

# Case Law Retrospective: How did we get here?

2nd Annual Water Law in Eastern Washington Conference



A scenic view of a river flowing through a forested landscape under a clear blue sky. The river is in the foreground, with a rocky shoreline and dense trees in the background.

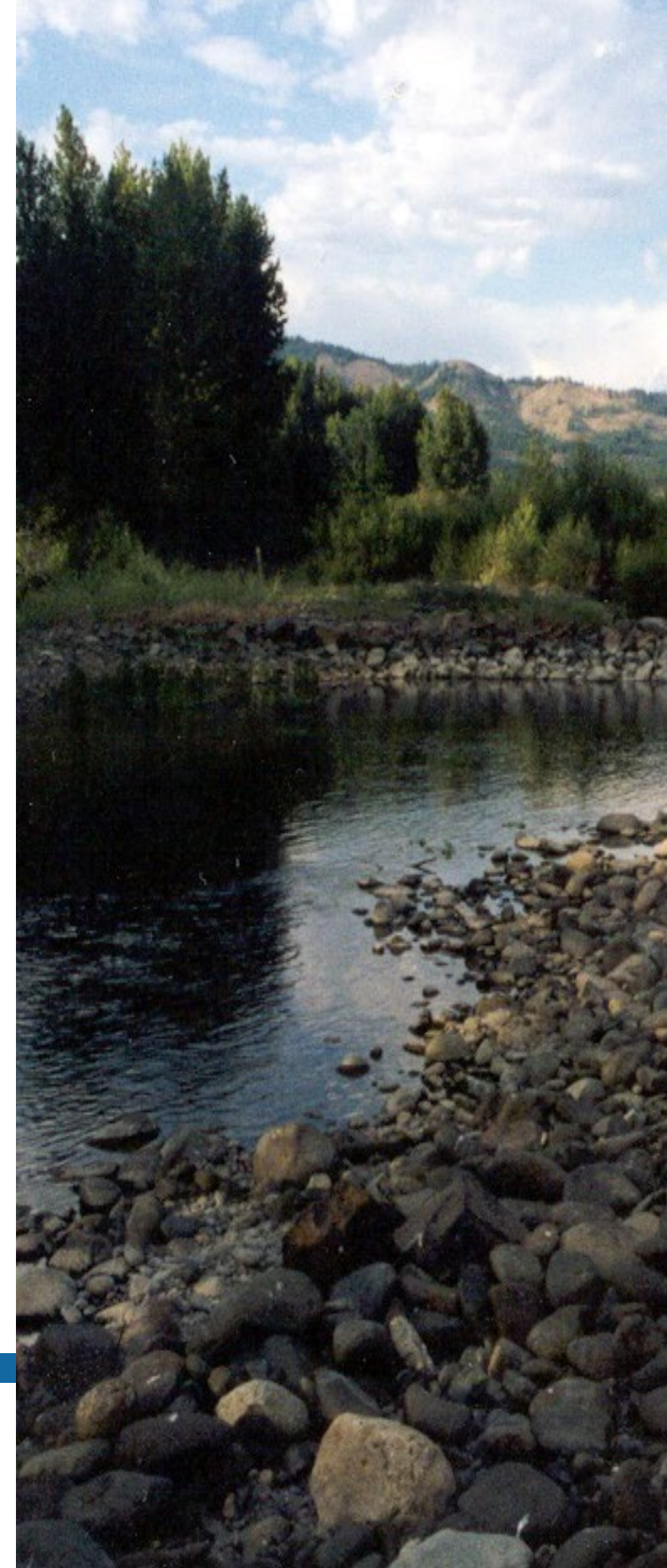
# **Pre Code Instream Flows: Public Trust Doctrine and Riparian Rights**

**Jim Davenport, JHDavenport LLC**



# Public Trust Doctrine

- Jus Privatum: “Private” assets that may be conveyed by the Legislature
- Jus Publicum: “Public” assets (water) that may not be conveyed by the Legislature, but managed in the public interest
- Res Communes; Res Publicum: Water “belongs to the public.” RCW 90.03.010
- *Wilbour v. Gallagher* (1969)
- *R.D. Merrill Co. v. Pollution Control Hearings Bd.* (1999)



14<sup>th</sup> Century

15<sup>th</sup> Century

1789—Property Clause

1827—Tyler v. Wilkinson

1853—Washington Territory

1855—Stevens Treaties

1862—Homestead Act

1877—Desert Land Act

1889--Washington Statehood

1890—WA 1<sup>st</sup> Approp. Stat.

