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Water Right Impairment in Reclamation and Reuse

How Other Western States Can Inform Washington Law

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TABLE OF CONTENTS

I. Introduction

Conserving and recovering Washington's aquatic ecosystems will require numerous efforts, not least of which is addressing the quality and quantity of water in the state. Water reclamation and reuse offers an opportunity to limit polluting discharges from municipal wastewater treatment plants and other sources to Washington's surface waters and directly to the Puget Sound. However, the nature of western water law and the statutory variations specific to Washington present barriers to this endeavor. Water rights under the prior appropriation system are based upon the flows available at the time of initial appropriation, which can include return flows, seepage, and wastewater. Therefore, a downstream water user's right, and the very stability of the water distribution scheme, may depend on continued releases by upstream users. Washington's statutory protection against "impairment" of the rights of downstream users reinforces this common-law concept. Such protection of downstream water rights can make upstream water reuse difficult, since additional upstream consumption can result in impairment of existing rights in highly allocated basins.

Western states have balanced reclamation policies and water rights in different ways, guided by the laws and politics of the state.[1] For example, as between the rights of treatment facilities and the rights of contributors to their sewage flow -- such as multiple municipal water services contributing to a single treatment facility -- both Washington and California have vested the rights to reclaimed water, once treated, to the treatment facility owner. In other states, such as Utah, the original appropriators retain their rights until the water reaches a public watercourse. As between reclaimers and downstream users, states have established policies and procedures that lie somewhere on a theoretical spectrum between, at one end, a strict adherence to appropriation requirements, and on the other, an absolute right to reuse.

As a general matter, states such as Washington that have had recent input from their legislature on water reclamation and reuse have tended to leave the prior appropriation system intact. Conversely, due to the authority of courts to determine what is and is not a violation of the prior appropriation scheme, states that have left the issue to common-law have tended to evolve certain exceptions that favor reclamation and reuse. Under either legal system, however, there remains some flexibility in the amount of protection provided for right holders. States starting with a baseline of strict appropriation requirements have streamlined their procedures for reclaimed water permits, or even shifted the burden of identifying and proving water right impairment to the downstream user. States closer to the "right to reuse" side of the spectrum do not always allow reuse of sewage effluent outside of the municipal borders stated in the original water right, or for beneficial uses different from the one listed in the original right.

Distinct from this policy decision are several other concepts that shape the legal landscape and potentially influence the ability to reuse wastewater effluent. The common-law doctrine of "capture and reuse" traditionally is limited to irrigation waters, but the expansion of the "wastewater rule" in several western states suggests that a broader interpretation could be possible. Further, the original source of the water can determine a user's rights in some states. In

[1] The western states analyzed in this paper were chosen by staff of the Washington Department of Ecology and the Environmental Law Institute. The information gathered in this study was drawn from statutes, regulations, and personal interviews with key staff from the various states.

Washington and elsewhere, the original appropriator of foreign flows cannot be compelled to continue discharges of water from that source by downstream users. In California, the same is true for water originating from an aquifer.

The Washington State Legislature and Department of Ecology face the challenge of reconciling these legal limits and previous legislative pronouncements with the policy goal of encouraging and increasing water reclamation and reuse where it is appropriate. But even within the existing water rights framework, there are realistic options to restate and further streamline Washington's water reuse application procedures.

II. Water Rights Impairment

A. Brief Background on Water Rights

Following the European notion that water is a natural resource held in common for the public good, the State of Washington has declared, in both its Constitution and statutes, that water is held in trust for the people of the state.[2] However, individuals have the right to put this public resource to private use. Theories on how to allocate this individual use right took two dominant forms in the United States, and created a mixed system in Washington in its early history.

The riparian doctrine ties rights to a particular body of water to the land adjacent to it.[3] In this doctrine's classic form, multiple landowners adjacent to the same waterbody have equal rights to the water, and in times of shortage, each user's share is reduced proportionately.[4] Because the riparian doctrine is most appropriate in areas with plentiful water and where most people are adjacent to a waterbody, development in the western United States, specifically mining, brought about the prior appropriation doctrine.[5] Often explained as "first in time, first in right," the classic form of this doctrine prioritizes individual's rights, the earliest appropriator being "senior" to all subsequent, or "junior," appropriators. Hence, "junior" users would be prohibited from diverting water if such usage would prevent "senior" users from exercising the full amount of their water rights.[6]

Originally, Washington courts followed California's lead in determining the nature of these individual use rights: prior appropriation law was used for rights on unpatented federal lands, and the riparian doctrine was used in all other cases.[7] However, the Washington Legislature favored the prior appropriation doctrine, eventually passing the first comprehensive water code in 1917, which adopted the prior appropriation standard for water rights issuances and adjudications.[8] The courts gradually withdrew from the riparian doctrine, ultimately melding riparian rights into the prior appropriation doctrine by requiring beneficial use of riparian rights

[2] JAMES K. PHARRIS & P. THOMAS MCDONALD, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, AN INTRODUCTION TO WASHINGTON WATER LAW 1-2 (2000).
[3] *Id.* at 2.
[4] *Id.*
[5] *Id.* at 3.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 4.

and prioritizing those rights in the same manner as appropriated rights.[9] While Washington remains a "mixed" water rights system to this day, in practice it is governed by the doctrine of prior appropriation.[10]

B. Definition of "Impairment"

Under the prior appropriation doctrine, a water right holder has a right to a predetermined amount of water as against all others except those to whom the user is junior. Impairment of this right violates Washington state law.[11] For purposes of reclaimed water applications, the Washington Department of Ecology presently defines "impairment" as:

> [A] condition caused by someone or something other than a natural condition where a water right holder cannot carry out the beneficial use(s) for which the right was perfected using reasonable care and diligence. Ecology considers a reclaimed water impairment analysis in the same context as the issuance of a new water right pursuant to RCW 90.03.290 and RCW 90.44.060.[12]

When considering the legal implications of reclaiming water, the potential for water right impairment is a critical issue. While reclaiming water can increase the quantity of usable water in one location, it may impair water rights of others if the water is consumptively used.

