

Introduction to the Law of Water

Water Law in Eastern Washington

May 27, 2026

The Law of Water Rights

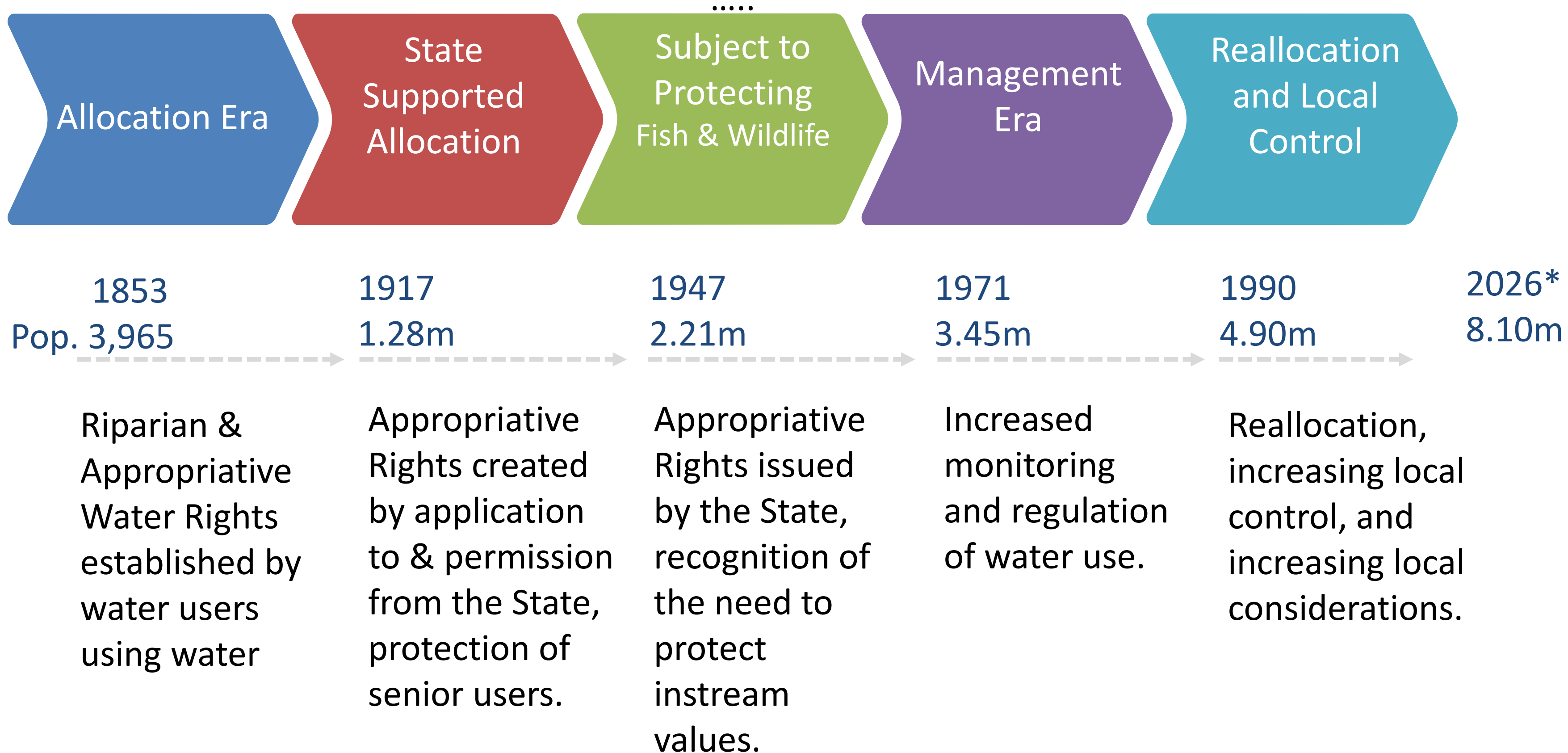


First Water Code: Babylonian Empire

- Babylon: from a minor city-state to vast empire circa 1792 to 1750 AD
- Situated on the banks of the Euphrates River, the Euphrates and neighboring Tigris Rivers were both life-giving and a constant threat
- Why: River hydrography! Sometimes Scarcity / Sometimes Flooding
- Code of Hammurabi: 282 Laws and retributive justice
 - Water as Life
 - Water as divine justice—Trial by Water
 - Accused of a crime or witchcraft? Jump in the river!
 - Water is the basis of commerce
 - Shared system of infrastructure
 - Strict punishment for negligence
 - Individuals responsible for maintaining and sharing resources
 - Food Damage,

