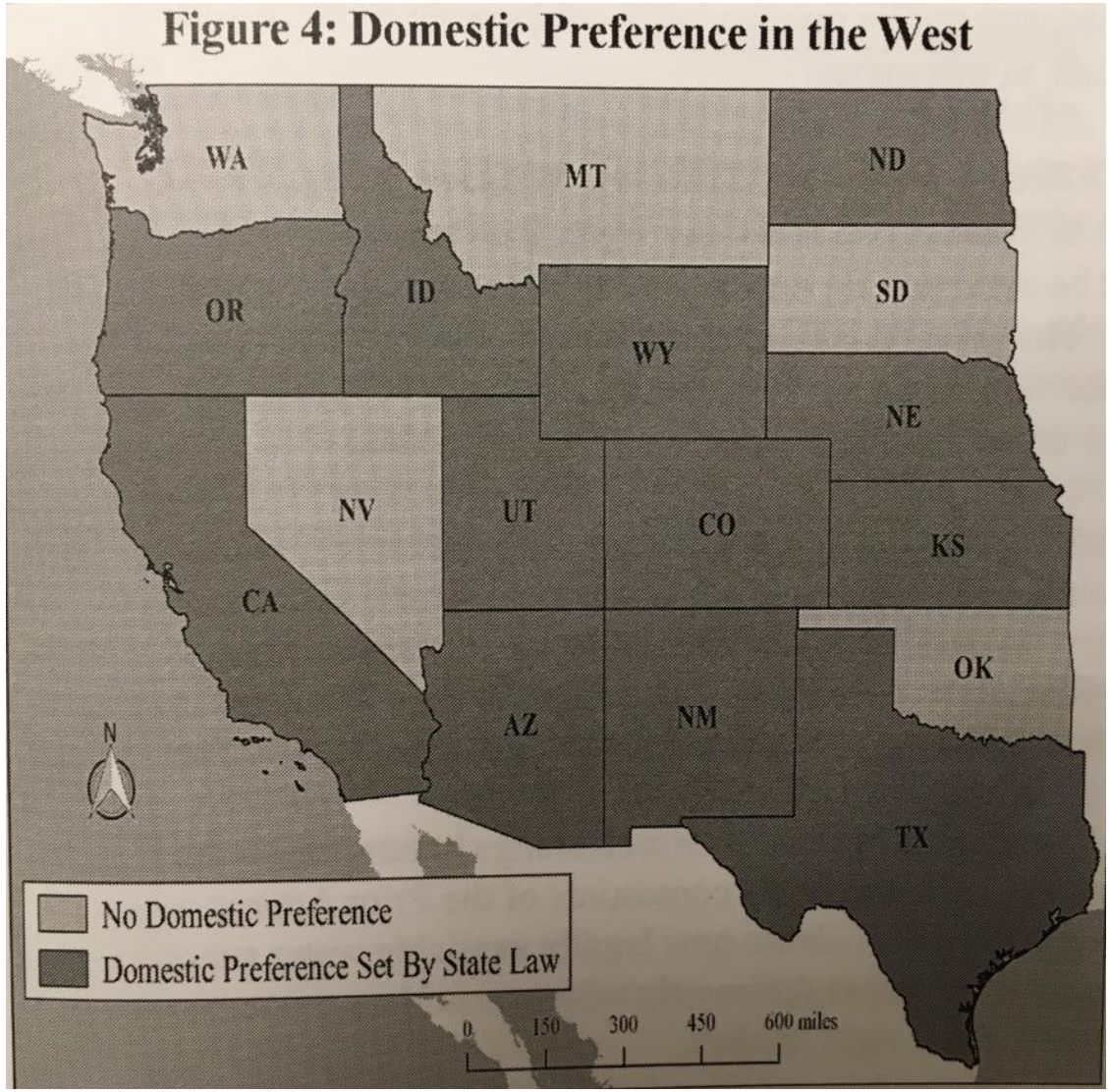
- It is important to remember that although you are exempt from the water right permit process under the ground water exemption, **all other water laws and regulations still apply.** For example, there are a number of rules and regulations associated with the actual drilling of the well.

- Cannot irrigate two acres by installing four wells (each serving 1/2 acre).

- When developing land and supplying the commercial or domestic development with water from several wells, **all the wells of the development together must pump 5,000 gallons a day** or less to be covered under this exemption.

- If the cumulative total of withdrawn ground water for a project **exceeds 5,000 gallons a day, a water right from Ecology is needed.**

Washington state DOES NOT have a "domestic preference" right to water



In other words, drilling a well on your property **does not give you the "right" to use the water.**

Water use in WA is subject to the prior appropriation doctrine, and recent Supreme Court decisions have ruled that even permit exempt wells can be subject to proof of no impairment to nearby surface waters and the legal availability of water.

Counties now has this responsibility to determine this (under the GMA).

How do I get a water right?

- Water rights are issued by Ecology's regional office in Lacey, Bellevue, Yakima and Spokane.
- One fills out an "Application for a Water Right" and submits a $50 fee **(additional fees may be required for large water right applications)**
- Once application is received, that date is the application's "priority date" – which establishes the water right's "Seniority"
- Often several years will pass between the application submittal and actual decision to either reject the application or approve the water right. Currently ~5000 application backlog statewide.

Are there exceptions/exemptions/other options?

Cost Reimbursement –

- The cost reimbursement option allows a private consultant to do the work that Ecology hydrogeologists and permit writers would ordinarily do. Presently, Ecology has eight consulting firms pre-approved to do this work.

- Applicants assume the full cost of processing their water right application. Ecology's Water Resources Program permit writers/hydrogeologists review the report of examination work done by consultant and recommend approval or denial.

Can a water right be changed?

Yes.

- Many water right holders make changes to existing water rights in order to meet changing needs.
- Changes can be made to the
  - **Place of use**
  - **Point of diversion or withdrawal**
  - **Additional points of diversion (s) or withdrawal(s)**
  - **Purpose of use (including season of use)**

However there can be added complexities:

- i.e. a point of withdrawal and place of use of a ground water permit can be changed, but the purpose of use cannot be changed until the water right has been perfected (Certificate)

Can a water right be transferred?

- **Generally, yes.** Water right application or permits may be assigned to a new property owner. These assignments must be filed with Ecology. This keeps the permit valid and the new owners may continue to develop the permit.
- Water right certificates are already part of the legal record, so a change application cannot be filed for a Certificate.
- The water right automatically transfers with the property on the sale of the property, unless the seller chooses to sell it separately.

Can a water right be relinquished?

- **Yes.**
- Since water rights are confirmed and maintained through beneficial use, a water right may be wholly or partially lost due to extended periods of voluntary “non-use”.
- Five or more successive years of non-use can trigger the relinquishment of a water right unless there is sufficient cause to explain the non-use:
    - Water is unavailable due to drought
    - Military duty
    - Legal Proceedings that prevent the water right holder from using the water
    - Special federal or state programs
    - Irrigation specific (i.e. reduced irrigation due to varying weather conditions)
- Relinquishment exemptions include municipal water supplies, trust water, power development, etc.

Trust Water and Water Acquisition

- **Trust Water Rights Program**
  - Provides a way to legally hold water rights for future uses without the water right relinquishing.
  - Water is held in trust to benefit groundwater and instream flows, and other beneficial uses.
  - While water is held in trust it retains its original priority date.

- **Washington Water Acquisition Program (to increase stream flows in Critical River Basins)**
  - Voluntary program to increase stream flows in 16 watersheds with vulnerable salmon and trout populations. The program is backed by strong interest and support from local, state, federal and tribal governments and private entities. State agencies involved include the departments of Ecology, Fish and Wildlife and Washington Conservation Commission.

Can water rights be purchased or leased?

Yes.

- In 2003, the state launched a voluntary program to increase stream flows in 16 watersheds with vulnerable salmon and trout populations. The program is backed by strong interest and support from local, state, federal and tribal governments and private entities. State agencies involved include the departments of Ecology, Fish and Wildlife and Washington Conservation Commission.

How the Program Works

- Using state and federal funds, program sponsors are providing an opportunity for farmers, ranchers and other water-right holders to participate in salmon recovery by selling, leasing or donating their water where critically low stream flows limit fish survival.
- All water obtained through the program will be returned to the creeks, streams and rivers where it was originally withdrawn. Program sponsors have developed criteria and guidance to help ensure water-right acquisitions receive fair market value and are targeted in areas that will most benefit fish.

Additionally

- Water right certificates can be sold as real property on the open market.

See: http://www.waterexchange.com/

Can reclaimed water be “reused”?

- Reclaimed water can be used for a wide variety of beneficial uses such as:
  - irrigation,
  - industrial process and cooling water,
  - toilet flushing,
  - dust control,
  - construction activities and many other uses of non-potable water supplies.
- Can also use reclaimed water as resource to create, restore and enhance wetlands, recharge groundwater supplies and increase the flows in rivers and streams.

Can rainwater be captured and used?