III. Reclaimers' Rights against Contributors

While water right impairment in the reclaimed water context most commonly concerns upstream reuse threatening to impair the rights of senior downstream users -- an issue discussed below -- the rights of treatment facilities as against their wastewater contributors also can be contentious. Before the recent advancement of treatment technology, wastewater, particularly municipal effluent and industrial process water, was viewed as a pollution problem rather than a natural resource. At that time, treatment plants performed a service, and parties rarely had an interest in the resulting water prior to its release into the nearest waterbody. However, with water supplies increasingly unable to satisfy the demand for water throughout the West, treated wastewater has become widely viewed as a viable commodity. This has created conflict over who owns the rights to the treated effluent.

On one hand, leaving the water rights with the original holders until the water is released back into a waterbody is an analytically simple solution and the most consistent with the prior appropriation system. However, from a policy perspective, this legal structure allows contributors to a wastewater stream to reclaim the water themselves or demand rights to or compensation for the subsequently treated water, which would deter investment in the technology needed to treat to high-level reuse standards. These issues can be settled through

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[9] *Id.*
[10] *Id.*
[11] *See* WASH. REV. CODE §§ 90.03.290(3), 90.42.040(4), 90.44.100(2).
[12] WASH. STATE DEP'T OF ECOLOGY, WATER RIGHTS IMPAIRMENT ANALYSIS GUIDANCE FOR RECLAIMED WATER FACILITIES 2 (2006).

contract, but established treatment plants seeking new markets for their discharge could suffer from parties holding out for a share of the proceeds.

On the other hand, vesting treatment plants with rights to treated water removes the possibility of claims by wastewater contributors. However, this policy is less defensible within the prior appropriation doctrine and does not necessarily alleviate concern over contributors reclaiming the water themselves or diverting wastewater prior to its arrival at the treatment plant.

A. In Washington

The Washington Legislature has decided on the latter option, vesting certain categories of wastewater treatment facilities with an "exclusive right" to the water they treat. Most important, regarding "water and wastes discharged from homes, businesses, and industry to the sewer system,"[13] the state code provides that "[t]he owner of a wastewater treatment facility that is reclaiming water with a permit issued under this chapter has the exclusive right to any reclaimed water generated by the wastewater treatment facility."[14] (Separate code provisions targeted at industrial and agricultural industrial water reclamation contain parallel "exclusive right" language.)[15] Given that municipal wastewater effluent is the primary arena for producing reclaimed water, and for potential arguments over the rights of contributors versus treatment plant owners, this provision goes a long way toward encouraging and protecting investment by utilities or other treatment plant owners.

What this provision appears to leave open, however, is who has a right to the water prior to its treatment. A strict reading of the text might suggest that the treatment plant owner gains a right to the water only *after* the reclaimed water is "generated." On this reading, wastewater contributors may have full rights to withhold their wastewater and treat it themselves, potentially undermining distribution of reclaimed water by the downstream treatment plant. Thus, regardless of the present state of water rights law, contracts between the parties may be the most secure means of protecting investment in wastewater treatment technology.

B. In Other States

Other western states have addressed this issue in a definitive manner, but not all of them have come to the same conclusion. California has a statute very similar to Washington's: "The owner of a waste water treatment plant operated for the purpose of treating wastes from a

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[13] WASH. REV. CODE § 90.46.010(20).
[14] *Id.* § 90.46.120(1).
[15] WASH. REV. CODE §§ 90.46.150, 160. Section 90.46.150 states, "The owner of the agricultural processing plant who obtains a permit under this section has the exclusive right to the use of any agricultural industrial process water generated from the plant and to the distribution of such water through facilities including irrigation systems." Section 90.46.160 states, "The owner of the industrial plant who obtains a permit under this section has the exclusive right to the use of any industrial reuse water generated from the plant and to the distribution of such water." These appear to be valuable as enabling provisions for their respective sectors, but unlike the municipal provision, they do not seem to change the rights landscape, since there are no analogous upstream contributors to the industrial process water, and since (as discussed below) WASH. REV. CODE § 90.46.130(1) continues to protect downstream users from impairment.

sanitary sewer system shall hold the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system."[16]

Conversely, Utah requires that rights to reused water be based in an original water right, the beneficial use of which is generating wastewater as a by-product.[17] Water rights do not automatically attach upon treatment. Thus, a wastewater treatment plant either must privately contract for the right to use the reclaimed water[18] or, if there is unappropriated water in the source, it may get a reuse authorization contract in addition to filing an application for a water right.[19] The latter is rarely used, since most basins in Utah are fully appropriated; and if the one at issue is not, a user often will choose to appropriate the new water rather than treat used water.[20] Hence, this system is highly dependent on contracts. But, that dependence has made it work effectively, because it gives treatment plant owners confidence that they have rights to the treated wastewater.[21]

IV. Reclaimers' Rights against Downstream Users

Most of the controversy over water rights in the reclamation context relates to potential impairment of downstream water rights. Since its inception, the prior appropriation system has relied upon seepage, return flows, and surface runoff to fulfill the claims of downstream users. Due in large part to the specific uses, primarily agriculture and mining, and primitive technology in the early years of western settlement, the quantity of a water right holder's allocation greatly exceeded his actual consumptive use. In fully allocated rivers, this meant that downstream users relied upon the difference between allocation and consumptive use by upstream users for fulfillment of their water rights. Downstream users that are senior to an upstream user have full rights to their allocated sums, even at the expense of the upstream junior user; however, the upstream user still may divert his full allocation so long as enough water is subsequently released to fulfill the rights of the downstream senior user. Seepage, return flows, and surface runoff can all play a role in ensuring that the senior downstream users' rights are not impaired. Similarly, junior downstream users theoretically founded their appropriative right on the water discharged by the senior upstream users. In both instances, maintaining the status quo of consumptive use by each right holder in the basin creates stability in the system.

