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Whose Water is it Anyway?: The Adjudication of Water Rights in the Nooksack Watershed

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**Whose Water is it Anyway?:
The Adjudication of Water Rights in the Nooksack Watershed**

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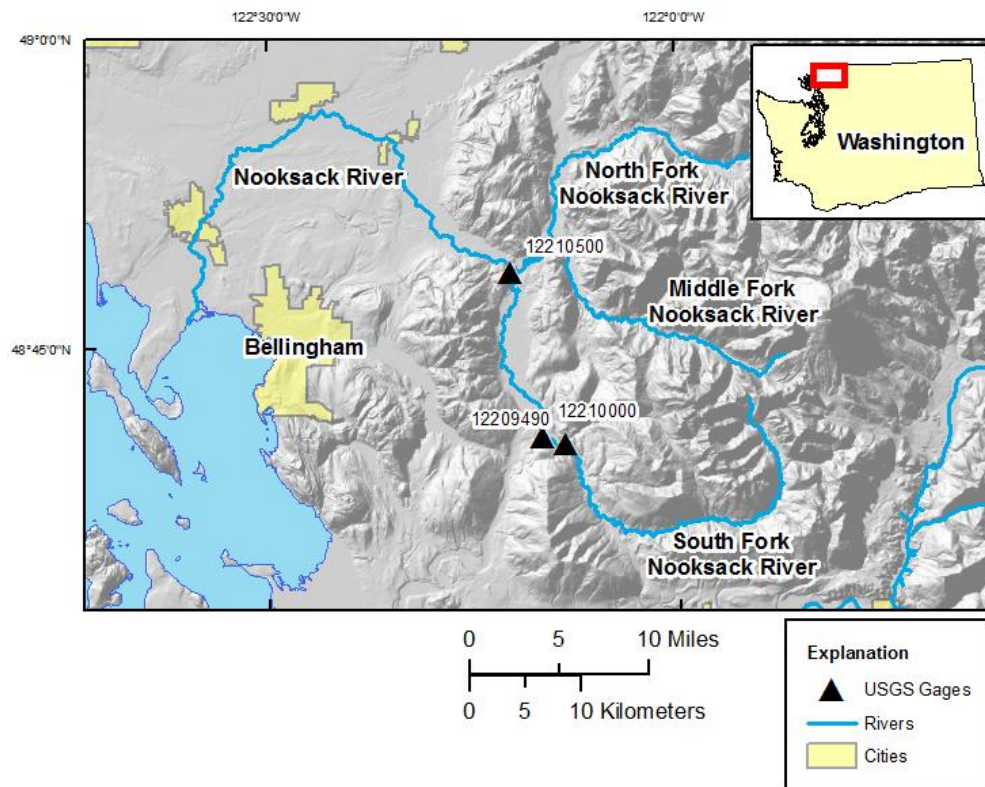
Introduction

When the Washington State Department of Ecology (“Ecology”) announced in September 2020 that they were considering the Nooksack Watershed as a potential candidate for adjudication, the news was met with fury from some and joy from others. Adjudication when applied to water law is a process that brings together all of the water users in one watershed to determine their legal water rights through a court process (Water Resources Program, 2021, p. 1). Ecology had just finished the adjudication of water rights in the Yakima River Basin in May 2019, a process that had taken a little over 40 years (Bedell, 2019, p. 1). The Washington State Legislature then directed Ecology to conduct a review of basins where water rights are uncertain and determine whether adjudication would be useful in those areas (McPherson & Adjudication Staff, 2020, p. 3). Ecology identified two watersheds as urgently needing adjudication, the Nooksack in Whatcom County and Lake Roosevelt and Middle Tributaries along the Columbia River (p. 15). In response to their recommendation that the Nooksack Watershed be adjudicated, critics in the area argued that the adjudication might take just as long as the Yakima River Basin adjudication and harm local farmers (Bierlink, 2020). Supporters argued that the adjudication process would clear up confusion around who is legally using water in the watershed and would ensure that enough water is left in the rivers for fish (Coe, 2021).

The Nooksack Watershed, also called Water Resource Inventory Area 1 (WRIA 1), is located in western Whatcom County and a small area of Skagit County (Water Resources Program, 2020, p. 1). It is bounded by the Cascade Mountains to the east and Bellingham Bay to the west. A watershed is defined as an area that captures precipitation and funnels it into streams and rivers. Current concerns surrounding this watershed are unquantified tribal water rights, seawater intrusion, and low instream flow. Most of the water in the watershed is already “appropriated”, or legally claimed by a water user.

Figure 1

Map of the Nooksack Watershed



Note. From Map of the Nooksack River basin, by American Rivers, n.d.