1911—Still v. Pelouse I & P

1917—WA Water Code

1945—WA Groundwater Act

1967—Claims Registration Act

1969--Wilbour v. Gallagher

1973--Endangered Species Act

1979—Maximum Net Benefit

1985—Instream Flow Rule

1985—DOE v. Abbott

1993—Rettkowski v. State

1999— R.D. Merrill v PCHB

Now

Res Communes

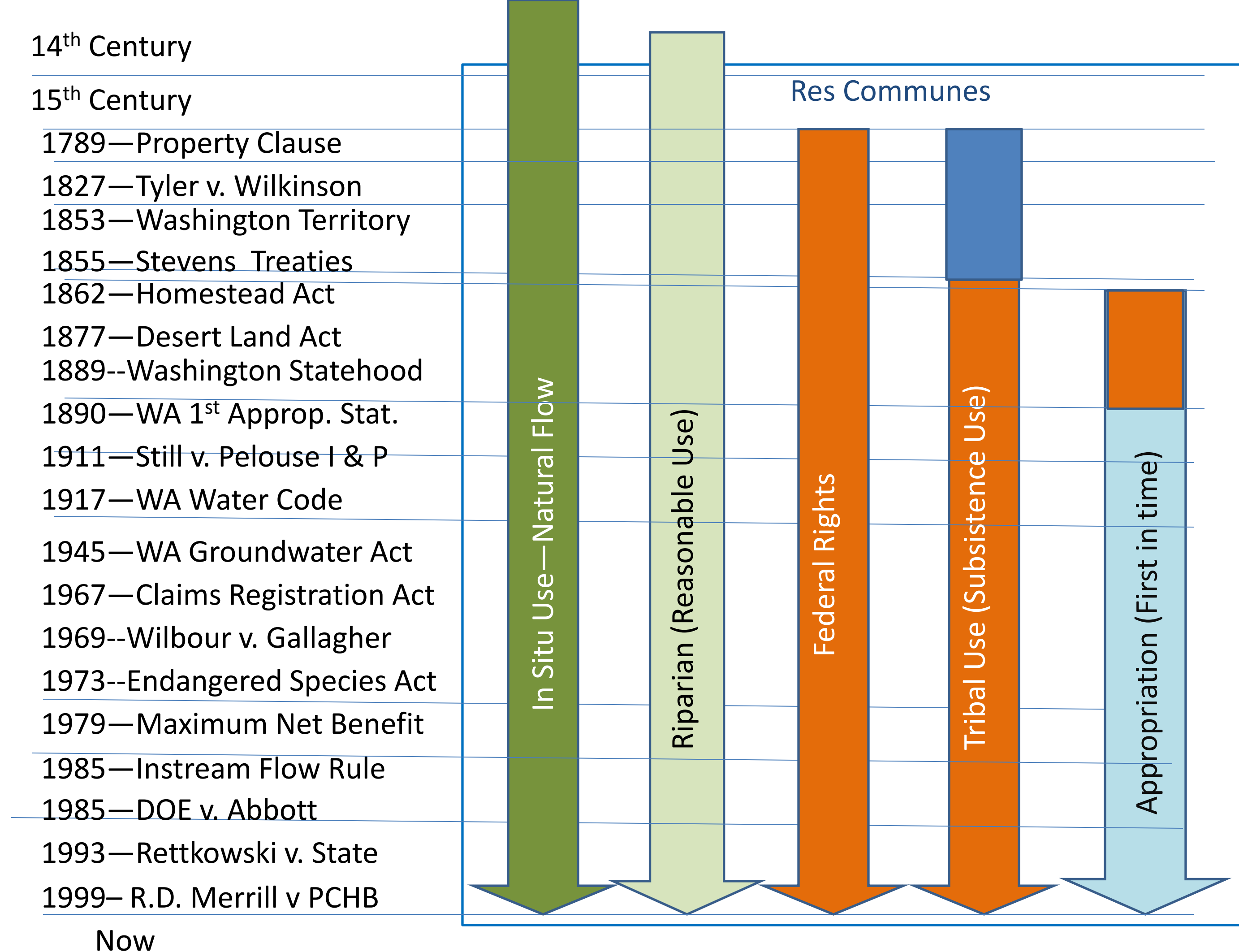
In Situ Use—Natural Flow

Riparian (Reasonable Use)