But increased demand, more fully allocated waterbodies, and improved technology have put significant strain on the delicate structure of the prior appropriation system. Along with more efficient irrigation techniques, vastly improved wastewater treatment facilities have raised the prospect of greater consumptive use by upstream users and potential impairment of downstream water rights. Water reclamation and reuse improves efficiency and water quality, but prevents discharges to a waterbody that otherwise would have occurred.

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[16] CAL. WATER CODE § 1210.
[17] Telephone Interview with Jerry D. Olds, P.E., State Engineer, Utah Div. of Water Rights (July 31, 2007).
[18] UTAH CODE ANN. § 73-3c-202.
[19] *Id.*; Telephone Interview with Jerry D. Olds, *supra* note 17.
[20] Telephone Interview with Jerry D. Olds, *supra* note 17.
[21] *Id.*

If there is no consumptive use of the reclaimed water, for example, for use in toilets, and the water is later discharged to the original waterbody, then there is no net loss to the basin from the reclamation. Similarly, if water reclamation and reuse is coupled with a reduction in the amount of water diverted from the river equal to the amount being reclaimed, there is no net loss to the basin. However, both of these scenarios are rare, as indicated by the fact that reclaimed water is often used for park and golf course irrigation or otherwise viewed as an additional water source, leading to lower streamflows. The challenge faced by policymakers is to encourage water reclamation, but in a way that will prevent impairment of downstream water rights.

A. In Washington

In Washington as in other western states, the balance between encouraging water reclamation and reuse and protecting downstream water rights has been struck by simplifying permitting requirements for reclamation projects, while creating express statutory protection for downstream water rights.

First, Washington law completely exempts specific sources from the usual procedural requirements for obtaining a water right permit: "Use, distribution, and the recovery from aquifer storage of the reclaimed water by the owner of the wastewater treatment facility is exempt from the permit requirements of RCW 90.03.250 [the water appropriation permit] and 90.44.060 [the groundwater appropriation permit]."[22] Similarly, for agricultural production plants and industrial plants, "Use and distribution of the water by the owner is exempt from the permit requirements of RCW 90.03.250, 90.03.380, 90.44.060, and 90.44.100."[23] These provisions greatly ease the process of reclaiming water and distributing it, since no distinct water appropriation permits are required for that purpose. Instead, conditions on a water right for the use of the reclaimed water are included in a single permit along with water quality and Department of Health provisions.[24]

Second, Washington law uses direct statutory language that protects the rights of downstream water users from potential impairment by water reclamation: "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."[25] The statute is silent as to what constitutes "impairment" in this context, nor does it mention who determines whether there is impairment, or how or when this determination is made.

The Washington Department of Ecology has issued guidance concluding that a written analysis by the reclamation project proponent is necessary to evaluate the potential impairment of water right holders when a facility begins to reclaim water.[26] With technical assistance from the Department of Ecology, the project proponent must determine which downstream right holders may be affected by the proposed project given the hydrology of the basin and record low flow levels. This impairment self-assessment requirement places some burden on the project

[22] WASH. REV. CODE § 90.46.120(1).
[23] *Id.* §§ 90.46.150, 160.
[24] *Id.* § 90.46.030.
[25] *Id.* § 90.46.130(1).
[26] WASH. STATE DEP'T OF ECOLOGY, *supra* note 12.

proponent and is a potential disincentive to water reclamation; but it also creates an opportunity to be directly involved in the impairment determination, and still results in a more streamlined approval system than conventional water right permitting procedures.

B. In Other States: A Spectrum of Approaches

1. The Theoretical Extremes

Nearly all western states have established some balance between encouraging water reclamation and reuse and protecting downstream water rights, whether through legislation or court decisions. Analytically, the spectrum of options for striking this balance falls between two theoretical extremes: at one end, strict adherence to prior appropriation requirements, and at the other, an absolute right to reuse water.

Requiring reclamation projects to adhere to the procedural requirements for new water appropriations provides the maximum protection for rights holders, but little legal incentive for reclaiming water. Economically, the cost of water reuse, both in terms of treatment and infrastructure, may already make it a less-appealing option than obtaining additional water allocations, where available. If the law treats reclaimed water the same as a new water allocation, then applicants simply would get new allocations instead of reclaiming water, and reclamation projects would be limited to over-allocated basins.

On the other end of the spectrum, an absolute right to reuse water would offer the fewest procedural hurdles to reclaiming water and unparalleled certainty in the right to the reclaimed water, but also no protection of downstream users. Such an absolute right to reuse would vest the reclaimer with full rights to use or sell the reclaimed water; in essence, if the source of the wastewater had the legal right to divert the water, subsequent reclamation and reuse of that water is deemed not to impair other water rights. Several jurisdictions have adopted common-law variants of this rule, as explained below, but a prominent theoretical argument supporting it was advanced by Stuart L. Somach in a 1984 issue of the *Pacific Law Journal*. Somach argues that rights to reclaimed water should be held exclusively by the treatment plant owner as against any up- or downstream rights holder, and that traditional water right concepts do not apply to treated wastewater return flows since they have been so substantially changed that they are now "foreign" waters.[27]

2. The Practiced Approaches

Most western states fall somewhere between these two extremes. Generally speaking, states that have had recent input from their legislature on water reclamation and reuse have tended to leave the prior appropriation system intact, while making certain legislative or regulatory accommodations to reclamation projects; whereas states that have left the issue to common-law have tended to evolve exceptions that favor reclamation and reuse. Within each type of legal framework, there are a variety of models. These are discussed below in an order ranging (roughly) from those most protective of water rights to those that more freely encourage reclamation and reuse.