Although water has generally been viewed as an unlimited resource in Western Washington, with Whatcom County averaging 42 inches a year, it actually has been a large issue in Whatcom County and many other areas of Western Washington (Blue Water GIS, n.d.). Especially in the summer, a combination of the growing population, climate change, and an increase in agricultural use have decreased water availability, worsened stream health, harmed fish, and caused water shortages for farmers. Supporters of adjudication highlight these problems as reasons why the Nooksack watershed would greatly benefit from adjudication to clear up possession of water rights, figure out their order of seniority, and also manage illegal water use.

Water Rights in Washington State

Background on Water Rights

In Washington State, water is a public resource held by the state, which can then issue water right permits to the public (Washington State Department of Ecology, n.d.-b). Before a water right permit is issued, the proposed use must pass four tests: the water must be available, used beneficially, be in the public interest, and cannot impair an existing use (Rev. Code of Washington § 90.03.290). Water rights in Washington and many other western U.S. states are decided using what is called “prior appropriation”, or “first in time, first in right” (RCW § 90.03.010). This means that the first people who use the water legally have senior rights to those who come later. If there is a shortage, those with senior rights will have their water rights fulfilled before those with junior water rights. Additionally, the water right must be put to full use. If someone does not use all of the water that the permit grants them, that portion of the water right is returned to the state (RCW § 90.14.160). A water right application must be submitted for the use of any amount of surface water such as from a stream or lake, and for the use of more than 5,000 gallons per day of groundwater (RCW § 90.03.250).

Before a water code was established in Washington State, the 1891 Water Rights Statute provided a way to claim water similar to the way that mining claims were made; one simply had to post an announcement near the water source (Water Resources Program, n.d.). In 1917, Washington’s Water Code was adopted, which established prior appropriation as the standard for determining water rights. It also put into place the process of adjudication as a way of determining the validity of water rights and priority during shortages. In 1935, a specific state agency was created to manage water rights, called the Division of Water Resources. When the Department of Ecology was created in 1970 it merged with Water Resources, and was the first ever state agency in the U.S. created to deal with environmental protection.

In addition to managing water use, Ecology also monitors the amount of water left to flow in rivers, called the instream flow (Washington State Department of Ecology, n.d.-a). Instream flow rules are implemented to protect ecosystems by requiring that a certain amount of water remains in the stream. This ensures that the plants and animals that depend on the water in the stream remain healthy. The seniority of this instream flow compared to the other water users in the watershed is determined by when the instream flow rule was passed. In 1985, Ecology adopted an instream flow rule for the Nooksack Basin with the intent of protecting wildlife, fish, recreation, and water quality in the area (Melious, 2015). Additionally, the Washington State Growth Management Act (GMA) requires that counties protect both surface water and groundwater resources and the quality and quantity of that water (Growth Management Act, 1990). In the case *Whatcom County v. Western Washington Growth Management Hearing Board*, the county attempted to argue that it was not required under the GMA or the Nooksack Basin instream flow rule to protect wildlife, fish, or the environment from the impacts of permit-exempt wells, or wells that individuals could use without first acquiring a permit from Ecology (Melious, 2015). Section 90.44.050 of the Revised Code of Washington stated that water from permit-exempt wells could be used in unlimited amounts for domesticated animals and for watering lawns and noncommercial gardens under half an acre, and in limited amounts of up to 5,000 gallons a day for single and group homes (2003). Environmentalists argued that allowing the use of unlimited amounts of water for animals and watering lawns from these permit-exempt wells violated the GMA and also went against the state law of prior appropriation, as many permit-exempt wells should be considered junior to the instream flow rule, which was adopted in 1986 (Melious, 2015).

The case was decided in 2016, with the Washington State Supreme Court ruling that under the GMA it is the county's responsibility to determine the legal availability of water, not Ecology's (*Whatcom County v. Western Wash. Growth Management Hearings Bd.*, 186 Wn. 2d 648, 2016). They also ruled that new private wells must demonstrate that they are not impairing

a senior water right, including instream flow rules. This decision is often called the Hirst decision, and had the potential to greatly impact how Washington counties deal with water rights.

Table 1

Permit-exempt well restrictions

Criteria	Well drilled and building permit issued after June 26, 2020	Well drilled between Jan. 19, 2018 and June 26, 2020 Or Building permit issued before June 27, 2020	Well drilled before Jan. 19, 2018
Water limitation per day	500 gpd indoor use	5,000 gpd	5,000 gpd
Annual average daily use limit per home	-	3,000 gpd	-
Irrigation allowed per home	1/12 acre	½ acre	½ acre
Total group use limits	3,000 gpd indoor use ½ acre of irrigation	5,000 gpd ½ acre of irrigation	5,000 gpd ½ acre of irrigation

Note. From *Water Availability Focus Sheet* (p. 4), by Water Resources Program, 2020. Gpd stands for gallons per day.

