

Water: 'We're pitting neighbor against neighbor'

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"It would follow what Judge Boldt did — his interpretation of treaty rights," Cline said.

'Neighbor against neighbor'

The tribes contend that stream flows are too low for salmon, particularly in the summer when farmers irrigate about 40,000 acres to supplement the heavy rain that falls on the region during the rest of the year.

Cline said it's probably too much to expect to again see fish runs so thick you couldn't step into a creek without stepping on a salmon, but he said he wants to at least go back to the 1970s, before the Nooksack spring chinook were listed as a threatened species under the federal Endangered Species Act.

Water rights for cities, industries and homeowners with wells will also be examined. Ecology says it knows of 5,400 people with water rights in the Nooksack River Basin. Some 14,000 rural residents might have wells.

Viewpoints on adjudication in Whatcom County vary. Environmentalists say they like it, for example. But it's dreaded by agriculture.

The more seed potato farmer Greg Ebe talked about adjudication in an interview, the more he shook his head. "Ridiculous," he said.

"I think there's an adequate supply of water," he said. "We're pitting neighbor against neighbor."

Ebe said flows could be improved if farmers weren't punished for not using their full allotments — the "use it or lose it" law. In addition, he said, allowing farmers more flexibility in moving water around could free up more of it.

"Those two things we could implement and have more flow than now," he said. "We want the tribes to get their treaty rights. We want them to thrive, and we want fish recovering."

Ebe's grandfather started the farm in 1919. To prepare for adjudication, Ebe has hired a hydrologist, hydrogeologist and lawyer to prove and defend the farm's water rights in court.

"In Superior Court, our water rights will be put under a microscope," he said. "We're leaving no stone unturned. The stakes are that high. Losing our access to water essentially puts us out of business."

A promise not kept

Adjudication has been brewing for a long time in the basin. One reason, ironically, is that it rains a lot there.



Whatcom County, Wash., dairy farmer Hans Wolfsberg says a lawsuit over water rights planned by the Washington Department of Ecology might help him, but might hurt him.

Whatcom County gets 40-plus inches of rain annually. Historically, water rights were not as vigorously pursued or enforced as in arid Eastern Washington. A lot of farmers irrigated with no water right.

Over the years, water became a rarer commodity. In 1985, Ecology created a new water right by setting minimum flows for the Nooksack River and tributaries. Farmers warned that Ecology was sowing a water war.

In the early 1990s, Ecology's then-Deputy Director Terry Husseman promised farmers without a permit that the department wouldn't shut them off if they applied for a water right by Dec. 31, 1993.

More than 200 submitted applications, but the water rights weren't granted.

"Applications cannot be legally approved unless there is water available," Ecology adjudication manager Robin McPherson said in an email.

In the late 1990s, the Legislature considered "amnesty bills" to legalize the Husseman promise. About one-third of Whatcom County irrigators were watering without a permit, according to a bill report.

Most farmers irrigated to supplement rain and were not as familiar with water-right requirements as farmers in Eastern Washington, witnesses testified. A bill was needed to address the legal quagmire, they said.

The Legislature passed amnesty bills in 1997 and 1998. Gov. Gary Locke vetoed both, saying the bills were unfair to other water-right applicants and that



Whatcom Family Farmers executive director Fred Likkel sees widespread risk for agriculture in a lawsuit planned by the Washington Department of Ecology.

local negotiations should resolve water use disputes.

The tribes say the negotiations failed, leading them to seek adjudication. "To be honest, I believe there's been too much concern for the illegal water users," Cline said.

Husseman died of an apparent heart attack in 1998 while giving a presentation on water issues to Locke's chief of staff.

"Different people have differing memories about what was meant by Mr. Husseman, and it was not well documented," McPherson, of Ecology, said.

Nevertheless, Ecology has tried for 30 years to work with "noncompliant water users," she said.

"But we are limited to the water available and are required to follow the law," McPherson said. "If someone thinks their permit application should be granted, they will have a chance to explain that to the

court."

The future for many farmers hangs on the Husseman promise being kept, Likkel, of the family farmers' group, said.

"That's the difference between a lot of people having water and not having water."

Haves, have-nots

Hans Wolfsberg grew up on a dairy in Switzerland. After hiking and skiing around the U.S. he bought a farm in Whatcom County and named it Edelweiss Dairy, an organic operation with 150 milking cows.

The farm had a well. Since Western Washington seemed to have a lot of water, "I didn't worry about that," Wolfsberg said.

Several years ago, Wolfsberg acquired a right to draw water from the Nooksack River. When the river drops, Wolfsberg gets shut off. It happens every summer just as he needs to

irrigate pastures.

"That right is fairly useless to me," he said.

Wolfsberg said adjudication might firm up his water right and make it more useful. It might go the other way, though. "My water right then would be completely useless," he said.

With little to lose, Wolfsberg doesn't fear adjudication for himself. He said he's worried, however, about its effect on the county's overall farm economy.

Whatcom County has three times as many dairy cows as any other Western Washington county. The concentration of dairies was one reason Wolfsberg chose to farm there, he said.

"The whole community of dairy farmers is still here," he said. "I feel that's undervalued."

Whatcom County farms produced goods worth \$372.8 million in 2017, according to the last Census of Agriculture. Neighboring Skagit County, with the second-biggest farm economy in Western Washington, produced goods worth \$287 million.

