

## **WASHINGTON MODERNIZES WATER RIGHTS ADJUDICATION PROCESS**

The 2009 Washington Legislature has enacted legislation to modernize the water rights adjudication process, in Chapter 332, Laws of 2009 (ESHB 1571), effective on July 26, 2009. Drawing on recommendations from the 2003 Water Disputes Task Force report, the Legislature has updated the law to make the adjudication process faster, less cumbersome, and less expensive for all parties.

### **Background**

Under Washington law, the water right adjudication is a special form of quiet title action to determine all existing rights to the use of water from a particular water source. The adjudication mechanism has been part of Washington's Water Code since 1917. *See* RCW 90.03.110 et seq. Adjudications can be used to determine rights to surface water, groundwater, or both.

An adjudication is conducted in the superior court, with the Department of Ecology as the plaintiff. RCW 90.03.220 provides that, when an adjudication is initiated, "any defendant who shall fail to appear in such proceedings, after legal service, and submit proof of his claim, shall be estopped from subsequently asserting any right to the use of such water embraced in such proceeding, except as determined by such decree."

A surface water adjudication of the Yakima River Basin, originally commenced in 1977, is still ongoing after over thirty years. *See Ecology v. Aquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997). The case, involving a huge geographic area and complex relationships between federal agencies, Indian tribes, irrigation interests, cities, and thousands of water right claimants, has already spawned multiple appeals to the Washington Supreme Court. It is widely anticipated that, once the court enters its final order – possibly this year – a final appeal will occur.

Experience in the *Aquavella* case led to several amendments of the Water Code in the 1980's relating to service of process and other procedural matters. In 1997, when it enacted provisions for watershed planning, the Legislature added a provision to enable local watershed planning units (typically convened by county governments) to petition the Department to initiate an adjudication. RCW 90.03.105. Thus far, this provision has not been used – most likely because of trepidation over duplicating the experience of the Yakima River Basin.

The inordinate expense, duration, and complexity of the Yakima adjudication led to calls for reform of the adjudication process, including a report in 2003 by a legislatively-authorized Water Disputes Task Force.

### **The Adjudication Bill**

In ESHB 1571, the Legislature has mandated a more streamlined process to govern the conduct of water right adjudications. Key aspects of the legislation, drawn in part from recommendations by the Water Disputes Task Force, are summarized below.

**Commencement:** After a petition for adjudication is filed, Ecology must file a statement with the superior court, and must consult with the Administrative Office of the Courts to determine whether there are sufficient judicial resources available to conduct an adjudication in a timely manner. Ecology must then report to the Legislature on the estimated budget needs for the court and Ecology to conduct the adjudication. The courts are encouraged to adopt innovative practices and technologies in conducting adjudications, such as filing documents electronically, using teleconferencing for court appearances, and allowing pre-filed testimony.

**Summons:** Service may be either by personal service or certified mail, or, if a potential claimant cannot be found within Washington, by publication. The summons must state that if the claimant fails to file a claim, the court may issue a default judgment. Court rules on default judgments will be applicable to allow parties to file late claims under certain circumstances.

**Preliminary Investigation:** Ecology must conduct a preliminary investigation and file a report of its findings with the court. Ecology must then bring a motion for a partial decree in favor of all the stated claims, or for a determination of contested claims, or both.

**Referee:** The superior court is authorized to appoint a referee or other judicial officer to assist the court. Under the prior law, the referee was an Ecology employee.

**Settlement:** Parties are encouraged to use alternative dispute resolution, mediation, and out-of-court settlements.

**Final Decree:** After determination of all issues, the court must issue a final decree and provide notice of the decree to all parties.

**Disqualification of Judge:** The legislation permits a judge to be partially or fully disqualified from hearing an adjudication. Partial disqualification will bar a judge from hearing only specified claims.

**Fees:** At the time of filing an adjudication claim, the claimant must pay the clerk of the superior court a fee of \$25. Within 90 days after the final decree, each party must pay Ecology a fee of \$50 for preparing and issuing a water right certificate.

### **Conclusion and Implications**

General adjudications are widely recognized as a valuable – albeit cumbersome – tool for determining rights to water in a particular basin or watershed. This legislation is intended to make the process quicker and simpler, in an effort to avoid the procedural appeals that

delayed the Yakima River Basin adjudication during the 1970's and 1980's. However, the current recession has dramatically undercut the State's ability to fund current water resource programs, let alone to launch costly new litigation. After the State's fiscal fortunes have improved and the Yakima River Basin adjudication has concluded, ESHB 1571 will set the stage for a 21<sup>st</sup> Century adjudication process in Washington.