[27] Stuart L. Somach, *Who Owns Reclaimed Wastewater?*, 25 PAC. L. J. 1087 (1984).

a. Modified Permit Procedures

States, like Washington and California, that explicitly prohibit the impairment of downstream water users fall much closer to the "strict appropriation requirements" model than the "absolute right to reuse" model. In these states, legislative or agency accommodation of reclamation projects tends to take the form of streamlined permitting procedures or other procedural tools. Setting the requirements of a permit application, as well as who bears the burden of identifying impairment, can make a significant difference both in the difficulty of getting a reclamation permit, and in the level of protection for downstream users. In general, the more liberally a state deviates from strict appropriation requirements in water reclamation permitting, the greater the incentives it provides for reclamation.

i. Form of Application

The application requirements for water reclamation and reuse projects provide an initial opportunity to ease the process of obtaining a right to reclaim and reuse wastewater. While many states have adopted simplified application procedures, others actually have made their procedures somewhat more complex for water reuse than for appropriation of instream flows. But the rationale for the added protections tends to have as much to do with ensuring that the beneficial uses to which the reclaimed water is being put fit within the permitted uses as it does with protecting downstream users.

Utah. Utah simplifies its water reuse applications with regard to the amount of information required, but also mandates an application to the Water Quality Board, which is not a part of an application for streamflow appropriation.

First, a water reuse proponent must submit an application to the State Engineer that includes:

> (a) the name of the applicant; (b) a description of the underlying water right; (c) an evaluation of the underlying water right's diversion, depletion, and return flow requirements; (d) the estimated quantity of water to be reused; (e) the location of the POTW; (f) the place, purpose, and extent of the proposed water reuse; (g) an evaluation of depletion from the hydrologic system caused by the water reuse; and (h) any other information consistent with this chapter that is requested by the state engineer.[28]

Because many of the details required for streamflow appropriation applications are encapsulated in the description of the underlying water right in the reuse application, the data needed for a reuse application is somewhat less. On the other hand, unlike reuse applications, streamflow appropriation applications do not require an evaluation of hydrologic system depletion from the use.[29] This potentially could be an expensive and time-consuming endeavor for the applicant, but

[28] UTAH CODE ANN. § 73-3c-302(2).
[29] *See Id.* § 73-3-2.

application submissions to date suggest that agency expectations are low for the level of technical sophistication and detail in these evaluations.[30]

Additionally, water reuse proponents must submit an application to the Utah Water Quality Board, which will review the proposal to ensure "that water reuse meet[s] standards and requirements for water quality set by the Water Quality Board."[31] This procedure was added by legislation in 2006 and coincides with a conscious effort in the state to ensure communication between the Water Quality Board and the State Engineer. Again, streamflow appropriation applications do not require this procedure,[32] making the application requirements for water reuse in Utah arguably greater than the requirements for appropriation applications.

Nevada. Nevada encourages water reclamation proponents to submit both a primary and secondary application, as opposed to a new appropriation application.[33] As outlined in Section 533.440 of the Nevada Revised Statutes, the primary application quantifies the total discharges of the sewage treatment facility, and the secondary application details how much of the discharge will be beneficially reused, and how.[34] The applicant must also get approval from the Nevada Division of Environmental Protection (NDEP) regarding water quality issues. If the applicant receives NDEP approval for the primary application, the Division of Water Resources (DWR) almost always will approve the treatment plant discharges, since they are adding water to the system.[35] However, while NDEP approval substantially helps an applicant's chances of overall approval, DWR still performs a detailed inquiry into the finances and other capacities of the applicant to carry out the beneficial use.[36] Additionally, if the applicant is proposing to reuse effluent that historically has been discharged into a waterbody, DWR will determine if such a project would impair the rights of downstream users.

Despite this extensive application process, water reclamation proponents universally have chosen this procedure for the past ten to fifteen years, due in part to DWR encouragement but also for its flexibility and lack of notice requirements.[37] When applying for a new appropriation permit, whether surface water or effluent is the source, the applicant must specify the precise beneficial use and where it will take place.[38] Under the primary/secondary application procedure, an applicant may submit numerous secondary applications for one primary application, allowing multiple supplemental options for beneficial use of the reclaimed water. For example, a water reclamation proponent may submit a secondary application for reuse of the entire amount on a public park, and another secondary application for reuse of the entire amount for instream flow. Thus, when the water is needed for the park, up to the full amount may be diverted to that use;

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[30] *See* Sewage Effluent Numbers NS001-NS012, http://www.waterrights.utah.gov/cgi-bin/wrprint.exe?Startup.
[31] *Id.* § 73-3c-301.
[32] *See Id.* § 73-3.
[33] Telephone Interview with Richard Lisle, Div. of Water Res., State of Nev. Dep't of Conservation and Natural Res. (August 16, 2007).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

any remainder would be used for instream flows.[39] This flexibility in use is a significant incentive for water reclamation over new appropriation.

Additionally, new appropriation applications require formal notice in a newspaper, and these often attract significant opposition.[40] Primary applications also require notice in a newspaper, but these rarely attract opposition from a water quantity standpoint because they are adding water to the system.[41] Secondary applications, which pertain to the beneficial use of the reclaimed water, do not require notice of the application;[42] thus, opposition is rare. The DWR still thoroughly investigates the potential for water right impairment, but the lack of public opposition makes the application process easier for the reclamation proponent than a new appropriation application.

California. California protects downstream water rights from impairment through the procedures designed for changes in point of diversion, place of use, or purpose of use[43] rather than procedures for water appropriation. Section 1211 of the California Water Code states that, "Prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater, the owner of any wastewater treatment plant shall obtain approval of the board for that change."[44] This provision applies "to changes in the discharge or use of treated wastewater that … result in decreasing the flow in any portion of a watercourse."[45]

Theoretically, consumptive reuse, which decreases the amount of water discharged to the watercourse, is a change in discharge and can be a change in place and purpose of use. Also, change of use applications are designed to protect downstream users, ensuring that the new use, location, or point of diversion or discharge does not so affect other users as to cause impairment. Thus, complying with this process is a reasonable alternative to the more laborious streamflow appropriation applications. However, pursuing an appropriation application, or treating water reclamation applications the same as appropriation applications, has the benefit of positioning the reclaimed water within the chronological appropriation of rights. This is especially true in states like Washington and California, which legislatively vest the treatment plant owner with rights in reclaimed water, since it is not fully clear whether this reclaimed water retains the appropriation date of the original beneficial use. In Washington this is significant only in the case of a lawsuit because the owner of the treatment plant may sell or lease the reclaimed water without going through the permit system to which other water is subject.[46]