- In October 2009, Ecology issued an Interpretive Policy Statement clarifying that a water right is not required for rooftop rainwater harvesting.
- According to the new rainwater interpretive policy, an “on-site” rooftop/guzzler system means the storage and use of the rainwater occurs on the same parcel as the roof from which the water was captured.
- Once you have collected the rainwater there are no limitations on its use.
- If and when the department determines that rooftop or guzzler rainwater harvesting systems are likely to negatively affect instream values or existing water rights, local restrictions may be set in place to govern subsequent new systems (there are currently no restrictions). However, Ecology generally does not expect the collection of harvested rainwater to cause problems or reduce the amount of runoff that would have occurred from the site in its natural, pre-development state.

What about measuring or metering?

Measuring water use benefits the public in many ways, such as:

- **Providing a tool for ensuring compliance with water rights.**
- **Supplying information for water resource planning and management.**
- **Informing water users how much water they are using, and**
- **Helping to better manage a limited natural resource.**

- **Laws governing measuring water**
  - RCW 90.03.360 – Controlling Works and measuring devices
  - RCW 90.44.050 - Permit to withdraw
  - RCW 90.44.250 - Investigations -- Reports of appropriators
  - RCW 90.44.450 - Metering or measuring ground water withdrawals

- **Rules governing measuring water**
  - Chapter 173-173 – Requirements for Measuring and Reporting Water Use.

- **Meter Information**
  - Meter Types, Technical Requirements, Vendors and Installers - includes information about: Pressurized systems, Open Channel systems, and Meter Vendors and Installers.

How are water law violations enforced?

- Water Resources Program receives numerous complaints
- All complaints of “illegal water use” are investigated
- Begin with compliance education
- Offer technical assistance, work to find solutions that are least disruptive
- Take enforcement steps and issue penalties when other steps don’t work
- Decisions are subject to appeal

Water Resource Management

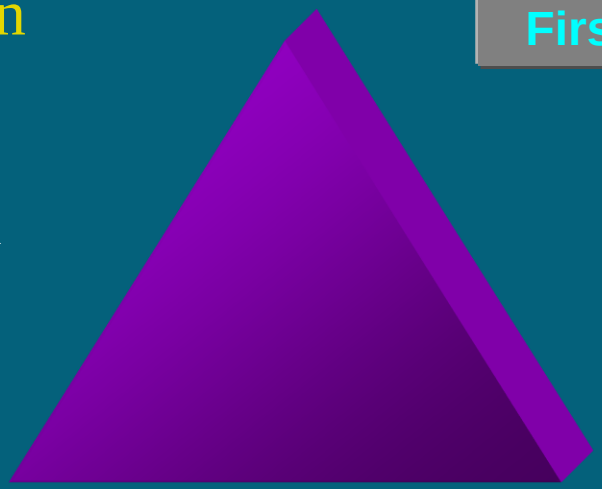
"is a real balancing act between competing interests"

Prior Appropriation Doctrine

First in Time, First in Right

Allocation

- New Water Rights
- Transfers
- Adjudication



Protection

- Senior Water Rights
- Reserved Federal Rights
- Instream Flows
- Compliance
- Trust Water Rights