As shown in Table 1, as a result of the Streamflow Restoration Act, which was a response to the Hirst decision, there are now greater restrictions on permit-exempt wells (RCW 90.94). In Whatcom County, building permits requesting water availability are now routed through the Whatcom County Health Department rather than through Ecology (Whatcom County, 2018). Even though these wells do not require a water permit, they are still limited under state water law (Water Resources Program, 2020, p. 4). Additionally, if a permit-exempt well encroaches on a senior water right, Ecology has the authority to regulate it even though it did not require a permit. In their September 2020 report to the state legislature suggesting that the Nooksack watershed be adjudicated, Ecology listed one of the challenges of an unadjudicated watershed

as being the inability to ensure that junior water rights do not impair senior ones, including instream flow rules (McPherson & Adjudication Staff, p. 9). They also specifically mention permit-exempt wells, stating that while they by definition do not require water right permits, they are still not allowed to encroach upon instream flow. Since the Hirst decision requires that instream flow rules be treated like any other water right, when the Nooksack watershed is adjudicated any right that was granted after the instream flow rule was implemented will be considered junior to it. The adjudication of the Nooksack watershed will help Ecology to catalogue all of the water use in the area and give them the ability to stop the illegal water use that is encroaching on instream flows.

Tribal Water Rights

Ever since European colonizers started settling in Washington State in the early 1800s, the question of who has water rights in the area has been a contentious topic. When the Treaty of Point Elliott was signed in 1855, it guaranteed hunting and fishing rights to the tribes that signed and also created specific reservations for each tribe (Nooksack Indian Tribe, n.d.). In return, the tribes relinquished their right to much of their land in Western Washington. The Lummi and the Nooksack tribes had lived in Whatcom County “since time immemorial”, or since humans have existed on this land, and both were present at the Treaty of Point Elliott. The Nooksack were not granted a reservation, and were instead expected to relocate to the Lummi Reservation, although few ended up doing so. They also only ended up gaining federal recognition in 1973, over a century after the treaty was signed. Additionally, for a very long time, the fishing, hunting, and water rights guaranteed to tribes in the western U.S. were not enforced, with new settlers claiming water rights without regard to the already existing water rights of the local tribes (Osborn, 2013, 84).

In the Pacific Northwest, there are currently two types of water rights that tribes possess. The first are the water rights gained through the 1908 U.S. Supreme Court case *Winters v. United States*. This case held that on-reservation water rights are implied in treaties between

the U.S. government and native tribes, even though they may not have been explicit in the text of the treaties themselves (p. 80). In the case of the Lummi Nation, they are granted on-reservation water rights through the *Winters* case. In 2009, there was a settlement between the United States, the Lummi Nation, Ecology, and local landowners that outlined responsibilities for water users in the Lummi Peninsula (Hamilton, 2016). This case also determined that *Winters* rights on the peninsula extend to groundwater. The second type of water rights that tribes possess in the Pacific Northwest are habitat-based water rights that are derived from the Treaty of Point Elliott, called Stevens Treaty rights (Osborn, 2013, p. 76). In the Treaty of Point Elliott, the right to traditional fishing practices was outlined, stating that “the right to taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory” (Treaty of Point Elliott, 1855). Even though these rights were outlined in the treaty, it wasn’t until what is called the Boldt Decision that these rights were legally enforced. In 1974, federal Judge George Boldt interpreted the fishing rights outlined in treaties to mean that the annual salmon harvest should be split equally between Stevens Treaty Tribes and non-natives (Osborn, 2013, p. 96). This created a lot of uproar amongst non-native recreational and commercial fishers who saw this ruling as unfair. It also created a new question about whether this right to fishing included a habitat right to water for instream flows outside of reservations. In several cases after the Boldt decision, including the adjudication of the Yakima River Basin that started in 1977, it was made clear that the Stevens Treaty rights do entitle tribes to off-reservation water rights (p. 98). In the case of the Nooksack watershed adjudication, it is the Stevens Treaty rights that are in question.