As one California lawyer explains, "in simply directing the SWRCB to review reclamation change petitions under a procedure originally designed for changes under existing appropriation permits, the Legislature did not provide a means for establishing a priority date or

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] NEV. REV. STAT. 533.440(1).
[43] Andrew H. Sawyer, *Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use*, 36 MCGEORGE L. REV. 209, 228 (2005).
[44] CAL. WATER CODE § 1211(a).
[45] *Id.* § 1211(b).
[46] WASH. REV. CODE §§ 90.03.252, 90.44.062, 90.46.120(1).

quantity for the new reclamation use."[47] Combined with the fact that "the Legislature did not state that water approved for reclamation under this procedure would no longer be available for appropriation by others," "These uncertainties may leave the wastewater treatment facility open to future challenges, even though it obtained Board approval to reclaim water under a petition for change."[48] As a result, "the wastewater treatment facility owner may find that the change petition procedure offers no significant short-cut to approval," and pursuing the appropriation right may be a legally prudent course of action.[49]

Oregon. Oregon completely exempts municipal wastewater reclamation and reuse from the application requirements for a water appropriation permit,[50] as long as three protective criteria are satisfied:

> (a) The use of reclaimed water is authorized by the national pollutant discharge elimination system or water pollution control facilities permit issued pursuant to ORS 468B.050 or 468B.053;
> (b) The Department of Environmental Quality, in reviewing an application for a permit pursuant to ORS 468B.050 or 468B.053, has consulted with the State Department of Fish and Wildlife on the impact to fish and wildlife to determine that the application of reclaimed water under ORS 537.130, 537.131, 537.132, 540.510 and 540.610 shall not have a significant negative impact on fish and wildlife; and
> (c) The Department of Environmental Quality has determined the use of reclaimed water is intended to improve the water quality of the receiving stream.[51]

This statute is unique in that, aside from the potential impact to fish and wildlife from reduced streamflows, all of these criteria concern water quality rather than quantity. Since the exemption is from appropriation permit requirements, which are primarily designed to protect senior users from subsequent appropriations, the measures required here for exemption do not seem to parallel the quantity-based procedures being bypassed.

Any person using or intending to use reclaimed water must file with the Water Resources Department (WRD) a reclaimed water registration form that includes:

> (a) Name and mailing address of the registrant; (b) The date the use of reclaimed water is initiated; (c) Source of reclaimed water supply, including a description of the location of the reclaimed water treatment facility and the name and mailing address of the owner and operator of the facility; (d) Nature of the use of the reclaimed water; (e) Amount of reclaimed water used or proposed to be used; (f) Location and description of the ditch, canal, pipeline or any other conduction

[47] Carolyn S. Richardson, *Legal Aspects of Irrigation with Reclaimed Water in California*, *in* IRRIGATION WITH RECLAIMED MUNICIPAL WATER: A GUIDANCE MANUAL 11-7 (G. Stuart Pettygrove & Takashi Asano eds., 1984).
[48] *Id.*
[49] *Id.*
[50] *See* OR. REV. STAT. § 537.131, 132(1).
[51] OR. REV. STAT. § 537.132(1).

> facility used or to be used to transport the reclaimed water from the treatment facility to the place of use; (g) A statement declaring the existence of a written contract or agreement to provide reclaimed water including the name and address of the reclaimed water provider and the date and terms of such contract or agreement; (h) A description of the season of use and the place of use of the reclaimed water, and any restrictions applicable to the use of the reclaimed water; and (i) If the reclaimed water is used in lieu of using water under an existing water right, the application, permit and certificate number of such right, or if the right is granted pursuant to a decree of circuit court, the volume and page number setting forth the right.[52]

While this notifies the WRD of the reuse and provides the information necessary to consider impacts on existing water rights, the WRD does not directly approve or disapprove a project based on this information; it is a registration form, not an application for an appropriation.

ii. Burden of Identifying Impairment

Determining which party is obligated to identify potential impairment is another means of raising or lowering the procedural hurdles faced by water reclamation proponents. The responsibility of discovering whether, and to what extent, a reclamation project impairs a water right can rest with the project proponent, the state agency, or the downstream user. Placing the burden on the proponent can increase the cost of the application process, and consequently lower the incentive to reclaim water. Placing the burden on the agency means that less time and hydrologic expertise is required of the applicant, but the applicant must wait for the agency to calculate the expected consequences to the hydrologic system, as well as compete for agency resources with other submitted applications. Placing the burden of identifying impairment on the downstream user may mean less upfront assessment of hydrologic consequences, but may also increase the chance of subsequent litigation, and result in less long-term security for water rights in general.

Washington. As explained above, Washington statutes prohibit water right impairment, but do not expressly dictate who must do the assessment.[53] The Washington Department of Ecology (DOE) has decided that a written analysis by the project proponent, with review by the DOE, is the preferred means of creating the assessment. The DOE has drafted a detailed guidance document on how to research and write an impairment assessment for a reclaimed water facility,[54] and agency support is also available if needed during this process.

Placing the burden of determining impairment in the hands of the project proponent conserves some agency resources, but also presents a potential conflict of interest. As seen in Washington, the state agency must carefully review the determinations of the proponent prior to making the final decision. Additionally, due to the legal and hydrologic expertise required for a complete impairment analysis of this sort, the state continues to provide guidance on how to perform assessments and technical assistance in completing them.

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[52] *Id.* § 537.132(2).
[53] WASH. REV. CODE § 90.46.130(1).
[54] *See* WASH. STATE DEP'T OF ECOLOGY, *supra* note 12.