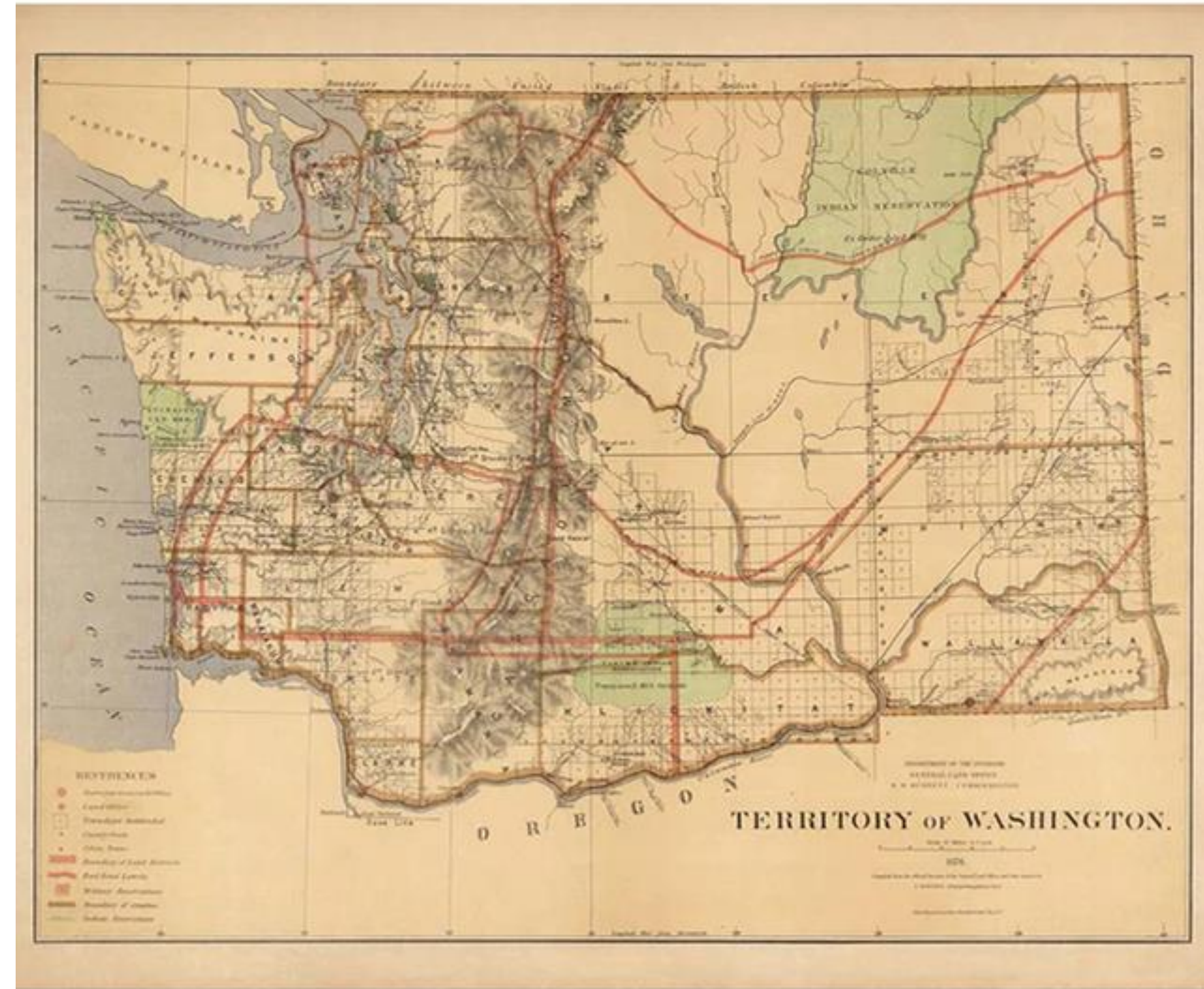


Washington Water Code



Territorial Government

- 1853, Washington Territorial Government Est.
- 1863, An Act Fixing the Rights of Riparian Proprietors ...on Mill Creek in Walla Walla County.
- 1869, Interference with infrastructure to divert water for beneficial use criminalized, up to \$1,000 fine and/or up to two years of hard labor.
- 1873, An Act Regulating Irrigation and Water Rights in the County of Yakima, Washington Territory (updated 1885).
- 1869, first law related to municipal water supplies; 1881, An Act Authorizing Cities, Towns and Villages to Provide for a Supply of Water Territorial law (RCW 90.16).



