

## *The Network Note*

### *January 2021*

#### *Focus on Washington*

#### ***Race, Federal Indian Policy, and Access to Water Parts II and III – Now in Development***

*Dividing the Waters* will convene its second and third webinars on racial justice and water in the coming months. The next ones will focus on tribal experience in water conflicts in the Upper (2<sup>nd</sup>) and Lower (3<sup>rd</sup>) Klamath River. For more information, please contact [Steve Snyder](#).

#### **WA Supreme Court: Cases from Administrative Appeals**

In the past decade, most water cases coming before the WA Supreme Court arose from the state's administrative appeals boards. They reflected the conflicts that arise in a state balancing environmental preservation and a growing population. The cases often approach water issues indirectly, in administrative appeals of growth and land-use decisions.

WA has long had administrative appeals boards to hear issues arising out of its environmental laws and agencies. In 1979, the Legislature consolidated the Pollution Control Hearings Board (PCHB), the Forest Practices Appeals Board, and the Shorelines Hearings Board into the Environmental Hearings Office, now called the Environmental & Land Use Hearings Office. The PCHB hears appeals from water rights and water quality decisions from the Department of Ecology. Board decisions get appealed directly to the Supreme Court.

Significant WA Supreme Court water decisions include:

- *Whatcom Co./Hirst v. W. WA Growth Mgmt. Hrg. Bd (2016)*: The WA Growth Management Act requires counties to protect water supplies in land-use plans. County cannot assume sufficient water for new development in the absence of state closure order.
- *Foster v. Ecology/Yelm (2015)*: Ecology is not allowed to grant a municipal water right that may impair instream flows, even with an "extensive mitigation plan."
- *Swinomish Indian Tribal Community v. Ecology (2013)*: Ecology may not reserve water for future growth that may impair instream flow requirements based on exception for "overriding considerations of the public interest."
- *Kittitas County v. E WA Growth Management Bd. (2011)*: Growth management board properly found that County failed to protect water resources by not requiring disclosure of common ownership of subdivisions, to prevent developers from relying on domestic well exemptions for multiple properties.

#### **WA Department of Ecology: Central Role**

The [Department of Ecology](#) plays the central role in WA water regulation, for both water quality and water rights. Its jurisdiction includes water quality (standards, discharge permits, stormwater, wastewater), water rights (adjudications, permits, certificates, groundwater wells, minimum streamflow requirements), wetlands, and shoreline management.

#### **Acquavella Adjudication Returns to WA Supreme Court**

After more than 40 years, Judge F. James Gavin issued the final decree for the Yakima River basin in *Ecology v. Acquavella* in May 2019. Another, and presumably last, appeal may consider the court's division of administrative jurisdiction between the Superior Court and PCHB.

#### **New WA Water Right Adjudications??**

In 2019, the Legislature directed Ecology to assess watersheds that may benefit from a water right adjudication. It concluded that adjudications should start in the Nooksack watershed in northwest WA and an area around Lake Roosevelt in eastern WA. It also recommended consideration of future water right adjudications in the Spokane and Walla Walla rivers.

#### **U of WA Water Law Professor Bob Anderson at Interior**

President Biden has appointed *Dividing the Waters* alumni and retired U of WA water law professor Robert Anderson to the Solicitor's Office at the Department of the Interior. After his inauguration on January 20, Biden appointed Anderson and others to take positions immediately at Interior that did not require confirmation. Anderson may be in line for Solicitor.

Anderson served as Associate Solicitor for Indian Affairs and Counselor to Secretary Bruce Babbitt. He then moved to U of WA, to teach Indian, public land, and water law. He also directed its Native American Law Center, and served as an annual visiting professor at Harvard. Anderson is an enrolled member of the Bois Forte Band of the Minnesota Chippewa Tribe. He began his career as a staff attorney for the Native American Rights Fund. Anderson has long worked with *Dividing the Waters*, presenting on water rights cases.

*This WA edition owes its creation to assistance from the following Dividing the Waters Convener and alumni:*

- WA Supreme Court Justice Debra Stephens
- Former PCHB Chair Tom Morrill
- Former Acquavella Judge Sid Ottem.

**Can YOU Help on the Focus Edition for Your State? Contact [ALFHH@sbcglobal.net](mailto:ALFHH@sbcglobal.net)**