Conservation

- Water Use Efficiency
- Water Reuse
- Metering

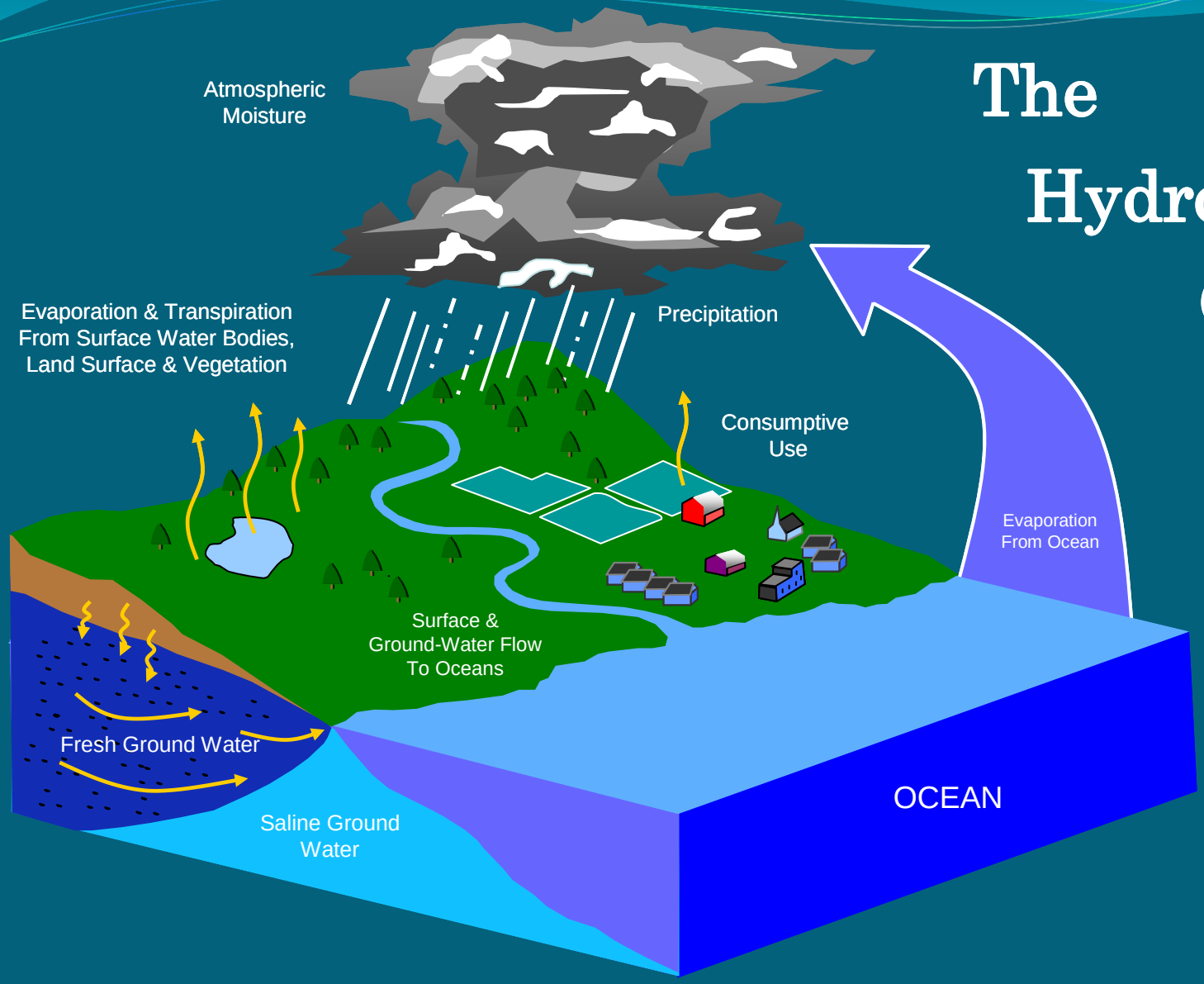
Public Interest

- Watershed Planning
- Land use Planning
- Utility Planning
- ESA Recovery Plans

Science

- Fish biology
- Hydrogeology

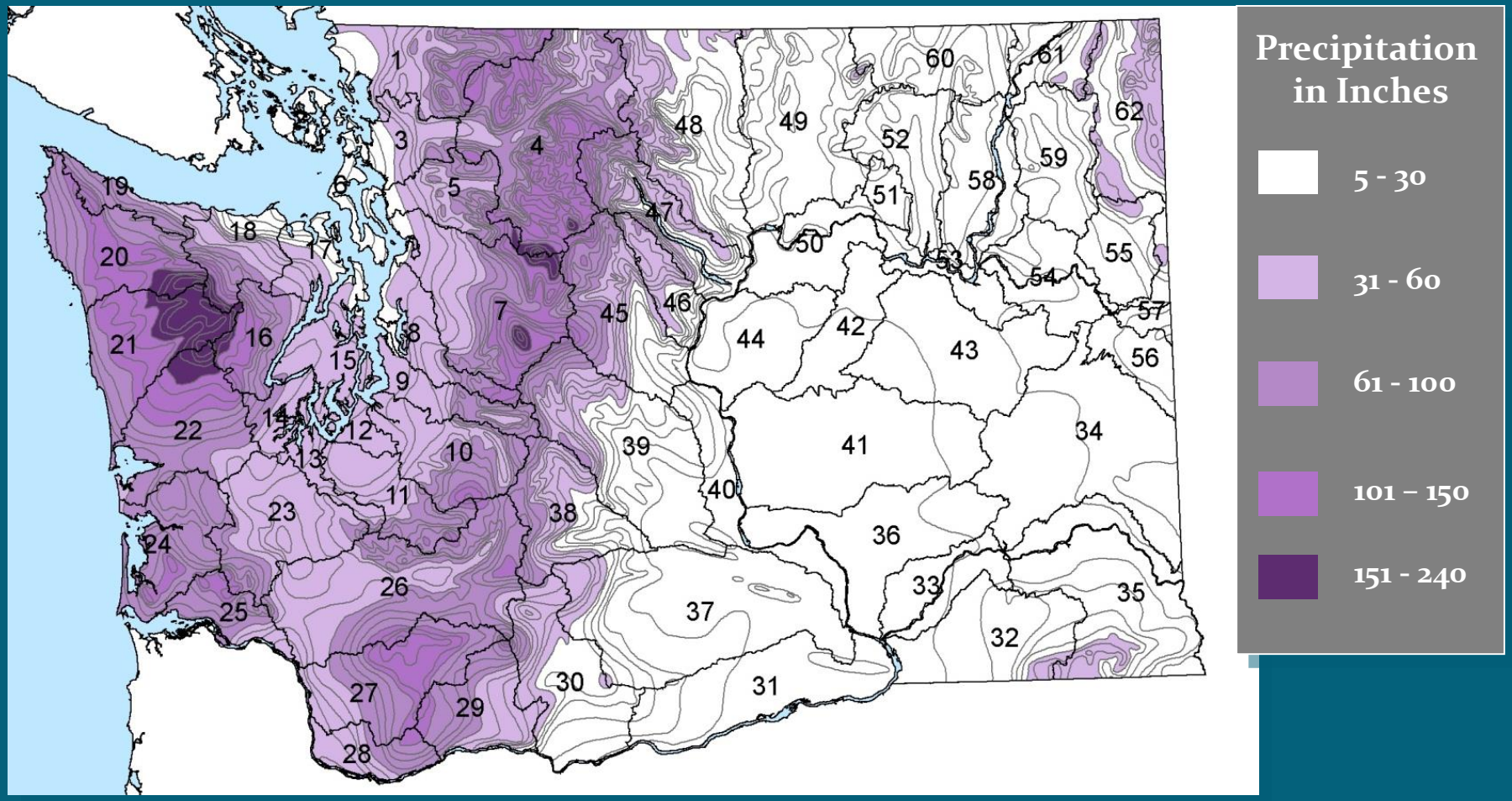
The Hydrologic Cycle



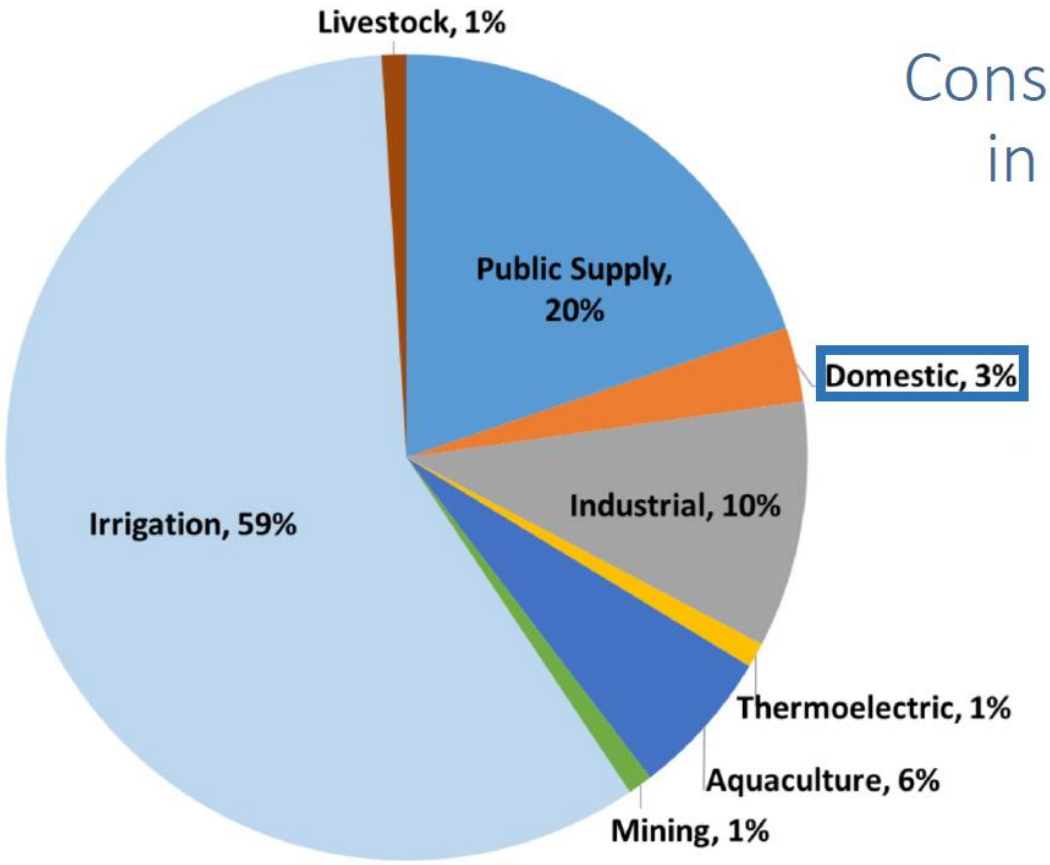
Other factors to consider as water right applications are processed

- **Location**
- **Location**
- **Location**
- Physical and legal water availability is different depending on various factors. What is available in the Elwha is not the same as what is available in the Dungeness is not the same as what is available in the Sol Duc-Hoh…

Annual Precipitation in Washington

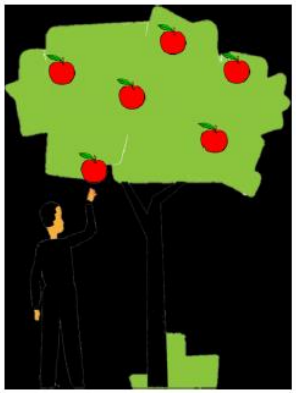


(Consumptive) Water Uses In Washington



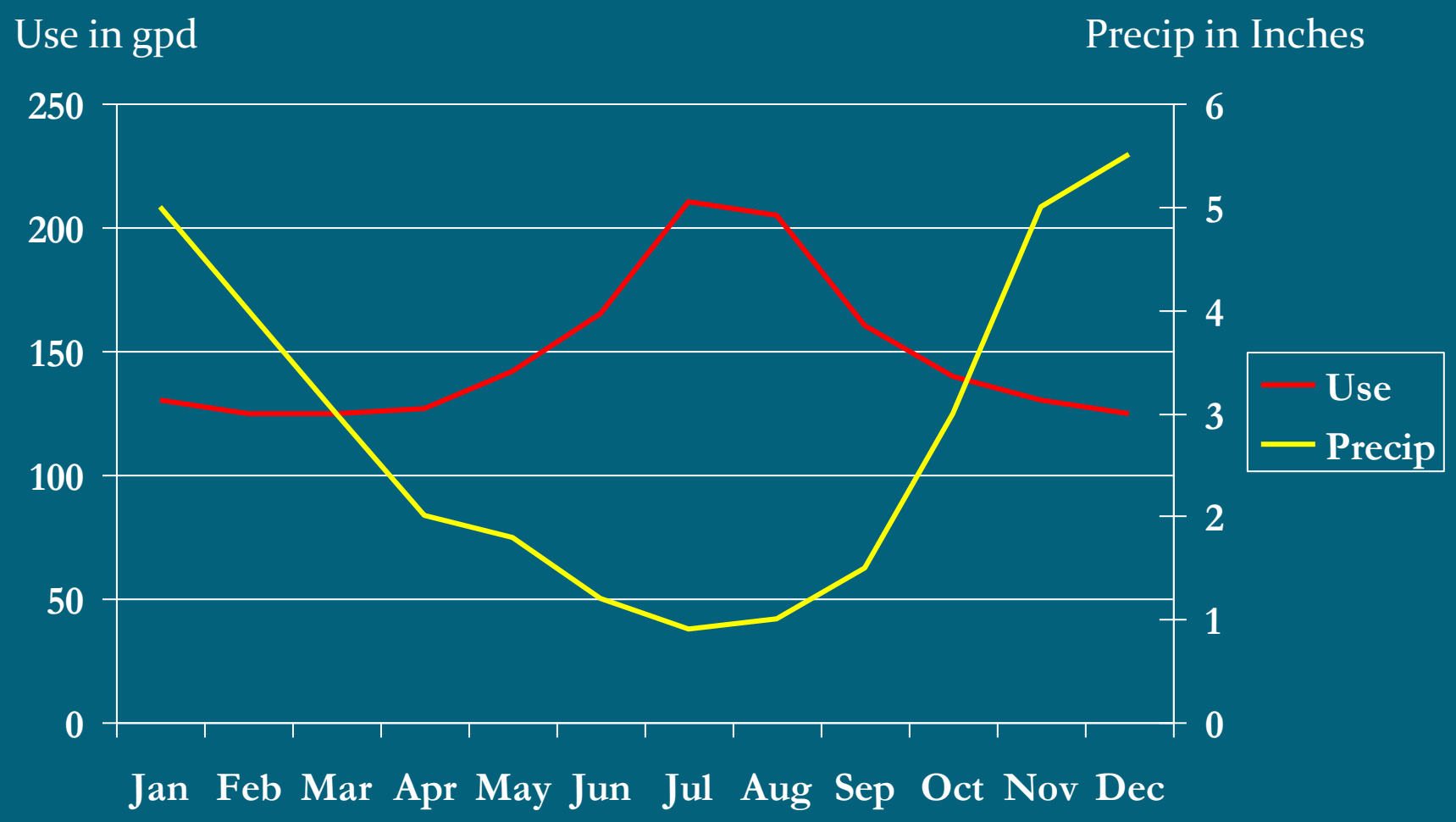
Consumptive Water Use in Washington (2015)

