

WOULD ADJUDICATION, AT LONG LAST, RESOLVE NOOKSACK RIVER WATER-RESOURCE ISSUES?¹

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How can we best resolve long-standing water-resource issues in the Nooksack River Basin? These problems – primarily too little water in the river and streams during the summer months – have been recognized for at least two decades. Several local entities, both government and nongovernment, developed plans and conducted projects during this time. Nevertheless, the problems are not resolved. Indeed, primarily because of climate change, these problems are getting worse and will almost surely continue to worsen during the rest of this century.

After completion of an adjudication of surface-water rights in the Yakima Basin, the Washington State Dept. of Ecology (Ecology) proposed to begin adjudication in another basin.² Ecology is considering the Nooksack River as a potential site for such a process, with a report on its recommendations due to the legislature in September 2020.

Locally, opinions are divided over the best way to resolve these issues. The Nooksack Indian Tribe and Lummi Nation, which hold the most senior but unquantified water rights in the basin, both support adjudication. Local farmers, represented by the Ag Water Board (AWB), oppose adjudication.

My sense, based on five years of observation and participation in local water-supply processes, is that adjudication may be the only viable path to increasing flows in the three forks, tributaries, and mainstem Nooksack River. Adjudication is complicated, expensive, and takes years to reach resolution. But I see no other way to encourage/motivate/pressure/compel the key parties to the negotiating table. (To me, the key parties are the two tribes and the farmers along with Ecology.) As Ecology notes, “Adjudications can encourage settlement and partnerships because all water users are joined together in a uniform process.”³ Also, the end result of adjudication is certainty on who has water rights, in lieu of the current situation in which many water rights are ambiguous. To be clear, I hope that the potential of adjudication preempts completion of and obviates the need for that process by producing a negotiated settlement.

The purpose of adjudication is to inventory and clarify water rights, to eliminate ambiguity and uncertainty about these rights. At the end of the process every water user knows how much water

¹ I thank Henry Bierlink, Jim Bucknell, Bill Clarke, Karlee Deatherage, Dan Eisses, Steve Jilk, and three anonymous reviewers for helpful comments on a draft of this paper.

² Ecology, *Focus on: Future Adjudications*, Pub. 19-11-092, Nov. 2019.

³ Ecology, *Focus on: Future Adjudications*, Pub. 19-11-092, Nov. 2019.

he/she/it can use, for what purpose(s), when and where. By itself, adjudication does not put more water in streams and rivers. However, the process would likely extinguish some water rights and eliminate some existing water uses, which would increase stream flows.⁴ In particular, the Tribes' senior water rights to instream flows might require reductions in the rights of other out-of-stream water users. And the certainty about one's water rights after adjudication is complete would allow water users to negotiate with greater confidence than they now have.

TRIBAL STATEMENTS

In May 2019, the Nooksack Indian Tribe petitioned Ecology to begin adjudication in the Nooksack Basin, and the Lummi Nation did the same several months later.^{5 6} The Lummi Nation noted, in its letter to Ecology:

“State-permitted water diversions have reduced flows in the Nooksack River and threaten the fish species that make up the Lummi Nation’s treaty fishery. State sanctioned water withdrawals within the Reservation threaten the Lummi Nation’s reserved water rights on the Reservation. A general stream adjudication of surface waters and related groundwaters in WRIA- 1 [Water Resource Inventory Area 1] appears to be the most appropriate action to resolve the ongoing water rights conflicts throughout the basin and provide all water users with the certainty and finality that is needed to move forward together in the shared management of our water resources.”

AWB STATEMENT⁷

A key sentence in the AWB statement is that “at least 50% of agricultural water use would be negatively impacted by adjudication.” My interpretation of this statement is that more than half of the irrigation water that farmers use is not authorized by Ecology and might not be part of a basin wide adjudication.⁸

Some farmers worry, appropriately, that adjudication could drastically reduce their water use. In turn, such reductions in available water would encourage some farmers to sell their land to developers, yielding rural sprawl, which most Whatcom County residents would oppose. Fortunately, farmers, in aggregate, in each of the six watershed improvement districts hold more than enough water rights to cover both permitted *and* unpermitted irrigation water use.⁹ Transferring water rights among farmers could be a complicated process and might (with support

⁴ The AWB notes that “Relinquishment of water rights through an adjudication would benefit instream flows and/or senior water rights.” (Ag Water Board, *Background Information on Water Rights Adjudication*, April 2020.)

⁵ R. Cline, Sr., Chairman Nooksack Tribal Council, letter to Maia Bellon, Director of Ecology, “Petition for General Water Rights Adjudication for WRIA-1 Pursuant to RCW 90.03.110,” May 3, 2019.