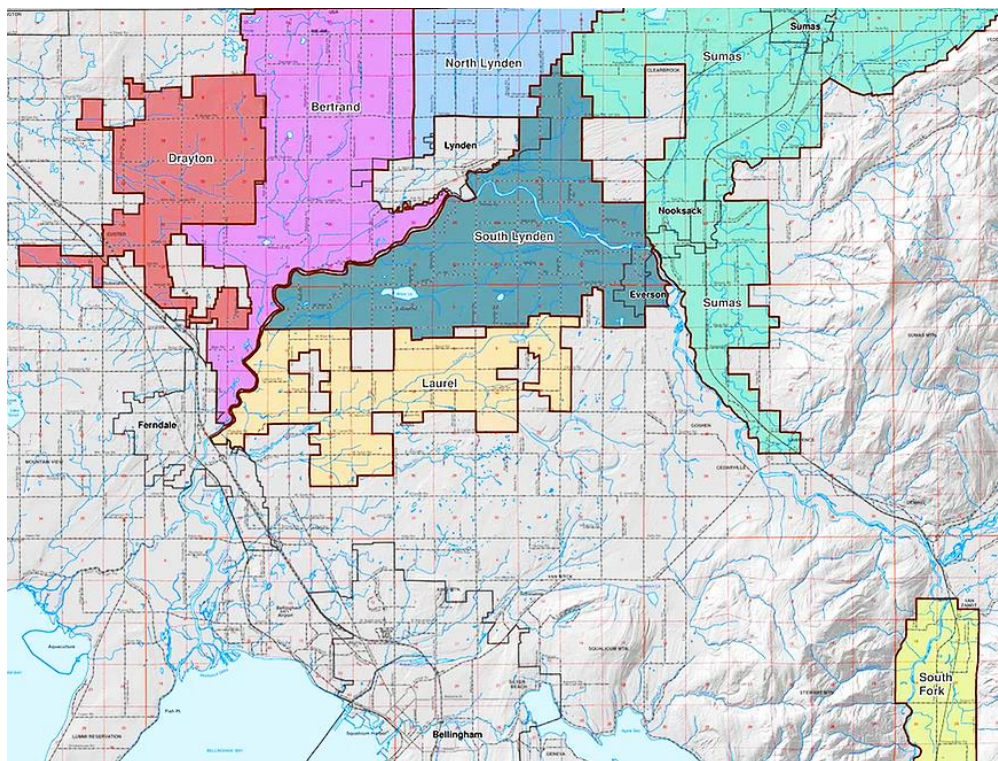
Agricultural Water Rights

Every five years, the Washington State Department of Agriculture (WSDA) conducts a census of all the farms in the state. The last one took place in 2017, and revealed that there are currently around 1,712 farms in Whatcom County, totaling to 102,523 acres (WSDA, 2017, p. 1). Of these farms, 36,498 acres are irrigated cropland, around 35%. The most common crops

grown in Whatcom County are berries, with 65% of the U.S.'s red raspberries being produced there (Blue Water GIS, n.d.). Overall, Whatcom County uses around 36 billion gallons of water a year, with agricultural uses accounting for 44% of the total (Hirst, 2017a, p. 2). Especially in the summer months, agricultural water use contributes significantly to the increase in usage, with the percentage rising to 68% of the total (p. 4). To help manage irrigation water use for farmers, Watershed Improvement Districts (WIDs) were created by RCW 87.03 to form irrigation districts (Ag Water Board of Whatcom County, n.d.-a).

Figure 2

Map of Whatcom County Watershed Improvement Districts



Note. From *Watershed Improvement Districts 2014*, by Ag Water Board, 2014.

These districts are located in the northwest of Whatcom County above Bellingham, and consist of six different districts: Bertrand, Drayton, Laurel, South Lynden, Sumas, and North Lynden. These WIDs are tasked with participating in watershed management, including projects involving water supply, water quality, and habitat protection.

Despite these WIDs and government policy dictating agricultural water rights, unpermitted use still occurs. In a 2017 paper, local environmentalist Eric Hirst attempted to determine the number of unpermitted agricultural water users in Whatcom County using data from Ecology and the WSDA. In this paper, he outlined the number of agricultural water users in Whatcom County by WID, their water usage by season, and also the potential number of water users without a permit. He estimated that agriculture accounts for 68% of water usage in the summer, making their impact on instream flows during that season significant (p.3). Additionally, he estimates unpermitted irrigation water use to be around 38% of all irrigation water use within and outside of the WIDs.

Table 2

Irrigated cropland by WID

WID	Acres irrigated		Acres without Water Right	% Acres without Water Right
	Total	Allowed		
Bertrand	10,900	7,600	3,300	30%
Drayton	3,400	1,700	1,700	50%
Laurel	3,800	2,800	1,000	26%
North Lynden	5,900	3,600	2,300	39%
South Lynden	7,900	5,400	2,500	32%
Sumas	14,300	7,700	6,600	46%
Outside WID	3,300	2,000	1,300	39%
Totals	49,500	30,900	18,600	38%

Note. From *Unpermitted Irrigation Water Use in Whatcom County*, by Eric Hirst, 2017b, p. 4.