Utah. Utah takes an approach that places the majority of the burden of impairment assessments on the Office of the State Engineer (OSE), but that also asks for input from both project proponents and downstream rights holders. To begin the process, a water reuse proponent must submit to OSE an application that includes, among other information, "an evaluation of depletion from the hydrologic system caused by the water reuse."[55] Upon receipt of the reclamation and reuse application, the OSE provides notice to interested parties through publication in a newspaper local to the proposed project, and allows for a 20-day protest period.[56] The OSE conducts its own impairment assessment using the information from the proponent, any objectors, and other resources at its disposal.[57]

Utah's approach allows input from the proponent, but only with regard to how much the reuse would deplete the available water sources downstream. This does not require detailed consideration of the effects on downstream users or a sophisticated understanding of local hydrology, and thus is less burdensome than a self-assessment requirement. This approach also seeks input from objectors, but only prior to the impairment decision by the OSE; after the protest period has elapsed, proving impairment is much harder. This stops short of placing the entire burden on downstream users, as it provides them with notice of new reclamation and reuse projects and offers a forum for objections outside a courtroom. Yet, the OSE is burdened not only with making the impairment determination, but also with managing all of the aforementioned procedural requirements. Despite all of these process requirements, the structure for impairment assessments in Utah has been successful, primarily because of the certainty of the process and the security in the right to reuse water.[58]

Oregon. Oregon's process essentially relies on downstream users to raise impairment concerns, but it does not formally notify them of potential impairment in most cases. The Oregon reclamation statute only requires that:

> If a municipality has discharged waste water into a natural watercourse for five or more years, and the discharge represents more than 50 percent of the total average flow of the natural watercourse and if such discharge would cease as a result of the use of reclaimed water in accordance with the provisions of ORS 540.510 (3) and this section, the director of the department shall notify any persons who, according to the department records, have a water right that may be affected by the cessation of the discharge by the municipality.[59]

By implication, if a municipality's effluent discharges comprise anything less than 50% of the total average streamflow – a threshold that would seem to encompass most cases – or those discharges have been conducted for fewer than five years, the state Water Resources Department (WRD) need not formally notify water right holders who may be affected by the water reuse.

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[55] UTAH CODE ANN. § 73-3c-302(2).
[56] Telephone Interview with Jerry D. Olds, *supra* note 17.
[57] *Id.*
[58] *Id.*
[59] OR. REV. STAT. § 537.132(3).

With or without formal notice, the burden of presenting the case for impairment appears to rest with the water right holders. If one can "demonstrate[] to the department that the cessation of discharge by the municipality substantially impairs the ability to satisfy a water right, the person shall be entitled to a preference to the use of the reclaimed water."[60] However, under the statute this "preference" must be satisfied by conveyance of reclaimed water through means other than a natural watercourse;[61] it apparently does not amount to a right to demand that the original discharge remain in place or that the reclamation project be stopped.

While Oregon's procedure greatly simplifies the initial burden on the project proponent and the state agency, it ultimately may reduce certainty in the right to reclaimed water. The process appears to grant use of the reclaimed water with little impairment analysis, leaving open a greater chance of actual impairment of existing rights, subsequent lawsuit, and a reduction or loss of the ability to use the reclaimed water. It also places significant pressure on water right holders to identify and defend against potential threats to their rights.

Oregon's approach to reclaimed water may be representative of a state that has had comparatively few water scarcity issues to date, or few reclamation projects proposed in fully allocated basins. Drier states that do not have sufficient flows in many streams may not be able to accommodate such a flexible approach. Even the more water-rich states will need to account for climate change and population growth that foreshadow decreasing supplies and increasing demand respectively. Current streamflows may permit reclamation and reuse without much impairment of downstream users, but the hydrology of the region may not always be so accommodating.

iii. Mechanisms for Compensation

If, despite all preventative and procedural measures, operation of a reclamation project would make impairment of water rights inevitable, the issue of compensation arises. Many western states do not have specific compensation statutes for water right impairment, instead relying on general eminent domain statutes to guide this process. However, Washington law provides some mention of compensation and eminent domain for water rights, while Oregon has established an alternate means of fulfilling the rights of senior users.

Washington. Washington has specific statutory language pertaining to compensation for water right impairment caused by water reclamation and reuse. The relevant provision states that "…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*."[62] While this provision allows for compensation, it sets a subjective standard that requires the consent of the right holder, without which impairment by a water reclamation facility appears to be barred. If this is the only controlling provision, it could give the impaired right holder substantial power to block a water reclamation project.

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[60] *Id.* § 537.132(4).
[61] *Id.*
[62] WASH. REV. CODE § 90.46.130(1) (emphasis added).

In 2007, the Washington Legislature attempted to amend this provision to read, "…facilities that reclaim water under this chapter shall not impair any existing water right downstream from any freshwater discharge points of such facilities *unless the impairment is mitigated or the holder of the water right is provided just compensation for the impairment*."[63] If adopted, this provision apparently would have set an objective standard for compensation, in effect removing the right holder's ability to block a proposed reclamation project. However, Governor Christine Gregoire vetoed the section of the bill that included this provision, citing its "unintended consequences to existing water rights."[64]

In addition, Washington has specific reference within its water code to eminent domain and compensation procedures for water rights:

> The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this chapter and use the same in common with the former owner, and including the right and power to condemn an inferior use of water for a superior use. In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one … Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations.[65]

The procedure for a taking of private property for public use by private corporations is further outlined in Section 8.20 of the Washington Revised Code. Under that statute, a jury, or a judge in the absence of a jury, makes the determination of just compensation to be paid to the owner of the condemned property, in this case a water right.[66]

California. California has long viewed water rights as a significant form of real property and treated them as such under state law.[67] The protection of the state's courts applies equally to water rights as it does to other real property.[68] When water rights are "taken" for a public purpose within the meaning of the Fifth or Fourteenth Amendment of the U.S. Constitution or Article 1, Section 19 of the California Constitution, just compensation is required.[69] Unless waived, just compensation is determined by a jury.[70] Only following completion of the eminent domain proceedings and payment of the determined monetary sums to the injured party may the