First Signs of Water Code

- 1889 Washington State Constitution Adopted:
ARTICLE XXI, The use of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use.
- 1889 First Water Code (irrigation & irrigating ditches), 1891 Amended to add mining, manufacturing, municipal supplies)
The right to the use of water ... may be acquired by appropriation, and as between appropriations the first in time is the first in right.
- 1902 Reclamation Act Creates the Bureau of Reclamation (US), 1905 Withdrawal of Waters in Yakima (RCW 90.40)
- 1913 Water Code Commission issues report



Comprehensive Water Code

- 1917, Surface Water Code (RCW 90.03)

“The power of the state to regulate and control the waters within the state....”

“Subject to existing rights all waters within the state belong to the public,...”

“... any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise...”

Existing riparian and appropriative rights protected

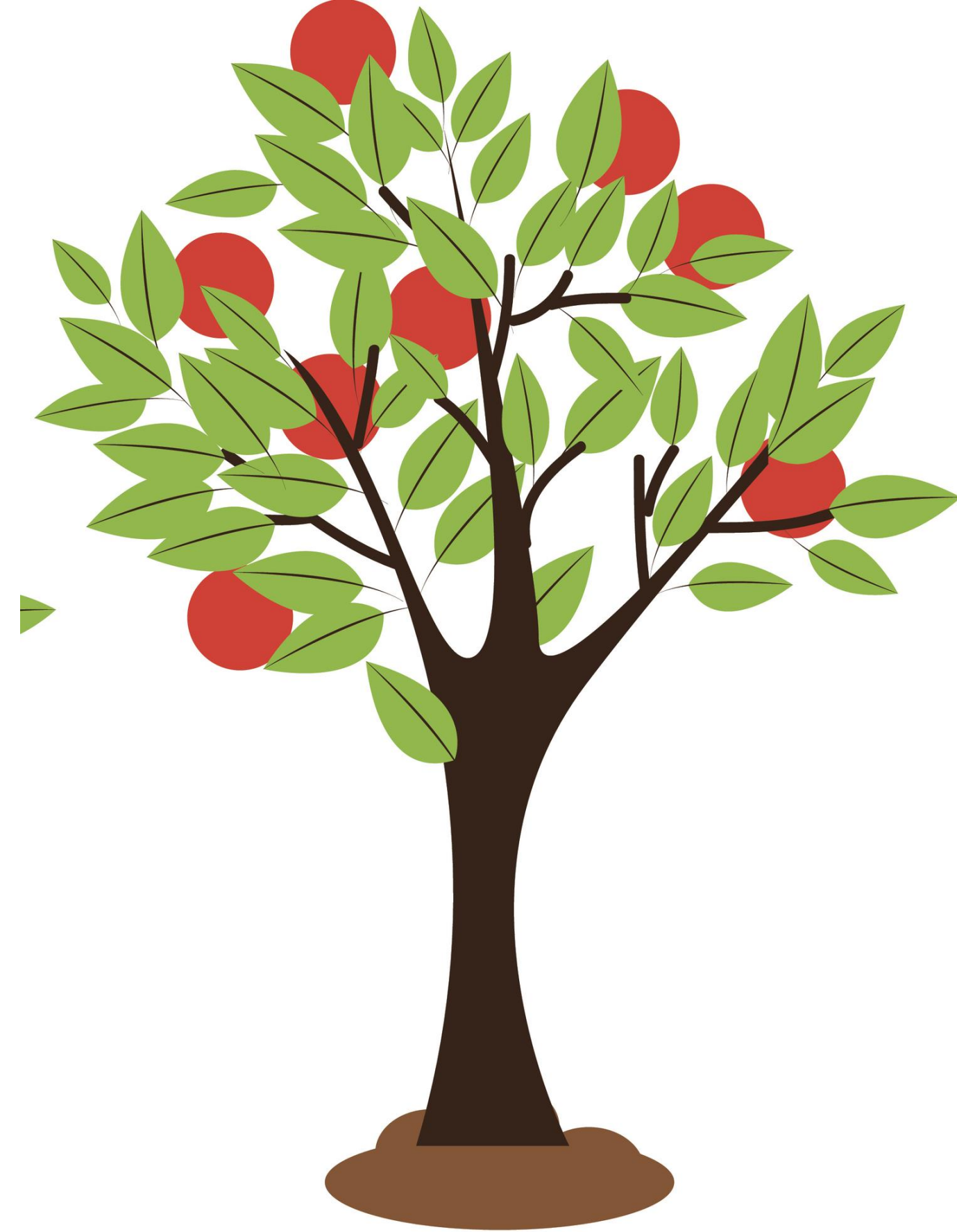
Legislating math: one cubic foot of water per second to be designated “second-foot”; forty-three thousand five hundred sixty cubic feet of water to be designated “acre-foot.”