Table 2 shows the division of acres irrigated amongst the different WIDs, including both the number of acres irrigated without a water right and the percentage. Sumas WID has the greatest number of acres irrigated without a water right at 6,600 acres, and Drayton WID has the greatest percentage of acres irrigated without a water right with 50% of the acres in the WID being irrigated without a water right.

Adjudication

Adjudication Overview

When the Washington State Water Code was adopted in 1917, it established adjudication as the method of determining water rights and seniority in locations where rights were disputed (Water Resources Program, n.d.). In the report presented to the legislature in 2020, Ecology highlights the fact that adjudication has been historically underused, leading to increasing amounts of uncertainty around water rights in many watersheds in Washington State (McPherson & Adjudication Staff, p. 3). Additionally, evolving laws around water usage such as instream flow rules impacted by the Hirst decision have added to this uncertainty. Due to this lack of clarity, Ecology has had difficulty permitting and regulating water rights as they are unable to determine the seniority and quantity of water rights in many areas. Ecology pushes adjudication as a way to clear up this uncertainty and improve counties' ability to enforce compliance to water regulations. When there is not a legal inventory of water use through adjudication, it makes Ecology's job much harder and time-consuming, as individual cases have to be litigated. The lack of certainty around more senior water rights such as those held by the tribes also creates issues when attempting to create water management plans. The Nooksack watershed is specifically highlighted as an area in need of adjudication due to the failure of local interest groups to come to an agreement through voluntary negotiations. In order for the local government and other interest groups to plan for future water use, a legal inventory of water users in the watershed is necessary. It is for these reasons that Ecology recommended the Nooksack watershed for adjudication.

Adjudication is outlined in RCW 90.03 as a way to determine water rights in an area. The process starts with Ecology filing an action in the superior county court and then joining "all pertinent water users into the court process before a local judge" (McPherson & Adjudication Staff, 2020, p. 4). Water users then submit their claims and Ecology examines each claim and

determines their water use after thoroughly examining them. Ecology then makes a recommendation to the court, and the court issues a final decree listing the water rights in the order of priority. If they wish to, water users can then negotiate settlement agreements which can be recommended to the court for inclusion in the decree. The final decree is extremely detailed, and contains information on the priority date, authorized quantity of water, time and place of use, and the purpose of the use. The details of the decrease make it much easier for Ecology and local counties to regulate water use. It also provides those with water right permits secure proof of their right to the water that makes it much easier for them to transfer and sell these rights in the future. Ecology's hope is that while adjudication may at first be an expensive and time-consuming process, it will in the future make water management cheaper and faster.

Past Adjudications in Washington State

As mentioned previously, adjudications in Washington State have occurred before. The most recent one was located in the Yakima River Basin, and began with Ecology filing an action in the Yakima County Superior Court in 1977 (Bedell, 2019, p. 1). Also called *Acquavella* after the name of the court case, this adjudication only covered surface water, and was the largest and longest adjudication in the state's history. Preliminary questions took several years; it was not until 1989 that the first claims were heard, the Yakama Nation's claims for on-reservation *Winters* water rights and off-reservation Stevens Treaty water rights (Osborn, 2013, p. 99). It was eventually decided that the Yakama Nation does hold both on-reservation *Winters* rights and off-reservation instream flow rights for "the absolute minimum amount of water necessary" to keep fish alive in the Yakima River, and that this right dates back to "time immemorial" (Osborn, 2013, p. 99). In May 2019, the court entered the final decree in the case, ending the adjudication more than 40 years after it began (Bedell, 2019, p. 1).

Many of those who participated in the adjudication process claim that it actually ended up benefiting many of the different interest groups present (Salmon Need Water, n.d.). In the USDA's 2017 census of the area, it found that irrigated farmland actually increased during the

adjudication process, from 247,313 acres to 260,023 acres between 1987 and 2017. The average per farm market value increased as well, from \$117,496 in 1987 to \$673,451 in 2017, an increase of 38% over the rate of inflation. Sid Ottem, the former Yakima Superior Court commissioner for *Acquavella*, stated that the Yakima adjudication helped to show that adjudication can have many benefits to water users, including farmers (Salmon Need Water, n.d.). He claims that over time, trust developed between the different parties that made for a more peaceful adjudication process. Additionally, the increased certainty in water helped benefit many different parties, and contributed to the increase in farm values. This increased certainty and trust between parties also led to a water bank being established in Yakima where people can buy or sell water according to their needs. Those who want an adjudication in the Nooksack watershed point towards these benefits from the Yakima adjudication as a glimpse into the possible benefits Whatcom County may gain in the future from adjudication.