- **Permit-exempt domestic (private) wells account for ~ 3% of WA water use.**
- **Private well use is low hanging fruit**



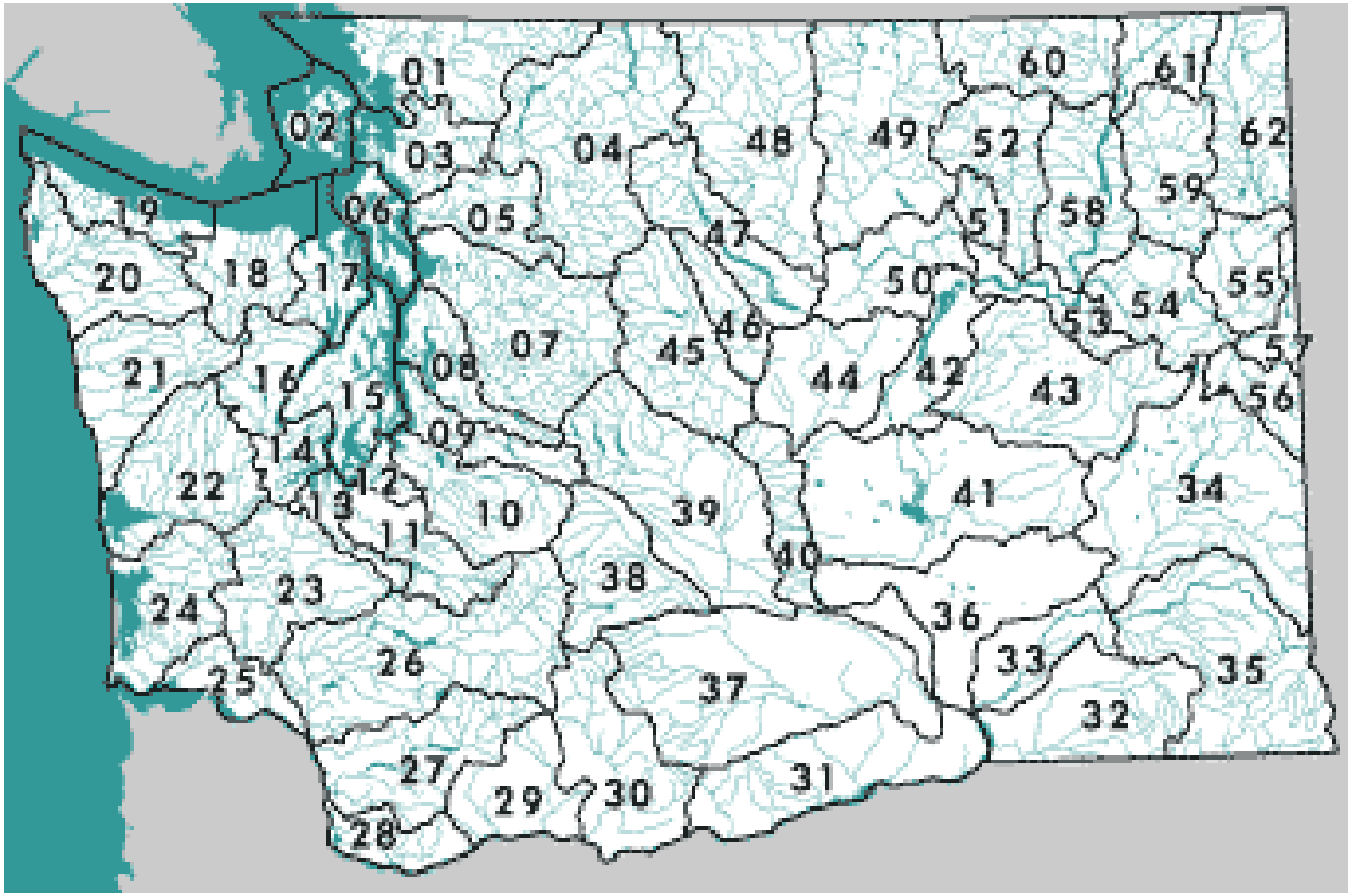
Source: Water Use in Washington – USGS, 2015

Water Use / Precipitation Crunch

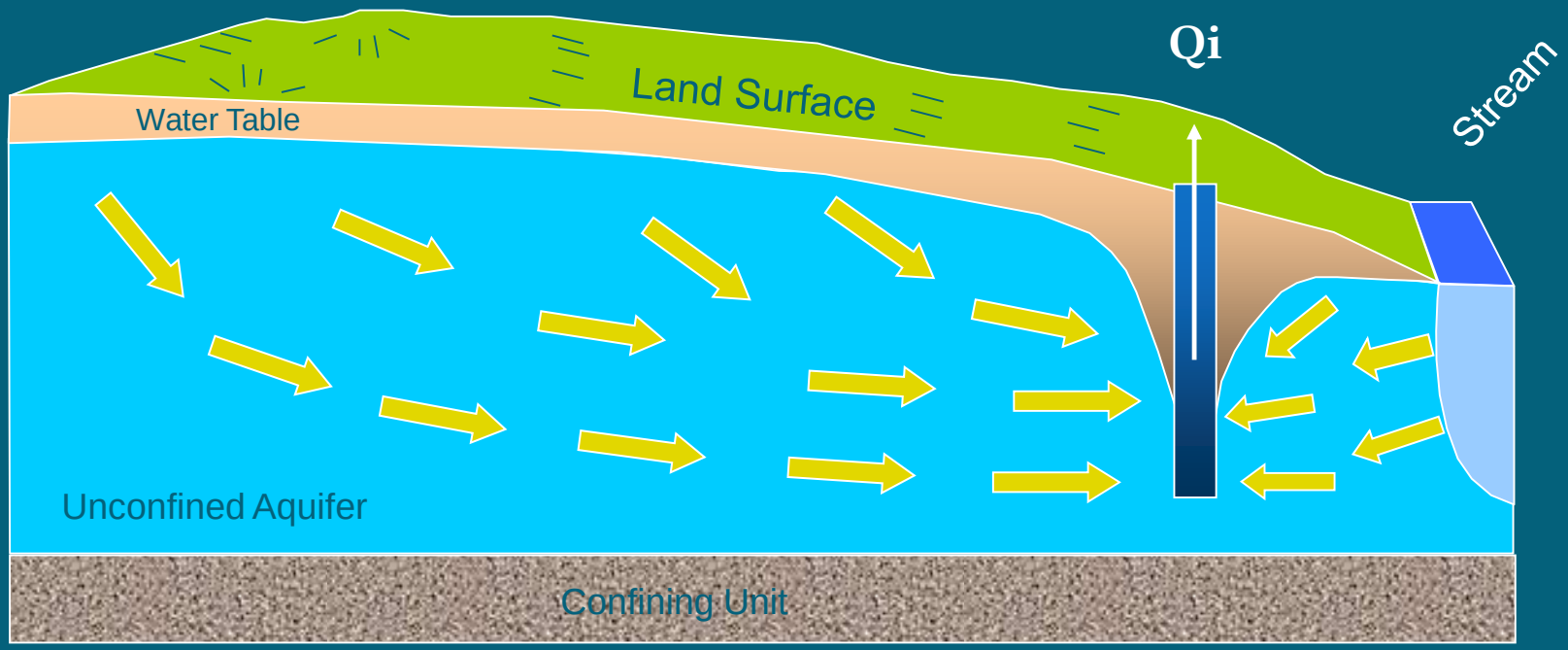


What Geographic Boundaries are used for Water Management in WA?

There are 62 "Water Resource Inventory Areas" (WRIAs) in WA



How Do Wells Capture Surface Water?