Creates the State Hydraulic Engineer, appointed by the Governor, technically qualified and experienced...



State Control of Allocation

- 1925 Stream Patrollers (RCW 90.08)
- 1935 Division of Water Resources (Supervisor of Hydraulics) (RCW 43.21 repealed)
- 1945, Groundwater Code (RCW 90.44)
Supplemental to the Surface Water Code, extends provisions of surface water code to groundwater. Applies provisions of Surface Water Code to Groundwater.
And also creates an entirely new and slightly modified process for applications for groundwater.



Protecting Instream Values

- 1949, Fishery Code (RCW 77.57)
Fish Screening required for all diversions upon notice of the Department of Wildlife, penalties for failure to comply.
Sufficient flow of water to be maintained in streams to support fish.
Notice of Application to Directors of Fisheries and Game.
Denial if flows lowered below necessary to support fish populations.
- 1969, Minimum Water Flows Act (RCW 90.22)
Dept may establish minimum water flows or levels for fish and wildlife, recreational or aesthetic values when in the public interest.
- 1979, Stream Flow Level Protection (RCW 90.03.247)



Water Resources Act, Guiding Principles

- 1970, Dept of Ecology Established (RCW 43.21A)
- 1971, Water Resources Act of 1971 (RCW 90.54)

Waters of the state to be protected and fully utilized for the greatest benefit to the people of the state, to promote public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values.

Beneficial uses enumerated to include water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and- preservation of environmental and aesthetic values, and all other uses ...

maximum net benefits test

The quality of the natural environment shall be protected and, where possible, enhanced.

- 2002, Amendments

critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish.



Management Era

- 1967, Water rights claims registration and relinquishment (RCW 90.14)

Beneficial Use is required to continued ownership of Water Rights including riparian water rights.