While some may point to the fact that the Yakima adjudication took over 40 years as proof that it will take the same amount of time in the Nooksack watershed, Ecology argues that the lessons learned from the Yakima adjudication will help streamline the process to instead be around 10 years (Water Resources Program, 2021). They also point towards the new technology developed since 1987 that will help them speed up the process, along with staff who worked on the *Acquavella* case and thus are already trained in adjudication. All of this combined means that the Nooksack watershed adjudication will probably take much less time than the Yakima adjudication and will cost less overall as well.

Local Politics

Local Tribes

While the 2009 Lummi Peninsula groundwater case determined the tribes' on-reservation groundwater rights, there has never been an adjudication of the tribes' off-reservation surface water rights. Until these rights are adjudicated, they cannot be enforced to prevent more junior water users from infringing on their water rights. Adequate instream flows

are critical for salmon habitat in the area, and thus critical to the tribes' right to fish outlined in the Treaty of Point Elliott (McPherson & Adjudication Staff, 2020, p. 22). In addition to being important economically to both the Nooksack Tribe and the Lummi Nation, salmon fishing is also extremely important culturally. Without the ability to enforce their water rights, salmon harvest levels have been steadily dropping over the last 35 years due to a decline in the fish population.

For years the number of farmers illegally using water in the Nooksack watershed without a permit had been increasing, with the farmers themselves estimating that if adjudication were to happen, up to 50% of farmers in the watershed would be negatively impacted (Ag Water Board of Whatcom County, n.d.-b, p. 1). The local Nooksack and Lummi tribes had participated in discussions with farmers and other local water users in an attempt to settle the problem of overuse of water in Whatcom County (Lummi Indian Business Council, 2020, p. 1). These talks attempting to remedy this issue without resorting to adjudication spanned years and mostly ended with broken promises and no results (Solomon, 2020). Both tribes have asked for years that Ecology enforce water rights in the Nooksack Watershed to ensure that the tribes are able to use their water rights and also to allow enough water to remain in the streams for the fish. However, the main reason Ecology was unable to enforce water rights in the area is that there has never been an inventory of water users in the area.

The Nooksack Tribe petitioned Ecology in May 2019 to start considering adjudication for the Nooksack Watershed, arguing that adjudication would aid in local water planning and development (Cline, 2019, p. 1). The Lummi Nation then requested in January 2020 that Ecology consider adjudication for WRIA 1, stating that since previous discussions had gone nowhere, adjudication was the only option that would help solve the water availability issues in the area (Solomon, 2020). Until the water rights of users in the area are quantified and enforced through adjudication, the tribes have no way of halting water use that infringes on their senior rights, especially when other parties can simply walk away and refuse to participate in

discussions. In a letter sent to Governor Jay Inslee shortly after Ecology announced it was considering the Nooksack watershed for adjudication, the Lummi Indian Business Council asked Governor Inslee to fund adjudication, as “without the legal framework...it is our fear (and had been our experience) that those who benefit from maintenance of the status quo will walk away from the negotiations once discussion turns toward action” (2020, p. 2).

Agriculture

In response to Ecology’s recommendation of the Nooksack watershed for adjudication, two groups have put themselves forward as advocates for farmers in the area. One is a group called Whatcom Family Farmers (WFF). The aim of WFF is to build public support of farmers, especially in relation to water rights issues (Whatcom Family Farmers, 2020). Their main argument against adjudication is that it would put farms out of business without much benefit to the instream flow. Another organization that has advocated for farmers in Whatcom county is the Ag Water Board (AWB), a group in Whatcom County that coordinates and represents different WIDs in the area (AWB, n.d.-a). The AWB has a very different view from the local tribes on the necessity of adjudication. In a memo created in response to Ecology’s consideration of adjudication, the group stated that adjudication is an unnecessary process that would harm farmers in the area and be too slow to address environmental issues (AWB, n.d.-b, p. 1). The contention around the topic of adjudication has continued since then, with farmers and some business groups pushing against it and environmental and tribal groups pushing for it. One point of contention is the unknown number of farmers in Whatcom County who are using water for agriculture without a permit. By their own estimates, up to 50% of farmers in Whatcom County could be negatively affected by an adjudication, a statement that some take to mean that 50% of farmers are using water illegally without a permit (Cline & Solomon, 2021, p. 2). However, due to the fact that water in the Nooksack watershed is over appropriated, farmers in the area usually cannot get approval for a water right permit even if they do attempt to apply (Hirst, 2017b, p. 2).