Federal Rights

Tribal Use (Subsistence Use)

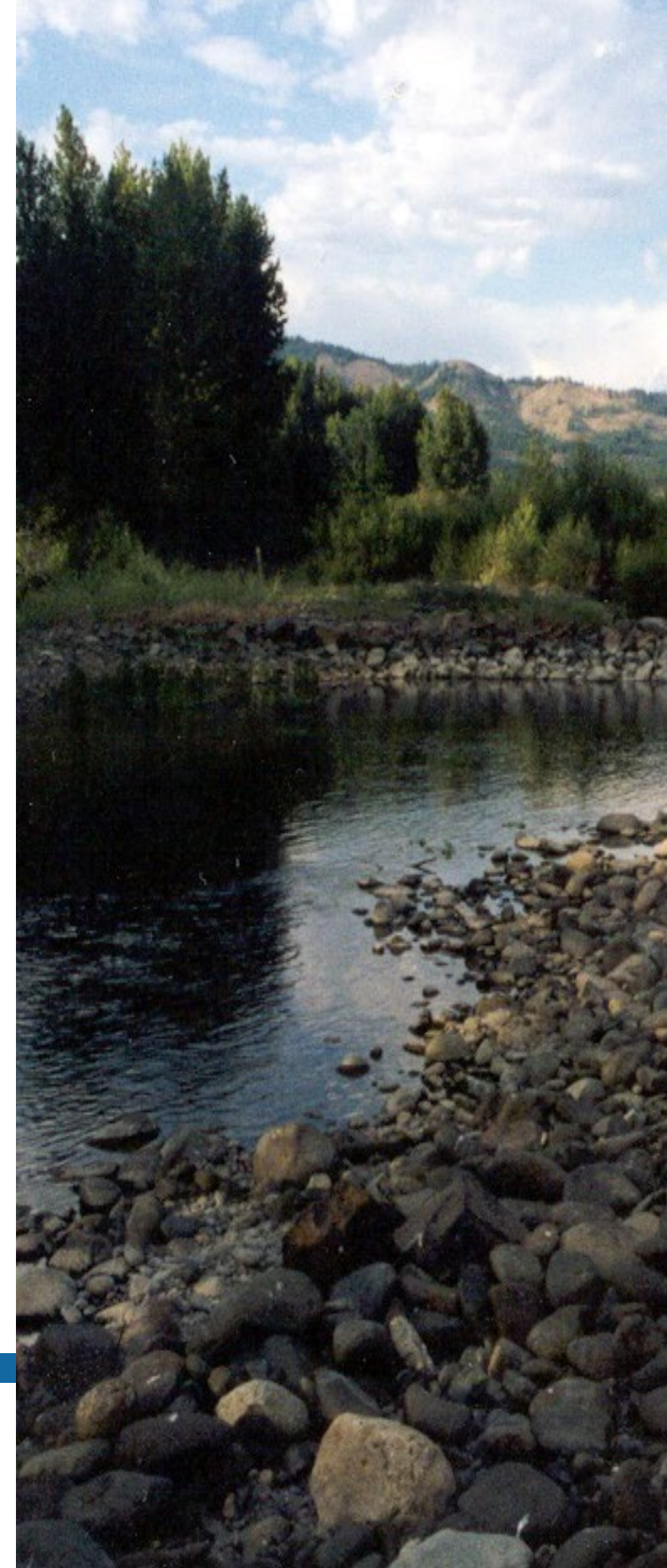
Appropriation (First in time)





# Retained Judicial Authority

- *Ecology v. Abbott (Deadman Creek)* (1985)
  - Relies on Legislative Policy
- *Rettkowski v. State* (1993)
  - Asserts judicial authority over administrative authority
  - Requires that competition between users be addressed judicially.
- Limited administrative authority



# Cases

*Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969).

*Ecology v. Abbott (Deadman Creek)*, 103 Wn.2d 686, 694 P.2d 1071 (1985).

*Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993).

*R.D. Merrill Co. v. Pollution Control Hearings Bd*, 137 Wn.2d 118, 969 P.2d 458 (1999).