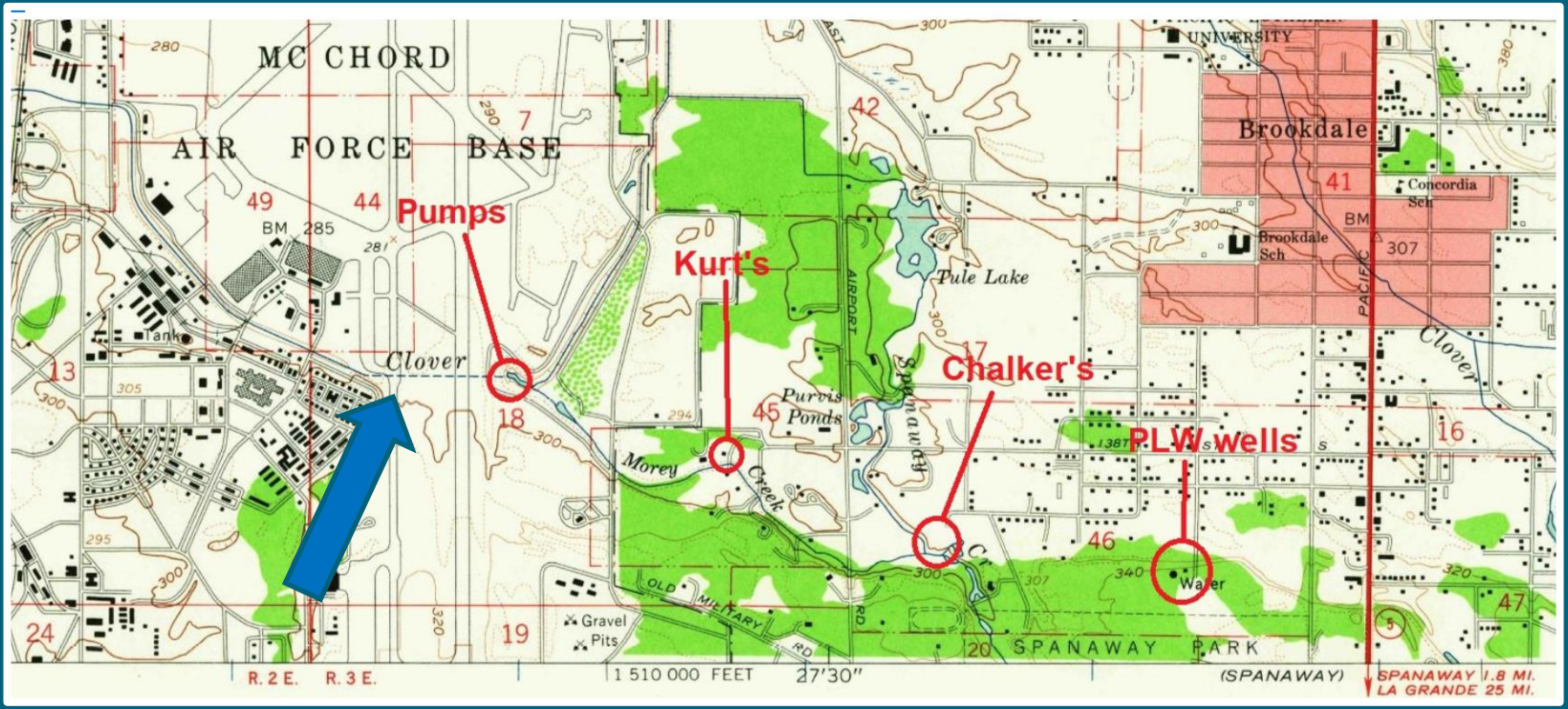


USGS C1186

Example of surface water impacts from groundwater pumping

Clover Creek Pipeline under McChord Runway Project - JBLM

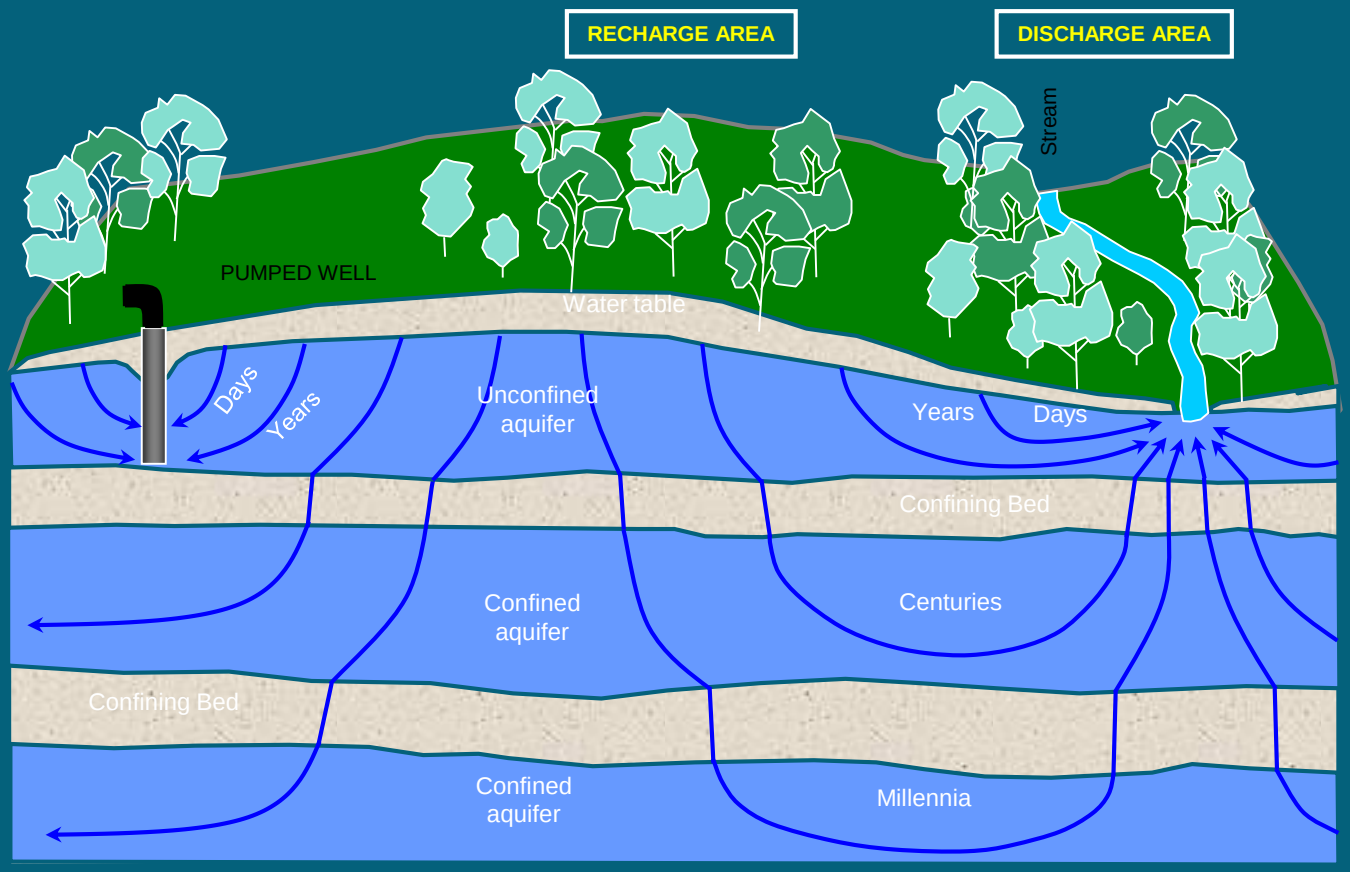
- Approximately one-year project
- Excavate existing culvert area under runway, remove the two deteriorated 12 foot diameter corrugated steel culverts and install a concrete arched bridge over Clover Creek that will support the overlying repaired runway.
- Bridge would span a 50 foot wide cobble bed over which Clover Creek would be free to flow. This bridge would have a capacity to accommodate a 100 year flood event with a reasonable safety margin.



Dewatering wells and pumps on east side of runway and discharge infrastructure on west side of runway