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[63] S.B. 6117, 60th Leg., Reg. Sess. (Wash. 2007) (emphasis added).
[64] Letter from Christine O. Gregoire, Governor, State of Washington, to the Washington State Senate (May 11, 2007), *available at* http://www.governor.wa.gov/billaction/2007/veto/6117.pdf.
[65] WASH. REV. CODE § 90.03.040.
[66] *Id.* § 8.20.080; *see also* Kurt Unger, Washington Department of Ecology, "Just Compensation and Eminent Domain," *at* http://www.ecy.wa.gov/programs/wr/rules/images/pdf/reclaim/justcompensationeminentdomain.pdf.
[67] ANNE J. SCHNEIDER, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA 6 (1978).
[68] *Id.*
[69] *Id.*
[70] CAL. CONST. art. I, § 19.

legislature provide for possession of the property by the condemnor.[71] Thus, impairment of water rights in the State of California results in monetary compensation in the amount deemed proper by a jury. This is a common means of compensating for water rights impairment throughout the West, although it is uncertain in Washington whether condemnation is available in the reclaimed water context to avoid impairment of another person's water right.[72]

Oregon. Oregon attempts to protect the water rights of senior appropriators by requiring the treatment facility to grant a "preference" and deliver flows to those users whose rights are impaired by the water reclamation.[73] This approach most closely aligns with the objectives of the prior appropriation system since it preserves the rights to water in the order in which they were perfected. But it also establishes a rather inflexible system of allocation and decreases stability of the treatment plant's right to use or market the reclaimed water. However, Oregon's statute further requires that delivery of this water "shall be accomplished through a conveyance facility or channel other than a natural watercourse."[74] The potential for fulfilling the rights of a senior user through the reclaimed water infrastructure or other means grants some flexibility to the treatment facility. But structuring this provision as a mandate rather than an option, as the statute apparently does, also could add substantial cost to fulfilling downstream rights.

b. Shifting Responsibility to Judiciary

Colorado. Colorado has established a unique procedure for managing water resources: the legislature has vested this authority in the judiciary.[75] Colorado is a traditional prior appropriation state, as compared to the hybrid systems in Washington, California, and elsewhere.[76] Appropriative rights are administered by the Division of Water Resources.[77] However, unlike any other prior appropriation state, Colorado does not have a permitting system.[78] Instead, the Colorado Legislature created special state district courts called water courts, one for each major basin in the state, which adjudicate all water right matters.[79] Any appeals of water court decisions proceed directly to the Colorado Supreme Court.[80] While this may complicate the administration of the state's waters, in practice it provides greater flexibility in the system, as the courts do not have the same political concerns or fear of a takings claim as in other states.

This structure allows the Colorado Legislature to largely refrain from addressing water rights issues since the water courts handle the legal questions on a case-by-case basis as they arise. Thus, the state has not adopted specific legislation concerning the rights to municipal wastewater effluent, but the courts have established strong precedent on the matter. In 1906, the

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[71] *Id.*
[72] *See* WASH. REV. CODE § 90.46.130(1)
[73] *See* OR. REV. STAT. § 537.132(4).
[74] *Id.*
[75] Colorado Foundation for Water Education, Citizen's Guide to Colorado Water Law 12 (2004), http://cfwe.org/CitGuides/CG-Law2004.pdf.
[76] *Id.* at 6.
[77] *Id.* at 17.
[78] *Id.* at 12.
[79] *Id.*
[80] *Id.*

Colorado Supreme Court held that one cannot gain a vested right to the captured wastewater of another.[81] The facts of that case concerned excess irrigation water that remained on the right holder's property. In 1972, the Court held that this "wastewater rule" also applies to municipal wastewater effluent, so long as no bad faith or arbitrary or unreasonable conduct is at issue.[82] In 1976, the Court clarified its definition of the wastewater rule, holding that wastewater is to be distinguished from return flows and seepage, the former not being subject to appropriation by a junior user.[83] Thus, the state of the law in Colorado appears to prohibit appropriation of municipal wastewater effluent, or at least the ability of downstream users to compel continued wastewater flows even if they have relied on them in the past. This suggests that water reclamation and reuse by municipal wastewater treatment facilities would never impair downstream water rights.

This is an exceptional outcome for such an over-appropriated state. The Colorado Constitution declares all unappropriated waters of every natural stream to be property of the public and subject to appropriation.[84] These "waters" are presumed to include seepage, flood water, return flow, springs, mine water, and groundwater. To justify distinguishing wastewater from these other second-hand sources of water can be a difficult task, as demonstrated by the text of the aforementioned decisions. However, in *Tongue Creek v. Orchard City*, 280 P.2d 426 (1955), Justice Lindsley shed light on the reason the court has excepted wastewater from the traditional rules: "the original appropriators have the right, and in fact it is their duty to prevent, as far as possible, all waste of the water which they have appropriated, in order that the others who are entitled thereto may receive the benefit thereof."[85] Thus, the policy rationale for this distinction appears to be a preference for encouraging wastewater reduction, even at the expense of past reliance on those flows by subsequent users.

c. Common-Law Right to Reuse

In other western states, the question of who owns rights to reclaimed water was first addressed by the courts; often, those decisions subsequently elicited little or no reaction from the respective legislatures. Most of these states have evolved policies that are close to an absolute right to reuse, viewing reclaimed water as largely outside the prior appropriation system. There exist a variety of explanations for these results, and each court may have its own rationale. Perhaps these judges would account for the policy implications of their decisions as Justice Lindsley did in the Colorado *Tongue Creek* case: prevent water users from compelling the continued discharge of wastewater. Regardless of the rationale, a broad reading of the common-law right to reuse, which has expanded to include reclaimed water, is well-established in several western states.

Arizona. Arizona arguably has the most favorable policy toward water reclamation and reuse with regard to water rights, and it is entirely based on a single decision by the Supreme

[81] Burkart v. Meiberg, 86 P. 98 (1906).
[82] Metro Denver Sewage v. Farmers Reservoir, 499 P.2d 1190 (1972).
[83] City of Boulder v. Boulder & Left Hand Ditch Co., 557 P.2d 1182 (1976).
[84] COLO. CONST. art. XVI, § 5.
[85] *Boulder*, 557 P.2d at 1185 (quoting KINNEY ON IRRIGATION AND WATER RIGHTS, 2nd ed., volume 2, page 1151, section 661).

