

Water Reuse: Water Rights Considerations

Water Law in Eastern Washington, May 2025

Natalie Reid

Introduction

- Increasing water demand due to population and climate changes
- Very few “new” water rights to meet this demand
- Water reuse offers a sustainable solution to meet increasing demand
- BUT Washington’s water rights system imposes limitations on ability to beneficially reuse water
- Risk of impairment of other water rights limits scope of water reuse

Western Water Law

- **Prior Appropriation: “First in time shall be first in right”**
 - Older water rights have more seniority than younger rights
- **Originally a common law doctrine, later codified into statute in Washington**
 - Surface Water: 1917 Surface Water Code
 - Groundwater: 1945 Regulation of Public Groundwaters Act

Prior Appropriation Doctrine

- **Beneficial use is the measure and extent of a water right**
- **Conditions of use:**
 - Place, purpose, point of diversion
 - May be changed only if there is no injury to existing rights, i.e., “impairment”
- **Water rights are relational**

Water Rights in Reused Water

Water Reuse – Definitions

- **Reclaimed Water** – must be derived from wastewater with a domestic wastewater component
- **Agricultural industrial process water** – water from agricultural processing that will be reused for agricultural purposes
- **Industrial reuse water** – water from industrial processing treated to be suitable for “other uses”
- **Process reuse water** – water reused for industrial process within the same facility (not defined in statute)

Water Rights are Property Rights

- Water as a natural resource and belongs to the state until water right is issued
- A water right is a right to use water (“usufruct”)
- A “perfected” water right is real property that attaches to land
- Water once diverted/withdrawn is personal property
- Water reuse requires distinguishing between water rights (real property) and water molecules (personal property)

Rule of Capture

Department of Ecology v. U.S. Bureau of Reclamation

118 Wn.2d 761, 827 P.2d 275 (1992)

- Ecology permit for diversion from stream within Columbia Project boundaries conflicted with U.S. Government's right to control water
- Stream fed by return flows from Columbia Project irrigation water
- "Geographic test" and "control and possession test" both adopted
- "Geographic test" applies on appropriator's property
- "Control and possession test" applies once water leaves appropriator's property

Water Rights Issues in Water Reuse

- **Water reuse creates a conflict between two principles of prior appropriation:**
 - Rule of Capture
 - Appropriator has rights in diverted water molecules
 - (1) within the boundaries of their property (“geographic test”)
 - (2) whether the appropriator has an intent to recapture the water after it leaves their property (“control and possession test”)
 - Right of Reliance
 - Water rights holders have a right to rely on continued stream conditions and historical return flows

Reclaimed Water

Water Rights Issues – Reclaimed Water

- RCW 90.46.005 et seq.
- WAC Chapter 173-219
- Permits for reclaimed water available only to:
 - A municipal, quasi-municipal, or other governmental entity
 - A private utility meeting certain requirements
 - The holder of an active on-site sewage treatment permit
 - The holder of an active waste discharge permit issued under chapter 90.48 RCW

Water Rights Issues – Reclaimed/Reused Water

- **Washington's Reclaimed Water Act, RCW 90.46.130**
- (1) Except as provided in subsection (2) of this section, facilities that reclaim water under this chapter shall not impair any existing water right downstream from any freshwater discharge points of such facilities unless compensation or mitigation for such impairment is agreed to by the holder of the affected water right.
- (2) Agricultural water use of agricultural industrial process water and use of industrial reuse water under this chapter shall not impair existing water rights within the water source that is the source of supply for the agricultural processing plant or the industrial processing and, if the water source is surface water, the existing water rights are downstream from the agricultural processing plant's discharge points existing on July 22, 2001, or from the industrial processing's discharge points existing on June 13, 2002.

Water Rights Issues – Reclaimed Water

- RCW 90.46.130(1) – Prohibits reclaiming wastewater from wastewater treatment plants if it would cause impairment to downstream water rights
- Ceasing freshwater discharge means downstream water rights have less water available = impairment
- Only applies to freshwater discharges where downstream water rights exist
- Effectively prohibits municipal wastewater treatment plants that discharge to rivers from reclaiming wastewater

Water Rights Issues – Reclaimed Water

- **Impairment – examples**

- Existing water right holder prevented from fully using a water right
- Existing water right holder required to make significant modifications to use their water right
- Instream flow impacts – cause the flow of the stream to drop below minimum instream flows more frequently, for a longer duration, or by a greater amount than previously
- Water quality degradation

Water Rights Issues – Reclaimed Water

- **Impairment Analysis in Permit Application**

- Identify any downstream water right holder of any priority date in this area whose exercise of a water right relies in whole or in part on the water body to which wastewater has historically been discharged
- Impairment can be addressed by “compensation or mitigation”
- Extremely burdensome to identify all potentially impaired downstream water rights

Washington's Instream Flow Rules

- **RCW 90.22.010 Establishment of minimum water flows or levels**
 - *Ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purpose of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values...*
- **RCW 90.03.345 Minimum flows are appropriations**
 - Minimum instream flow rules are an “appropriation” of water and therefore are equivalent in all respects to a certificated water right
 - Cannot impact existing rights and take priority over all subsequent rights

Water Rights Issues – Reclaimed Water

- **Impairment Analysis – Instream Flows**

- Impairment of instream flows can be mitigated only by water-for-water, in-time and in-place
- Instream flow impairment cannot be mitigated by out-of-stream projects such as habitat improvement
- Ecology may not use overriding consideration of public interest to authorize permanent impairment of instream flows
- Very limited options to address impairment of instream flows

Reclaimed Water – Inland Examples

- **Ephrata Water Reclamation Project**
 - Groundwater recharge
 - Previous disposal – land application
- **Royal City Water Reclamation**
 - Groundwater recharge, incidental non-potable uses
 - Previous disposal – land application
- **Quincy Water Reclamation Project**
 - Groundwater recharge/irrigation
 - Previous disposal – land application

Water Rights Issues – Agricultural & Industrial Reuse

- Permitting requirements of Reclaimed Water Act not applicable to reuse of agricultural and industrial water
 - Industrial Reuse Permit – issued under State Waste Discharge Permit Ch. 90.48 RCW
 - Agricultural Reuse Permit – issued under State Waste Discharge Permit Ch. 90.48 RCW
- Land application of reuse water subject to state laws controlling discharges to groundwater
- Limitation on impairment to source water rights similar to freshwater discharge

Questions?

Natalie Reid

206.455.2111

nreid@vnf.com