⁶ L. Solomon, Chairman Lummi Indian Business Council, letter to Laura Watson, Director of Ecology, “Lummi Nation Petition for General Adjudication in WRIA-1,” Jan. 29, 2020.

⁷ Ag Water Board, *Whatcom Ag Water Board Position Paper on Water Right Adjudication in the Nooksack Basin*, April 2020. Ag Water Board, *Background Information on Water Rights Adjudication*, April 2020.

⁸ This 50% estimate includes agricultural water use that lacks claims, permits or certificates; is subject to relinquishment; claims that were improperly filed; junior water rights; pending applications; and other reasons.

⁹ E. Hirst, *Unpermitted Irrigation Water Use in Whatcom County*, Sept. 2017

from Ecology) resolve long-standing problems, but has not been considered in the Nooksack basin.

Thus, adjudication could produce an outcome in which farmers who now use water without authorization would obtain access to legal water (e.g., through leases or purchases). Even if adjudication (or the negotiations that obviate the need for adjudication) yields less water for farmers, most can still operate by using water more efficiently, focusing water use on the most productive crops and soil types, and shifting to crops that require less water.

AWB argues that “processes other than water rights litigation would result in greater environmental benefits for the Nooksack Basin.” Neither the 2-page statement nor the 6-page Background Information supports this statement. Indeed, it is now 15 years since completion of the *WRIA 1 Watershed Management Plan*, and many projects in that plan were not implemented, were not implemented fully, or not documented.¹⁰ The most recent such plan is the *WRIA 1 Watershed Management Board 2018-2023 Implementation Strategy*.¹¹ This document is a plan to develop a plan rather than a resource plan itself. The plan identifies “technical appendices,” which were not available until several months later. It also includes several milestones that have already been missed. More important, this plan does not include the elements needed to clearly identify and address water supply and demand problems: forecasts of future water needs; identification of a range of supply, storage, and efficiency resources; analyses of different resource portfolios; and selection and implementation of a preferred resource plan.¹²

Even more important, flows in the mainstem Nooksack, forks and tributaries continue to decline during the critical summer months. And the water-resource situation will surely get worse because of climate change, the adverse effects of which are already being felt.

Flows in the Nooksack River are expected to be lower than current flows (which are already much lower than historical) by about 15% in the 2050s.¹³ Summer temperatures are expected to increase substantially over the next few decades and summer precipitation is expected to decline, leading to greater use of water for irrigation.¹⁴

¹⁰ *WRIA 1 Watershed Management Plan*, June 2005; *WRIA 1 Detailed Implementation Plan*, July 2007.

¹¹ *WRIA 1 Watershed Management Board, WRIA 1 Watershed Management Board 2018-2023 Implementation Strategy*, Aug. 2019, approved Sept. 2019.

¹² These factors might be addressed in two new projects that focus on three pilot sub-basins: Regional Water Supply Plan and Drainage-Based Management. Because both projects are in the beginning phases, it is too soon to know whether they will adequately address long-term water-resource issues.

¹³ *Tribal Climate Tool*, <https://climate.northwestknowledge.net/NWTOOLBOX/tribalProjections.php>

¹⁴ H. Morgan, *Maps of Climate and Hydrologic Change for the Nooksack River Watershed*, University of Washington Climate Impacts Group, Dec. 2017.

AWB argues that ongoing and planned “salmon recovery efforts” would be terminated or suspended during the many years required to complete an adjudication. It is impossible to know whether that would occur. An alternative possibility is that the “hammer” of adjudication would strongly motivate Nooksack water users and other interested parties to come to the table and negotiate in earnest.

AWB notes the projects that farmers have implemented to help improve instream flows, in particular streamflow augmentation on Bertrand Creek and conversion of surface-water rights to groundwater. These are both important activities. However, documentation of the effects and cost effectiveness of these efforts is meager.¹⁵ We have only one day of data (from September 2017) to show that stream augmentation works. And the only analysis of water-rights conversion is for Bertrand Creek. What about other times and locations in the basin? How expensive are these projects? How much will they increase streamflows? How cost effective? These crucial questions have not been addressed.

AWB mentions “the inaccuracy of water rights records.” The combination of (1) Ecology’s water-rights database, which is riddled with errors; and (2) the huge amount of water used for irrigation without legal authority presents a major obstacle to resolution of local water-supply problems. Adjudication would, once and for all, resolve these long-standing, critical problems.

AWB asks whether curtailment of junior water rights would allow Ecology’s instream flow rule to be met. To me, this is not the right question. The proper one is whether adjudication would result in meaningful increases in summer streamflows throughout the Nooksack Basin.

ECOLOGY STATEMENT¹⁶

Ecology’s April 2020 presentation on adjudication provides a compelling argument FOR conducting adjudication for the Nooksack Basin. Slide 16 contains this key statement:

“This [adjudication] is the only way to get a final inventory of all water users. It shows, for the first time, the total legal water use on a source and their relationship to each other. Otherwise we do not have this information.”