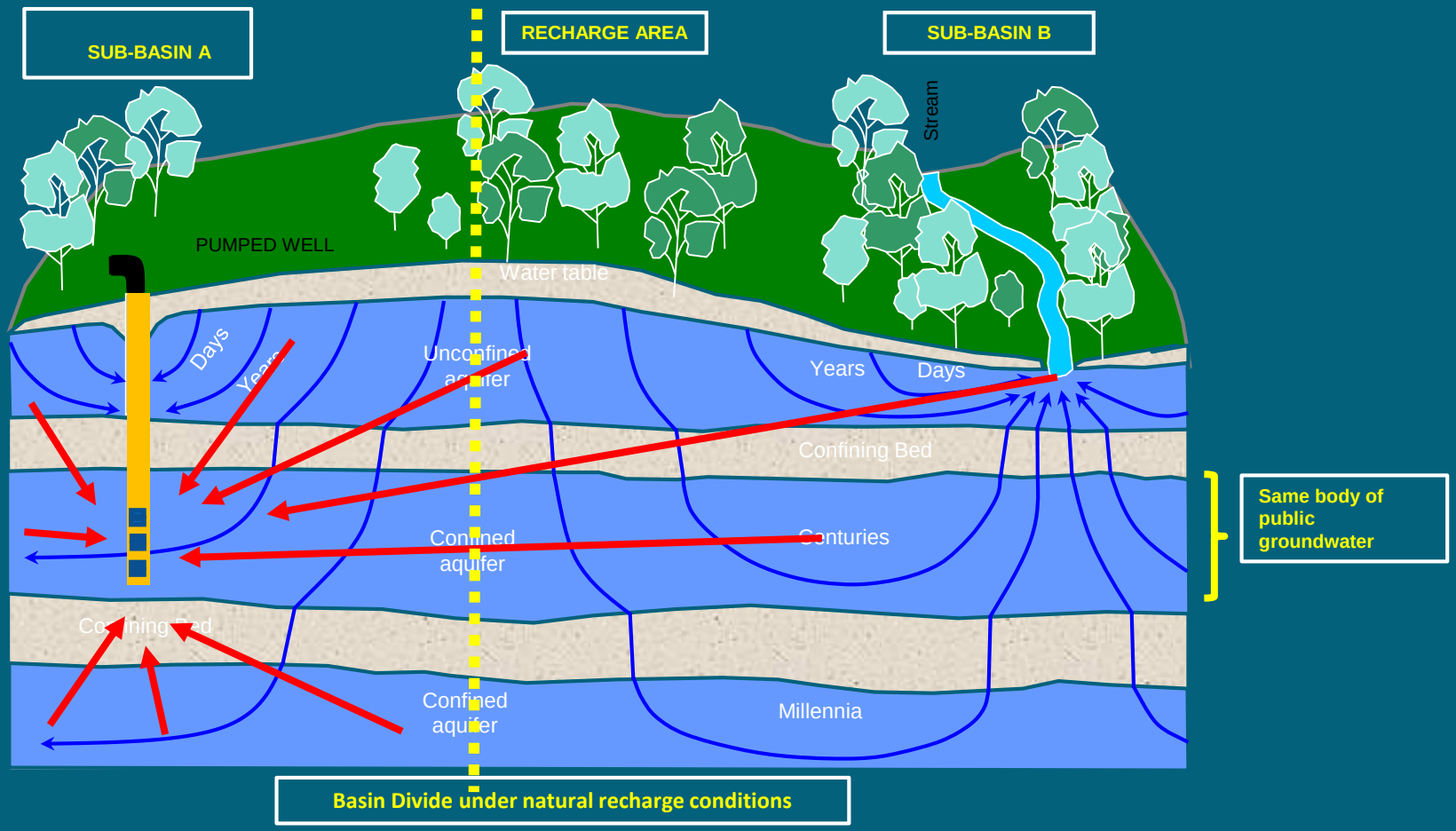
Dried up portion of Morey Creek and Morey Pond on east side of runway. Creek portion is off the base while the pond is on the base.

Ground-Water Flow Paths



Ground-water flow paths vary greatly in length, depth, and travel time from points of recharge to points of discharge in the ground-water system

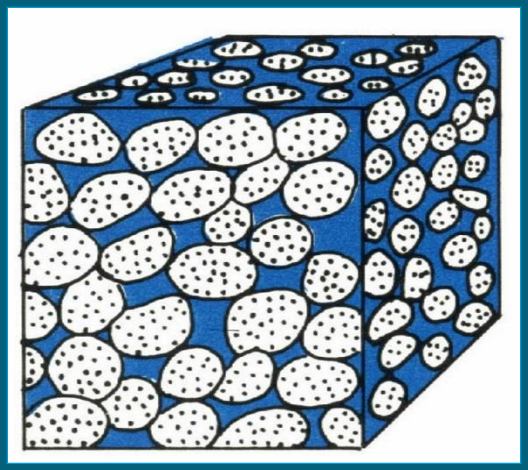
"Hydraulic Continuity" has made this all more complex…

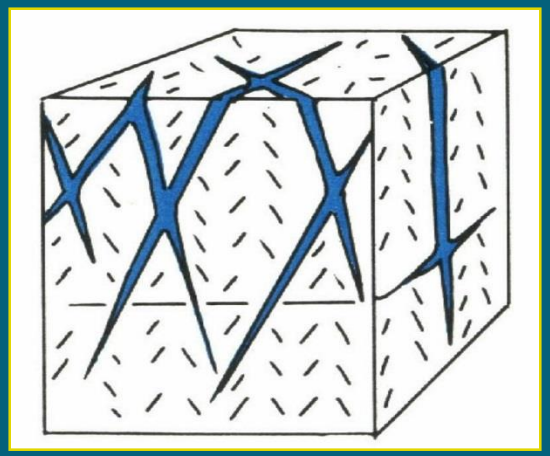


Hydraulically connected ground water and surface water cannot be considered as independent resources - a **withdrawal from one will have <u>some</u> effect on the other.**

Groundwater is stored in the porous part of bedrock and/or unconsolidated sediments

- Hydraulic Conductivity is related to the "Porosity" of a geologic material. Porosity is related to the sizes of **pores** or **fractures** in the material. The more pores or fracturing, the more water available.





The ability of groundwater to "flow" or move (i.e. hydraulic conductivity) depends on the aquifer material(s) the groundwater is in or part of…

- Gravel
- Vesicular Basalt (Primarily tops and bottoms of basalt flows)
- Sand
- Silty Sand
- Silt
- Silt-Clay
- Clay
- Shale, Mudstone
- Basalt with Dense Interior, Granite, etc

High Hydraulic Conductivity

Low Hydraulic Conductivity

Like surface water, groundwater flows or moves "downhill"

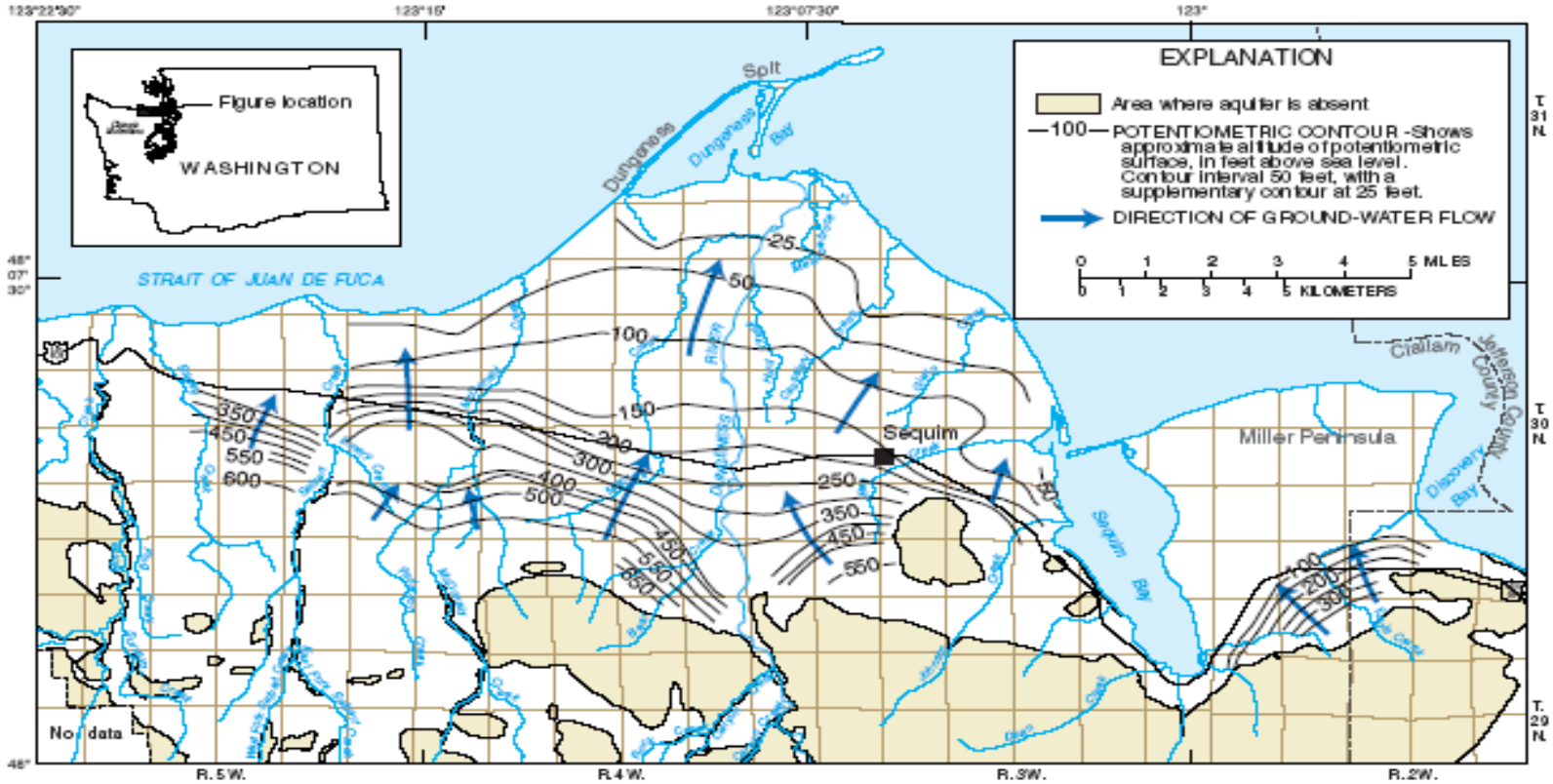


Figure 6. Horizontal ground-water flow in the water-table aquifer on the Sequim-Dungeness peninsula, Clallam County, Washington. (Modified from Thomas and others, 1999).