Despite the large number of unpermitted users in Whatcom County WIDs, or perhaps due to them, the AWD has been very firmly against the adjudication of water rights in the area. They argue that negotiations and settlements between the tribes and farmers would be a faster and cheaper way for water rights in the area to be determined, and thus more quickly provide benefits to salmon (AWB, n.d.-b, p. 1). They also argue that the costs adjudication would impose on farmers through litigation would be substantial and end up reducing the number of acres of farmland in the long term (Bierlink, 2020). Another concern is the lack of knowledge that many farmers had when they started their farms, with many unaware that they needed a permit for groundwater (Whatcom Family Farmers, 2020). Since these farms never applied for a permit when they were established, they would be considered illegal users during an adjudication and not granted a right since the Nooksack watershed is currently over appropriated. WFF claims that by forcing out unpermitted water users, Ecology would be creating an end to cooperative efforts to protect salmon that would harm the environment in the long run (2020).

In contrast to the farmers' position, the Salmon Need Water campaign, a joint effort between the Lummi Nation and the Nooksack Indian Tribe, argues that the halting of unpermitted irrigation would greatly benefit salmon to a greater extent than other options and be the only way to ensure that instream flows remain at optimal levels (Salmon Need Water, n.d.). Additionally, they argue that adjudication could bring many benefits to farmers. During the Yakima adjudication farming actually increased, both in irrigated land and in the number of acres of farmland. The average farm market value also increased during the Yakima adjudication, showing the value of increased water certainty. The Salmon Need Water campaign argues that similar outcomes could occur in the Nooksack watershed, with benefits being brought to the local tribes, the salmon, and farmers. In a 2020 paper on the potential benefits adjudication could bring to the Nooksack watershed, Eric Hirst argues that the AWB's claim that other processes besides adjudication could bring greater environmental benefits with

lower costs is false (p. 3). Previous attempts at discussion between the tribes and farmers have failed, and the WRIA 1 Watershed Management Plan has not succeeded in bringing the increase in instream flows that salmon need. Hirst agrees with the Salmon Need Water campaign and the tribes, saying that the only way to resolve the water issues in the area and maintain instream flows will be to go forward with an adjudication of the watershed.

Local Government

Originally, the City of Bellingham was against the adjudication of the Nooksack watershed. In a letter to Robin McPherson in May 2020, the adjudications assessment manager at Ecology, Seth Fleetwood, the mayor of Bellingham, wrote that the City did not believe that adjudication would be the best way to solve water rights issues in the watershed (p. 1). While he maintained that the City does support the senior instream flow rights and out of stream rights of the local tribes, he argued that reinitiating settlement agreements would be the better way of dealing with water rights issues. He also raised concerns about the amount of time and money adjudication would require, possibly straining City resources. However, in a letter sent to Governor Jay Inslee in December 2020, Mayor Fleetwood reversed his previous stance, instead stating that the City of Bellingham now supported adjudication in the Nooksack watershed (p.1). His reasoning behind his change in stance was that adjudication could possibly initiate further research into water rights and instream flow rule issues that desperately need to be solved. He stated that he hoped adjudication could proceed along with concurrent negotiations and settlements, and that the start of the adjudication process could help to spur people to come together and negotiate in good faith. He additionally addressed support for a proposal first brought forth by Whatcom County Executive Satpal Sidhu, in which money would be allocated for the development of a framework for settlement negotiations to occur in parallel with the adjudication process (p. 2). He wrote that it is his hope that this concurrent process of both adjudication and settlements will help alleviate some of the possible strain adjudication could

bring to farmers while also ensuring the environment is protected and the tribes' senior water rights are upheld.

Another governmental group that commented on the adjudication of the Nooksack watershed was the Whatcom Public Utility District No. 1 (Whatcom PUD). Created through a vote by the people of Whatcom County in 1937, Whatcom PUD was tasked with conserving energy and water resources and to supply both electricity and water in certain areas of Whatcom County (Whatcom PUD, n.d.). Whatcom PUD is governed by three elected commissioners who oversee policy decisions for the utility. In May 2020, Commissioner Jeff McClure sent a letter to Ecology stating his opposition to an adjudication in the Nooksack watershed (p. 2). Like in Mayor Fleetwood's first letter, Commissioner McClure stated his concern that adjudication could take a long time and strain government resources. He also advocated instead for a more collaborative approach involving negotiations and settlements, and suggested that Ecology ask the legislature for funding for these activities rather than funding for adjudication. He also highlighted the work done by the WRIA 1 Watershed Management Project, a group that consists of the City of Bellingham, Whatcom PUD, the Lummi Nation, and the Nooksack Indian Tribe, including representatives from local city councils, governmental agencies, and citizen water resource interests (WRIA 1 Watershed Management Project, n.d.). Commissioner McClure presented examples of projects the group has worked on in the past as proof that different parties can work together on water resource management projects even if they have differing views on what should be done. Because of this, he believes that adjudication would be an unnecessary and expensive process that could instead be replaced with cooperative negotiations.