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# Agency Authorities under the Water Code

Adam Gravley, Van Ness Feldman LLP



# Themes in Agency Authority

## Plain language and statutory interpretation

- *Whatcom Co. v. Hirst*, et al. (2016) – adequate/available
- *Foster v. Ecology* (2015) – withdrawal/appropriation

## Rule against reallocation of water/agency authority: public water

- *Ecology v. U.S. Bureau of Reclamation* (1992)
- *Swinomish Indian Tribal Cmty. v. Ecology* (2013)
- *Foster v. Ecology* (2015)

## Agency authority curtailed because of practical failure of Water Code?

- *Rettkowski v. State* (1993)
- *Whatcom County v. Hirst* (2016)



## Cases

*Schuh v. Ecology*, 100 Wn.2d 180, 667 P.2d 64 (1983).

*Ecology v. U.S. Bureau of Reclamation*, 118 Wn.2d 761, 827 P.2d 275 (1992).

*Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993).

*Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

*Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015).

*Whatcom County v. Hirst, Futurewise, et al.*, 186 Wn.2d 648, 381 P.3d 1 (2016).



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# Addressing Instream and Out of Stream Uses

Bill Clarke, Attorney at Law & Government Affairs



# Instream & Out of Stream Uses

**Q: How did we get here?**

**A: Accidentally.**

1969 Minimum Instream Flow Act – Chapter 90.22 RCW

1971 Water Resource Act – Chapter 90.54 RCW

**(Broad statutory language and discretion to Ecology)**

Minimum instream flow rules of the 70s/80s/90s adopted as surface water rules; inconsistent language as to groundwater rights and permit exemptions; inconsistent use of minimum flow levels vs. closures; impairment never defined by Ecology or Legislature, . . . . .



# Instream & Out of Stream Uses

## Postema v. PCHB (2000)

- Appellants: “Direct and measurable effect on surface water . . . .”  
“Significant measurable or detectable effect . . . .”
- Ecology: Hydraulic continuity + unmet streamflow level = GW Denial
- Decision: (1) Hydraulic continuity & impairment = GW denial  
(2) Stream closure—“any effect on the flow or level”=GW Denial  
(3) the “one molecule” comment (Sanders dissent)



# Instream & Out of Stream Uses

## **Swinomish v. Ecology (2013)**

- 1998 Skagit Basin Water Resources Memorandum of Agreement
- 2001 Skagit Instream Flow Rule conflicts with 1998 MOA
- Ecology Rule Amendment creates reservations of exempt GW using OCPI
- Why use OCPI? – ECY concludes OCPI necessary to allow “impairment” of ECY’s instream flow

## **Foster v. Ecology (2015)**

- Approval of new groundwater rights with comprehensive mitigation (in-kind, out-of-kind, out-of-place, instream, out-of-stream)
- ECY approves using OCPI – again concluding OCPI necessary to allow “impairment” of ECY’s instream flow



# Instream & Out of Stream Uses

## Whatcom County v. Hirst (2016)

- Not *how* should instream flows be protected, but by *whom*? Ecology or local governments?
- Whatcom County issued building permits and subdivisions in accordance with Ecology's Chapter 173-503 WAC (which allowed exempt groundwater).
- Court concludes GMA obligates County to review proposed exempt GW withdrawal for impairment, even if the GW withdrawal is allowed under Ecology's regulation (and even though Legislature rejected GMA language creating impairment review for exempt GW).
- Chaos ensues.



## Cases

*Ecology v. U.S. Bureau of Reclamation*, 118 Wn.2d 761, 827 P.2d 275 (1992).

*Postema v. Pollution Control Hearings Bd*, 142 Wn.2d 68, 11 P.3d 726 (2000).

*Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

*Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015).

*Whatcom County v. Hirst, Futurewise, et al.*, 186 Wn.2d 648, 381 P.3d 1 (2016).



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# Municipal Water Supplies

Sarah Mack, Foster Garvey



# Municipal Water Rights: From *Theodoratus* to the Municipal Water Law

**Supreme Court:** *Ecology v. Theodoratus* (1998)

- Certificate = actual beneficial use
- Certificate ≠ system capacity (“pumps and pipes”)
- Not talking about municipal water rights; statutory scheme allows for differences

**Ecology:** Maybe we should rescind inchoate portions of certificates...?

**Legislature:** 2003 Municipal Water Law

- Laws 2003, 1<sup>st</sup> sp. s. c. 5; Second Engrossed Second Substitute House Bill 1338
- Defined “municipal water supplier” and “municipal water supply purposes” (RCW 90.03.015(3), (4))
- Previously-issued municipal “pumps and pipes” certificates are rights in good standing (RCW 90.03.330(3))
- Henceforth, no more “pumps and pipes” certificates can be issued (RCW 90.03.330(4))