Whatcom County ranks second in the state in milk production, behind Yakima County, and produces about 90% of the red raspberries grown in the U.S. for processing.

Cline, the tribal chairman, said that just as tribes had to adjust to dwindling salmon runs, farmers will also have to adapt.

"They're going to have to be open-minded and figure out how to survive with less water," he said. "We've already had to do that."

Adjudication in Yakima

Ecology has adjudicated water rights before,

most notably in the Yakima River Basin. The adjudication, called the *Acquavella* lawsuit, was filed in 1977. The final decree, prioritizing 2,300 surface-water rights, came 42 years later, in 2019.

Ecology says adjudicating the Nooksack Basin can be done in 10 to 20 years. The Nooksack adjudication, however, may be even more complicated. *Acquavella* did not prioritize any groundwater rights.

Also, large irrigation districts represented the Yakima farmers. Whatcom County has no irrigation districts.

"Farmers will have no other choice but to lawyer up in this situation," Likkel, of the family farmers, said.

Ecology has approached adjudication enthusiastically. It successfully lobbied for money this year to start preparing. It plans to file the suit in 2023.

Ecology and the tribes are in accord on the need for adjudication. The tribes set up a website, salmonneed-water.org, that echoes some of Ecology's talking points on adjudication.

"The position of the Lummi Nation is that time is of the essence, and adjudication is really urgently needed now to bring lasting solutions," Kara Kuhlman, the Lummi water resources manager, said during a video forum on adjudication hosted by the tribes.

At the same forum, McPherson, of Ecology, said tribes "graciously" agreed to quantify their rights in state court.

"Many state water users are daunted by thinking, 'Oh, the tribal water rights in prior appropriation are before us.' Well, that's certainly true," she said.

As Ecology prepares for adjudication, talks to avoid a long, divisive and expensive court battle will go on. The Legislature appropriated \$250,000 to Whatcom County for negotiations to "complement water rights adjudication."

"That's been happening for like the last 20 years," Cline, the Nooksack Tribal Council Chairman, said.

The tribes say you can't have "creative solutions" until you know who has water rights. Ecology has equally embraced going to court, taking the position it's the most efficient way to resolve claims to water.

Ebe, the potato farmer, says he is braced for a "long, drawn-out, arduous process" but maintains that it's all unnecessary.

"A collaborative process could result in a lot of winners," he said.

"We feel agriculture is the most compatible use for salmon recovery," Ebe said. "It's pretty logical. If we don't have agriculture, we'd have pavement."

Wells: OWRD's study is intended to 'stimulate conversations'

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Similarly, new wells are only considered to interfere with existing ones in limited circumstances, Iverson said. "There is a fairly high threshold for finding injury."

Applicants are often "savvy" enough to know which locations are more likely to be approved for drilling, he said.

"The statutes say that we're going to presume that a new application is in the public interest, but that's a rebuttable presumption," Iverson said.

Permitting entities must always make decisions based on "imperfect information," but the study indicates that Oregon may not have the correct standards for approving groundwater applications, said Meg Reeves, retired general counsel for Oregon State University and the commission's chair.

"This does raise the questions for me as to whether we have drawn the line in the right place as to whether we would act to limit further appropriation," she said. "I hope we'll be able to find a way to do something with this information that would help us prevent further drawdown."



A water well site under construction. About 80% of new wells in Oregon are approved in areas of groundwater concern, according to state water regulators.

The OWRD's study, which has mapped the state's areas of concern for groundwater, is intended to "stimulate conversations" with stakeholders and may discourage drilling in problem areas, Iverson said.

The analysis will also help prioritize aquifer monitoring and may indicate where the agency should re-evaluate the boundaries of groundwater restricted areas, he said.

For example, some wells

next to the Mount Angel Groundwater Limited Area are showing declines similar to those within its boundaries, said Ben Scandella, OWRD's groundwater data chief.

"This is an example of how this tool can help us see areas where the existing boundaries of groundwater restricted areas may have been appropriate when they were created but don't necessarily reflect the current conditions," he said.

The agency's study does have a "data availability bias," in that it focuses on areas where irrigation is the most prevalent, Iverson said.

Areas of concern are also measured by township, a 36-square-mile unit of land measurement in which groundwater conditions may vary, he said.

The map will be incrementally improved as OWRD incorporates more data in the future, Iverson said.

"We wanted to make an objective and repeatable evaluation," he said. "This groundwater concerns map is going to be easily updated over time and we fully intend for it to be a living map as more information is brought in."

WOTUS: Biden inherited several lawsuits challenging the Trump rule

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rule was environmentally conscious and clear. "Today's announcement fails to recognize the concerns of farmers and ranchers," he said in a statement.

Duvall called on EPA Administrator Michael S. Regan to not return to the "regulatory land grab that was the 2015 WOTUS rule."

"He must keep his word to recognize the efforts of agriculture and not return to flawed, overly complicated and excessive regulations," Duvall said.

Biden inherited several lawsuits challenging the Trump rule. The Biden administration said it will ask courts to remand the rule to the EPA and Army corps.

Regan said in statement the rule was "leading to significant environmental degradation."

The lack of protection was particularly significant in arid states, such as New Mexico and Arizona, according to a joint statement from the EPA and Corps.

The Clean Water Act's scope has become a partisan issue, subject to rewrites after presidential elections.

Farms groups and red states sued to overturn the Obama rule. Conflicting rulings left roughly half the states under the Obama rule and half under the pre-Obama standard.