And Slide 18 says:

“Without an adjudication, Ecology (and the counties) have no accurate inventory of water rights. This means we are uncertain about seniority, validity and availability. All water rights are vulnerable to interruption. And Ecology cannot prioritize or regulate Federal or Tribal rights.”

And Slide 21 says:

¹⁵ C.S. Lindsay, “Stream Flow Augmentation: Bertrand Creek, Whatcom County,” Baker to Bay Symposium, Ferndale, WA, Sept. 20, 2017.

¹⁶ R. McPherson, “Adjudications Assessment,” Ecology, April 22, 2020.

“Without an adjudication, it is not clear what water anyone and everyone are legally entitled to. This makes it difficult for parties to mitigate trade, buy or sell water. The significant uncertainty in the Nooksack could be why compromise and solutions have taken so long compared to other areas. Adjudication brings all parties closer to their true (and ultimately inevitable) legal right, so negotiations are more efficient. Since all parties bear risk in litigation, there can be increased incentive for senior right holders (such as Tribes) to reach solutions. Sharing in this uniform risk can motivate parties to come to the table and reach creative solutions they might not otherwise.”

CONCLUSIONS

My assessment of our local water-supply situation, which motivates my reluctant support for adjudication, is:

Urgent Need for Action Now

- Salmon are doing poorly, and largely because of that the Orca are also doing poorly.
- One of the many factors affecting salmon health is low streamflows throughout the Nooksack Basin.
- Low flows lead to higher water temperatures, less dissolved oxygen, and reduced access to habitat, all of which are bad for salmon.
- The situation will almost surely get worse because of climate change: drier and hotter summers lead to more water use for irrigation; and less snow, earlier snowmelt, and less summer rain mean lower streamflows.
- We should move quickly to identify, define and implement a suitable mix of supply, storage, and efficiency projects to fill the growing gap between supply and demand.

Persistent Barriers to Participation by Key Stakeholders

- Responding effectively to water-supply problems requires active support and cooperation from farmers. But state regulations, especially the use-it-or-lose it requirement, discourages farmers from improving irrigation efficiency, likely a large and very cost-effective way to address these issues. And Ecology’s unwillingness to study and adopt solutions to the large amount of water used without authorization also inhibits farmer participation in solutions.
- Responding effectively to our water-supply problems requires active support and cooperation from the two tribes. Neither the Lummi nor the Nooksack have been clear about how much water they believe they are entitled to under the 1855 Treaty of Point Elliott. They have also not been clear on how much water is needed in the mainstem and tributaries to support healthy salmon populations.

Lack of Leadership

- Finally, no entity is in charge. We have a multiplicity of groups, including utilities, watershed improvement districts, PUD #1, and WRIA 1 Planning Unit, Staff Team, Management Team,

and Watershed Management Board, but no organization has stepped forward to lead the way to a sustainable water future.

Although the participants in the various WRIA 1 processes are generally well intentioned, we are too focused on process, yielding a failure to produce. That is, we plan and then plan again, but still – 20 years later – have no long-term strategic plan that we are implementing.

Given this continuing inability to comprehensively address local problems (as opposed to the current project-by-project piecemeal approach), I see no alternative to the opportunity (or threat, depending on one’s perspective) of basin wide adjudication. I would love to be proven wrong on this point and see local entities get serious about negotiation and resolution without adjudication. The Whatcom County Executive wrote:

Various water interests in Whatcom County have been engaged in water planning activities for over 20 years to resolve long-standing water management issues including participation in the watershed planning process under RCW 90.82. While a lot of good work has been accomplished during this time, there is a lot more to do to resolve these issues, including implementing the Watershed Management Plan approved by County Council in 2005.

There have been several efforts by various stakeholders to engage in settlement discussions, yet, significant agreements on water management issues have not come to fruition.¹⁷

I agree and hope the pressure (but not the reality) of adjudication yields substantial, long-lasting solutions to our water-supply problems.

One approach that might work better than either the current process-dominated one or adjudication would require Ecology to vigorously bring the parties together to develop regionwide solutions. A deadline from Ecology to begin enforcing state water law would motivate the participants to negotiate in earnest. Ecology, along with the farmers, tribes, and other local interests, could then make a strong case to the state legislature to allow implementation of locally developed solutions. Alas, Ecology shows no sign of such leadership.

Winston Churchill said, “democracy is the worst form of Government except for all those other forms that have been tried from time to time....”¹⁸ In the same manner, adjudication may be the worst way to resolve local water-resource issues except for all the other approaches that have not yet worked.

¹⁷ S. Sidhu, Whatcom County Executive, “Memo to Members of Ag Water Board,” April 29, 2020.

¹⁸ <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/>