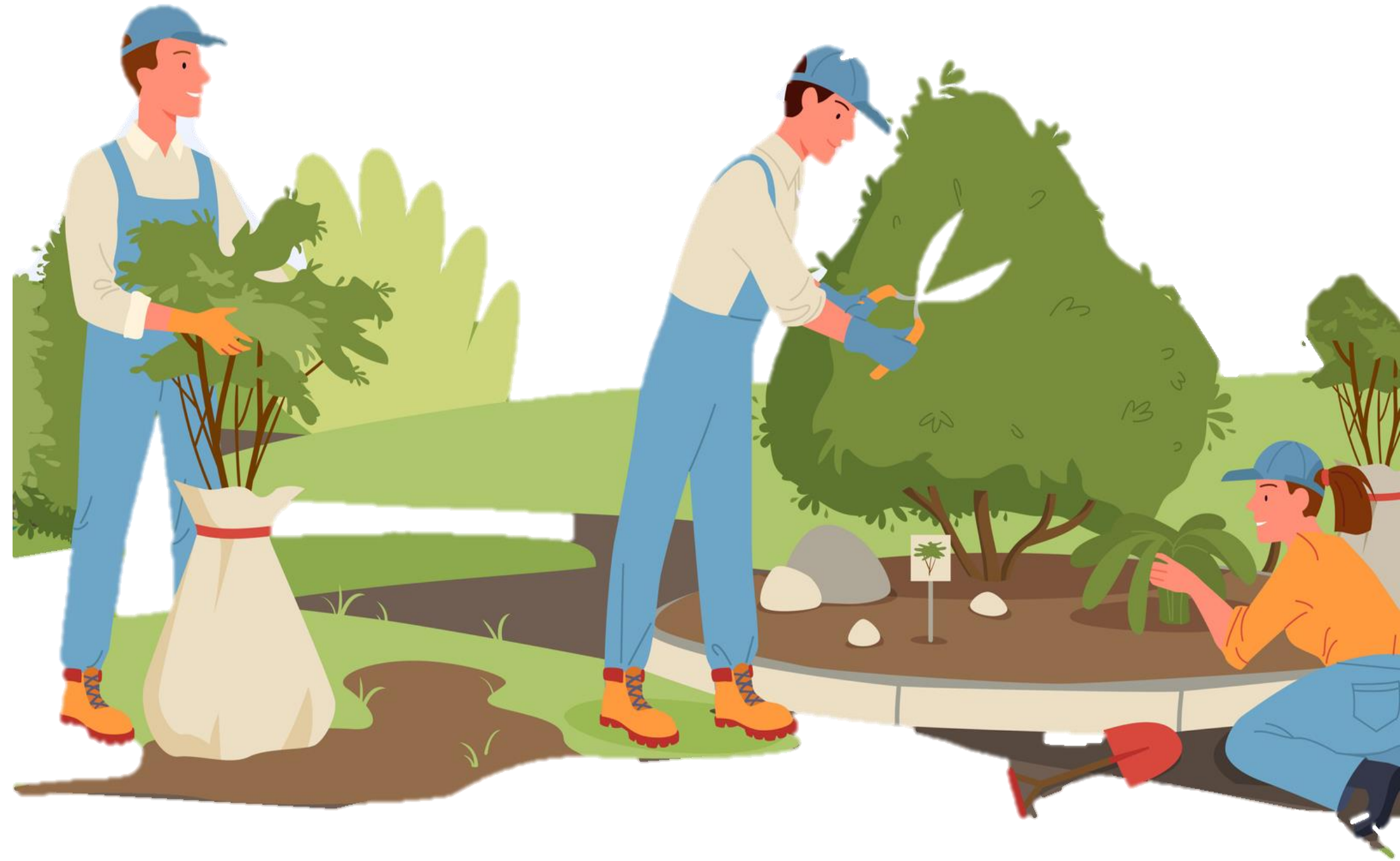
Claims registration is required to document all water uses, folding riparian rights into the prior appropriation framework, failure to file relinquishes right.

- 1977, Ecology files the Acquavella Adjudication
- 1979, Reservations of water for beneficial use or minimum flows shall constitute appropriations, with priority date of reservation (RCW 90.03.345)
- 1979, Family Farm Water Act (RCW 90.66)



Reallocation, Local Decisions

- 1989, Yakima Trust Water Program (RCW 90.38)
- 1991, Statewide Trust Water Program (RCW 90.42)
- 1997, Water Conservancy Boards (RCW 90.80)
- 1997, Watershed Planning (RCW 90.82)
- 2000, Cost Reimbursement Agreements (RCW 90.03.265)
- 2009, Water Banking (RCW 90.42)