ESA-Listed Species in Washington

Chinook Salmon

Chum Salmon

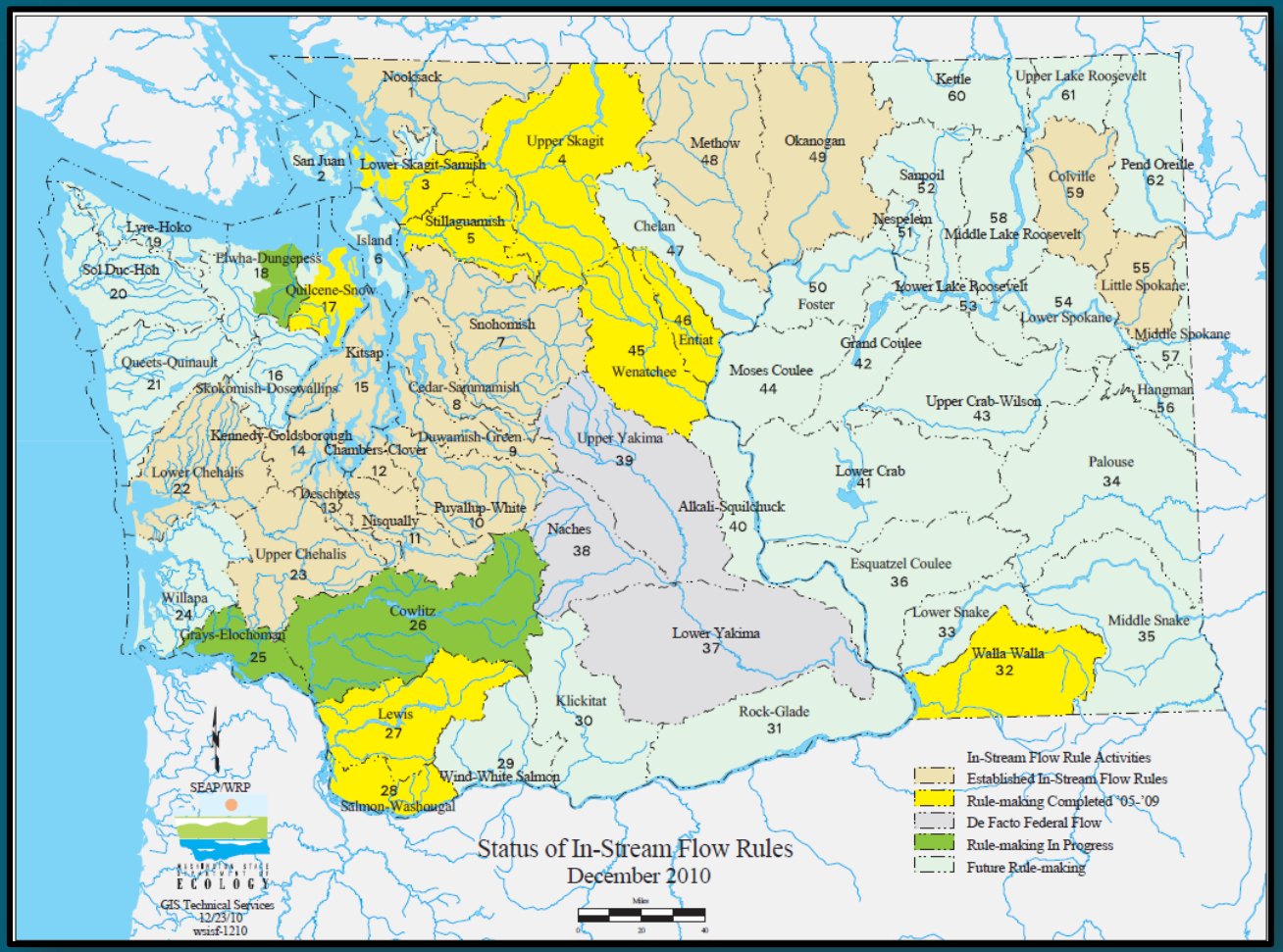
Steelhead

Bull Trout

Sockeye Salmon

Statewide Instream Flow Program

- There are 62 Water Resources Inventory Areas (WRIA's) in the state
- 25 of these have instream flows set by rule, and there are 3 that have a de facto instream flow dues to an adjudication



What is an instream flow rule?

- **Ecology is authorized under state law (RCW 90.22, RCW 90.54 and RCW 90.82) to establish state water-management rules that protect and preserve:**
  - ✓ **Fish**
  - ✓ **Wildlife**
  - ✓ **Recreation**
  - ✓ **Navigation**
  - ✓ **Aesthetics**
  - ✓ **Water quality**
  - ✓ **Livestock watering**

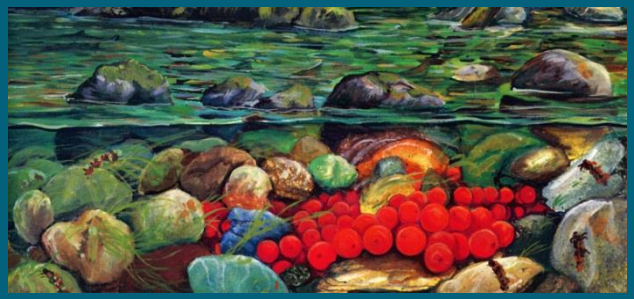
Authorizing Legislation
RCW 90.22 – *Minimum Water Flows and Levels*
RCW 90.54 – *Water Resources Act of 1971*
RCW 90.82 – *Watershed Planning*

What is an instream flow rule? (2)

- A regulatory instream flow is used to limit future water use when the actual stream flows drop below the flow described in the rule.
- An instream flow is a water right.
  - Priority date
  - Senior water rights not regulated
  - Junior water rights regulated
- So in stream basins with instream flow rules, impacts from new water rights need to be mitigated

How Low Flows Can Affect Fish

- Fish passage problems
- Loss of habitat
- Egg incubation mortality
- Mortality from high temperatures
- Increased competition for food
- Increased disease
- Predation from resident or introduced species
- Reduced production of essential food organisms
- Timing of migration for anadromous species



What is Mitigation?

- Mitigation = offset or compensate for the impacts of the new water use
- With the Foster Supreme Court decision, mitigation must be “in-kind” (i.e. water –for-water) and “in-time” and “in-place”.
- Examples:
  - Purchase and retire an existing water right
  - Aquifer recharge or reinfiltration
  - Direct discharge to surface water
  - Fill storage reservoir in wet season to use in dry season

Four Supreme Court decisions have *drastically changed the water availability landscape in Washington*

1) **Postema v. PCHB** **October 19, 2000**

   Law does not allow for the "de-minimus" impairment of existing water rights. Any effect (even modeled) on the flow or level of surface water in closed streams means impairment.

2) **Swinomish Tribe v. Ecology** **October 3, 2013**

   Overriding Consideration of the Public Interest (OCPI) cannot be used to justify allocating water (creating reservations) for domestic use or to justify water use that impairs existing instream flows.