Environmental Groups

A variety of environmental groups in the area also sent letters advocating for their positions on adjudication, however with very different opinions than Whatcom PUD. In a letter to

Ecology, the Environmental Caucus of the WRIA Watershed Management Project wrote of their support of adjudication in the Nooksack watershed (p. 1). They emphasized the good that adjudication would do for instream flow levels, thus greatly benefiting fish in the area along with the ecosystem as a whole. They also pointed out that due to a lack of leadership from Ecology and lack of interest from farmers, negotiations between farmers and the tribes have all failed, and thus adjudication is the only way forward. Another environmental group that had a similar view of things was RE Sources, a nonprofit founded in 1987 to deal with environmental issues in Western Washington (Wright, 2020, p. 1). In a letter to Ecology, the director of the nonprofit, Shannon Wright, wrote that adjudication would address many of the issues they advocate for, including streamflows, salmon protection, climate change issues, and general watershed health (p. 1). Agreeing with the Environmental Caucus, Wright stated that while adjudication is a complex legal process, she sees no other way to bring all of the relevant parties to the table to make decisions and solve these watershed issues (p. 2). Additionally, she emphasizes that the only way to have certainty in both water rights and water management is to have an adjudication to quantify and protect legal water rights in the area. Overall, environmental groups in the area are unsurprisingly in support of an adjudication in the Nooksack watershed, both for the protection of instream flow rules and also to ensure that future water management can be stronger and more efficient.

Adjudication Funding

After receiving all of the letters from various interest groups, Ecology had the job of deciding whether or not to recommend adjudication of the Nooksack watershed and submit a funding request for the 2022-2023 budget. They submitted their recommendation to proceed with adjudication and their funding request to the legislature in September 2020 (McPherson & Adjudication Staff, 2020, p. 6). From there, Governor Jay Inslee then proposed the budget to the legislature, who deliberated over it until it was passed at the end of April, and then signed by the Governor halfway through May (Office of the Governor, n.d.). The budget allocated \$463,000 for

2022 and \$537,00 for 2023 solely for the preparation and filing of adjudications for the Nooksack watershed and Lake Roosevelt and Middle Tributaries (S. 5092, 2021, p. 311). This section stipulates that Ecology will not file an adjudication in the Nooksack watershed prior to June 1, 2023. They also allocated \$125,000 for 2022 and \$125,000 for 2023 “to support a collaborative process among local water users” that is intended to complement the adjudication process in Whatcom County (p. 311). The funding for a collaborative process is an addition to the Governor’s proposal back in December and outlines a process in which there is mediation between parties and an assessment of solutions that both increase salmon populations and preserve farms.

The announcement of the funding for adjudication in the Nooksack watershed was met with joy from the local tribes, who said in response to the budget passing that they think this is a good step in the right direction for water management in Whatcom County (Mittendorf, 2021). Chairman Lawrence Solomon of the Lummi Nation stated that through adjudication, “we can look to a future where all our grandchildren are able to harvest salmon from our waters and still make a living on the land” (Mittendorf, 2021). The farming community, however, was not happy to hear that the funding passed. Fred Likkel, the executive director of Whatcom Family Farmers (WFF), emphasized that local farmers support compromise and settlements over adjudication, stating that adjudication will “drive people to their respective corners and spend a lot of money on attorneys” (Mittendorf, 2021).

Conclusion

While adjudication will not be filed in the Nooksack watershed until June 2023, it is possible that the passage of funding will prompt the different sides to draw inwards and refuse to work together on water management issues, as WFF claimed. Another possibility is that with adjudication looming, farmers will be much more likely to sit down at the table and have discussions with the tribes without walking away when talk turns toward action, as RE Sources

hoped. In any case, the fact that Ecology and Whatcom County have never had a full or accurate count of all the water users in the watershed makes local water management unlikely to be targeted or fully accurate.

The impending threat of climate change makes urgent action necessary to raise instream flow levels and have a better water management plan for the region. Additionally, the unquantified water rights of local tribes make it impossible to ensure that their senior rights are not encroached upon by junior water users, making it so that they cannot enforce their off-reservation instream flow rights. All of these issues make adjudication urgently needed in the area. Some have raised the possibility that adjudication could make creative solutions to water management possible, such as the establishment of a water market like the one that was created after the Yakima River Basin adjudication. Possibilities like this create more options for the future of water management in the county and could help to bring many sides together to improve the watershed. Regardless of the outcome, the next few years will see many changes in water management that have the potential to impact a variety of areas including salmon habitat, agriculture, watershed health, and local tribes. Ecology has also indicated many other areas of Washington State as possibly needing adjudication soon. The adjudication of the Nooksack watershed could be a good place to prepare for these adjudications and improve the outcomes for all of the stakeholders in the area.

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