Local Control / Local Obligations

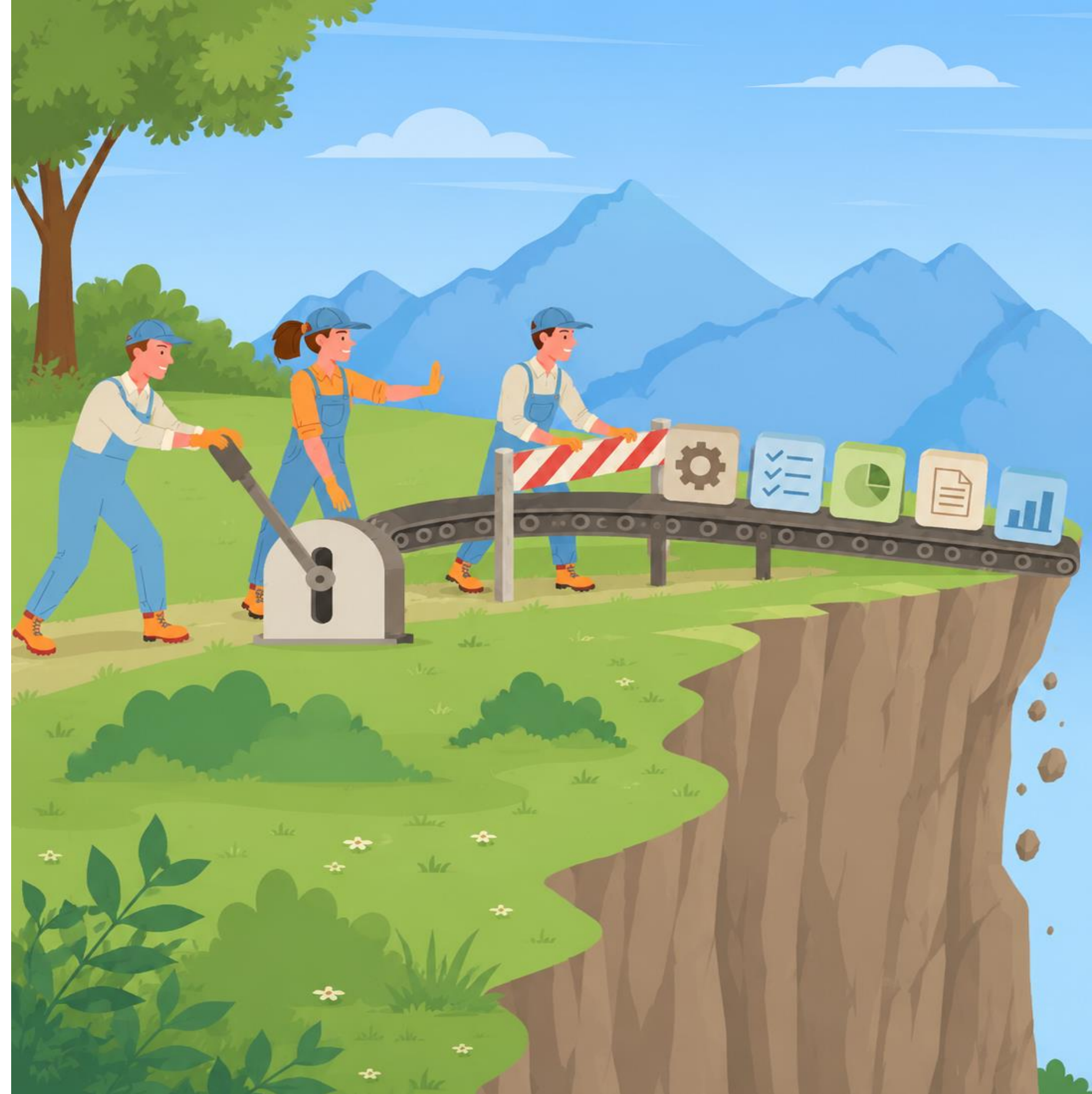
- 1990, Building Permits adequate water supply (RCW 19.27.097)
- 1990 Growth Management Act (RCW 36.70A)
- Whatcom Co. v Hirst (2016), GMA requires Counties to make an independent determination about water availability when making land use decisions.
- Legislative Response: ESSB 6091 (2018)
 - “Hirst Fix”, Counties can rely on ISF Rules
 - Streamflow Restoration (RCW 90.94), renewed planning, mitigation



Precipice to the Next Era

Competition or cooperation?

- *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015)
 - Ecology cannot make water rights decisions that involve the permanent impairment of senior instream flows.
 - Strict Non-Impairment Standard: The Court reaffirmed that Washington water law permits zero impairment of existing water rights. Even de minimis (minor) impairments to minimum flows for fish are not allowed without perfect mitigation.
 - "Out-of-Kind" Mitigation is rejected. Water impacts must be offset with actual water.



Washington's Water Future

To ensure an enduring supply of water for the next 100 years

- Launched by Gov. Bob Ferguson earlier this month
- **Regional Roundtables:** Ecology is convening regional roundtables across the state. Participants include local and Tribal governments, agriculture, utilities, industries, and environmental groups.
- **Stated Goal:** Identify successful local water programs, pinpoint ongoing challenges, and determine what infrastructure investments and policy changes are needed.
- **Action Plan:** The findings from these discussions will inform conservation and infrastructure proposals from Ecology ahead of the 2027 legislative session.



BEST OF KOTERBA, December 7, 2000

FURTHER EVIDENCE THAT RIVERS
ONCE FLOWED ON THE RED PLANET...