3) **Foster v. City of Yelm and Department of Ecology** **October 8, 2015**

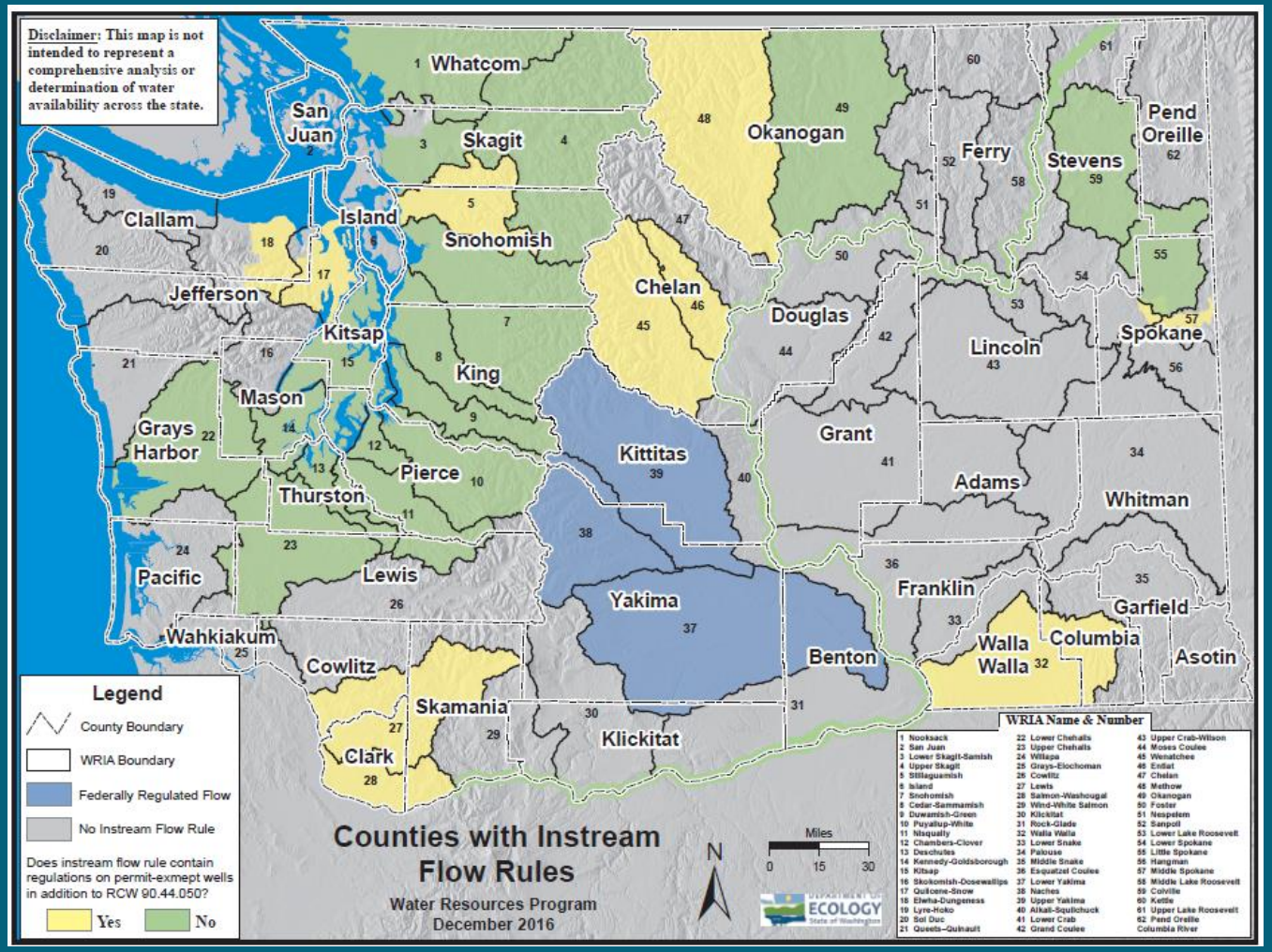
   Ecology cannot use "out-of-kind" mitigation to offset impairment of instream flows or use OCPI to justify permanent allocations of water.

4) **Whatcom County v. Hirst and Futurewise** **October 6, 2016**

   County has an independent obligation to ensure that new permit-exempt uses do not impair flows and closures when making water availability determinations nor can the county rely on the exclusion of permit-exempt groundwater from regulation in the instream flow rule area

Instream Flow Regulations

- There are 62 Water Resources Inventory Areas (WRIA's) in the state
- 27 of these have instream flows set by rule, and there are 3 that have Federally established flows



These Court Decisions have to be looked at with the following added context

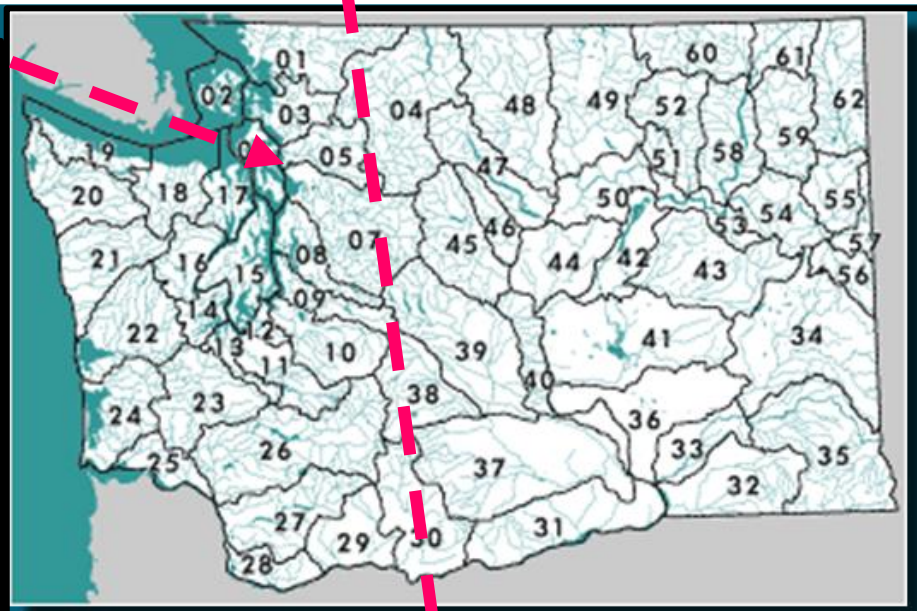
- **1855 Treaties between the United States** and Puget Sound area Tribes
  - Ensuing Boldt Decision of 1974

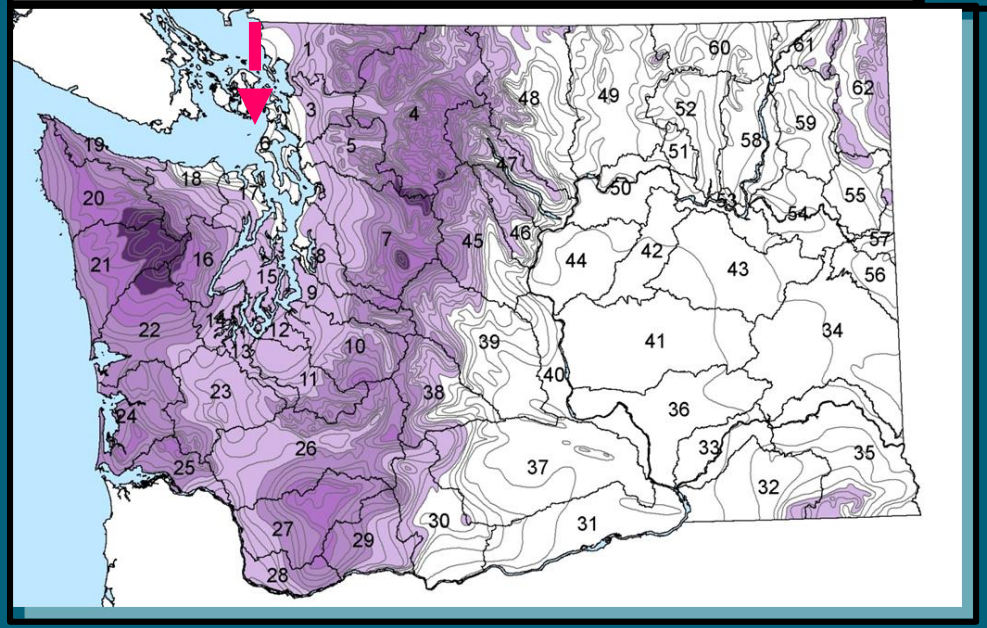
- **Endangered Species Act of 1973**
  - Ensuing listing of Chinook, Chum, Sockeye Salmon, Bull Trout and Steelhead as threatened in 1999

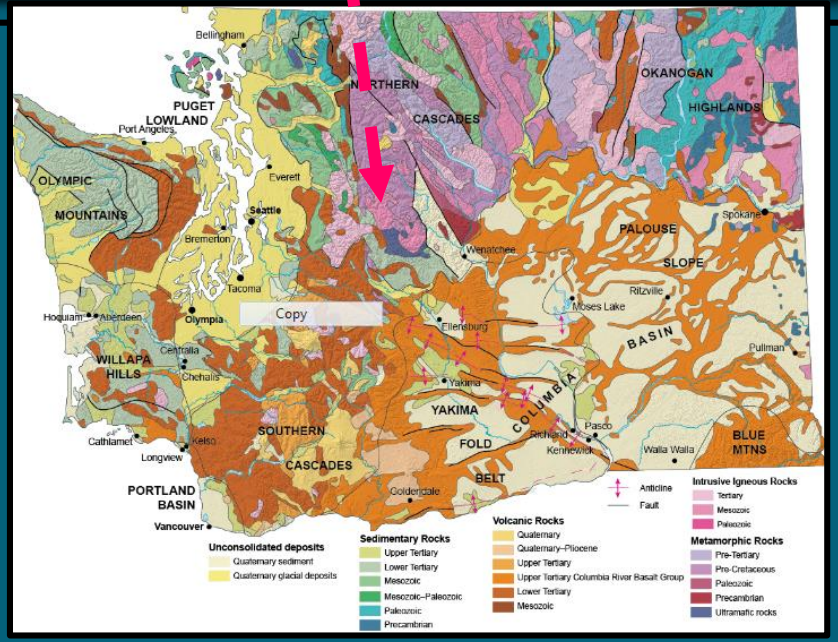
- Increasing awareness of the degree of ***"interconnectedness"*** between surface water and groundwater

- **Demand for water is highest when supply is lowest**
  - About 60% of all water use in Washington is for IRRIGATION

Big Challenge: Fitting legal and Court directed statutes/decisions with the wide variation in precipitation/recharge, surficial water supply and complex hydrogeological conditions….







In summary…

"Whiskey is for drinking; water is for fighting over." *- Attributed to Mark Twain*

Thank you

For more information on water rights

Ecology Water Resources Website:
http://www.ecy.wa.gov/programs/wr/wrhome.html

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