# Municipal Water Rights after the Municipal Water Law

## Facial Constitutional Challenge: *Lummi Indian Nation v. State* (2010)

- We told you in *Theodoratus*: not addressing municipal rights (and an appellate court is “not a performing bear”)
- MWL does not violate separation of powers or due process
- “We leave for another day consideration of any as-applied challenges”

## “As-Applied” Constitutional Challenge: *Cornelius v. Ecology* (2015)

- We meant what we said in *Lummi Indian Nation*; this is “a thinly veiled facial challenge, and it fails”
- Reasonable diligence required for municipal pumps & pipes water rights
- More efficient well operation ≠ unlawful expansion of water rights

## Court of Appeals Interpretations

- *City of Union Gap v. Ecology* (Div. III, 2008)
- *Crown West Realty v. PCHB* (Div. III, 2019)



# Cases

*Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

*Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010).

*Cornelius, et.al. v. Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015).

*City of Union Gap v. Ecology*, 148 Wash.App. 519, 195 P.3d 580 (2008).

*Crown West Realty v. PCHB*, 7 Wash.App.2d 710, 435 P.3d 288, rev. denied 193 Wn.2d 1030 (2019).

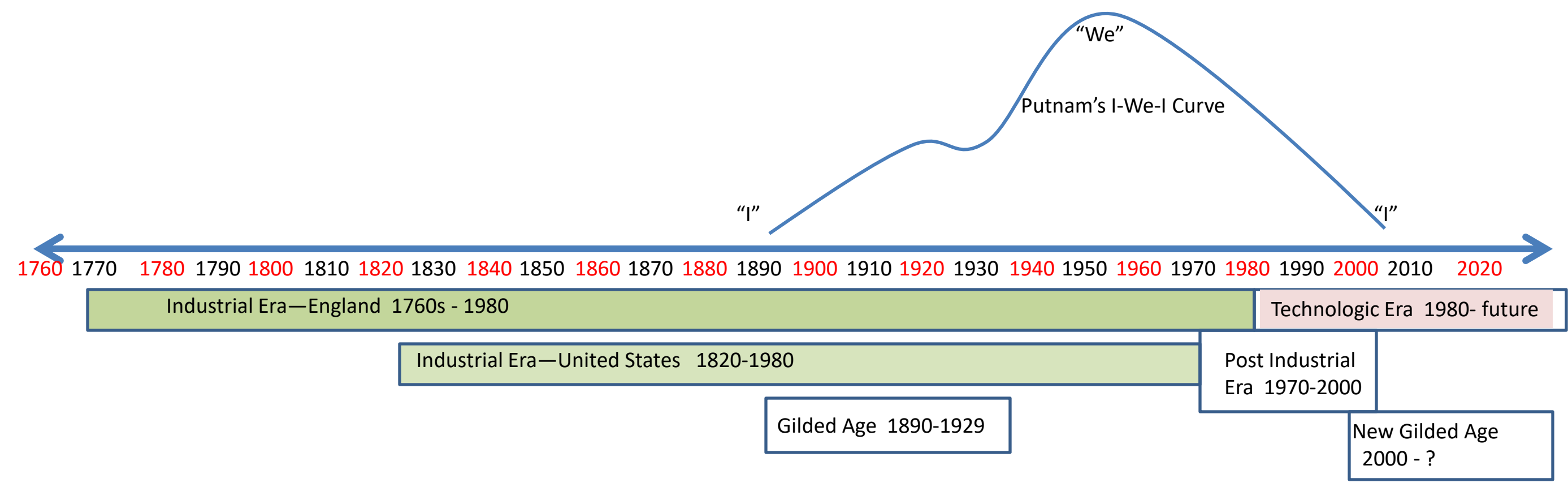


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# Last Thoughts



Robert D. Putnam, Shaylyn Romney Garrett, *The Upswing:*  
*How America Came Together a Century Ago and How We Can Do It Again*





# Thank you

Moderator: **Jamie Morin**, Confluence Law PLLC

Panelists:

- **Jim Davenport**, JHDavenport LLC
- **Bill Clarke**, Attorney at Law & Government Affairs
- **Adam Gravley**, Van Ness Feldman LLP
- **Sarah Mack**, Foster Garvey