Court of Arizona. In 1989, the court decided in *Arizona Public Service Co. v. Long* that, absent a regulatory scheme for wastewater effluent, those who treat the wastewater are entitled to put it to any reasonable use.[86] The case involved users downstream from a municipal wastewater treatment plant who alleged impairment of their water rights by the treatment plant's sale of its treated effluent to other parties, which halted effluent discharges to the stream.[87] Based on the definition of "effluent" in the Arizona groundwater code, as well as its exclusion from the surface water code and state health regulations,[88] the court held that wastewater effluent does not qualify as surface water or groundwater until it is returned to one of those states.[89] Without further guidance from the legislature on this third category of water, the court turned to common law, namely the wastewater rule. Thus, the court held that "Cities may discontinue the discharge of sewage effluent without violating the rights of those persons or entities which have previously appropriated it … Because the 'producer' of the effluent is a senior appropriator, those who have appropriated the effluent gain no right to compel continued discharge."[90]

Perhaps even more interesting than the legal analyses in the decision are the policy concerns expressly raised by the Arizona court. In making its decision, the court stated that its holding "will allow municipalities to maximize their use of appropriated water and dispose of sewage effluent in an economically feasible manner. It also provides a degree of flexibility that is essential to a city's ability to meet federal and state environmental and health standards."[91] The court added, "we think the city should not be hampered by a rule that would always require the sewage to be treated as waste or surplus waters,"[92] as this "would be contrary to the spirit and purpose of Arizona water law, which is to promote the beneficial use of water and to eliminate waste of this precious resource."[93] However, one equally could argue that in a highly appropriated state, the water is not wasted if it is returned to the watercourse and subsequently appropriated downstream -- as was the situation in this case. The only apparent explanation is a preference for improving water quality by eliminating effluent discharges to streams, and rewarding the municipality with the rights to the water it treats. For a very arid state such as Arizona, this amount of deviation from the strict tenets of prior appropriation doctrine is perplexing, but the benefits in promoting water reclamation and reuse are unquestionable.

New Mexico. Like Arizona's, New Mexico's policy regarding rights to reclaimed water is primarily governed by a single seminal decision by the state's highest court. In 1982, in *Reynolds v. City of Roswell*, the Supreme Court of New Mexico held that neither the State Engineer nor downstream users of discharged municipal sewage effluent can compel the continued supply of such water absent a contract, grant, dedication, or condemnation.[94] The case concerned the City of Roswell's applications to the State Engineer to, among other things, change the place of use of a newly acquired water right from one sector of the city to the whole

[86] Ariz. Pub. Serv. Co. v. Long, 773 P.2d 988, 995 (Ariz. 1989).
[87] *Id.* at 991.
[88] *Id.* at 995.
[89] *Id.* at 994.
[90] *Id.* at 997.
[91] *Id.* at 995.
[92] *Id.*
[93] *Id.* at 997.
[94] 654 P.2d 537 (1982).

city.[95] The State Engineer determined that this change of place of use would not impair existing water rights, but placed conditions on the permit requiring specific effluent discharges to parts of the Hondo River.[96] The Supreme Court confirmed the holding of the district court that conditions to such permits are allowed only when an impairment is found, and that sewage effluent is private water that the city has a right to reuse.[97]

The Court found that treated sewage effluent constitutes "artificial surface water," which is defined in the New Mexico water code as:

> waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage or percolation from constructed works, either directly or indirectly, and which depend for their continuance upon the acts of man. Such artificial waters are primarily private and subject to beneficial use by the owner or developer thereof; provided, that when such waters pass unused beyond the domain of the owner or developer and are deposited in a natural stream or watercourse and have not been applied to beneficial use by said owner or developer for a period of four years from the first appearance thereof, they shall be subject to appropriation and use; provided, that no appropriator can acquire a right, excepting by contract, grant, dedication or condemnation, as against the owner or developer compelling him to continue such water supply.[98]

Thus, the producer of the treated sewage effluent has an absolute right to transfer the place of use of the effluent, or to completely discontinue discharges of the effluent, without impairing any vested rights of others so long as there is no contract, grant, dedication, or condemnation of the water. Even though this decision was grounded in part on a legislative provision, that provision codified the common-law right to reuse that is clearly the basis for the outcome.

Montana. Montana also derives its policies on the rights to sewage effluent from the common-law right to reuse, and again primarily due to the decision in a single case. In 1996, the state Department of Natural Resources and Conservation (DNRC) held that a municipality need not file a change of place of use permit application for sewage effluent discharges to land when the intent of the municipality is to dispose of the effluent without causing a nuisance, rather than to irrigate or farm a crop.[99] The City of Deer Lodge had filed a petition for declaratory judgment with the DNRC to resolve what, if any, administrative approval is required before the city halted its historical effluent discharges to the river in favor of land-applying the effluent.[100]

This petition presented an issue of first impression in Montana, namely whether downstream users have the right to continued sewage effluent discharges.[101] The DNRC noted Montana's statutory definition of "water," which includes "sewage effluent."[102] This, according

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[95] *Id.* at 538.
[96] *Id.* at 539.
[97] *Id.*
[98] N.M. STAT. ANN. § 72-5-27.
[99] In the Matter of the Petition for Declaratory Judgment by the City of Deer Lodge, B-No. 97514-76G (1996).
[100] *Id.* at 1.
[101] *Id.* at 2-3.
[102] *Id.* at 10.

to the agency, makes "clear that other appropriators who want to beneficially use the sewage effluent at issue here can apply to the DNRC to do so."[103] Yet, the agency sought to reconcile this with prior Montana court decisions that refused downstream users the right to compel continued waste or seepage water[104] and other states' significant cases on the subject of water rights to sewage effluent, including the *Long* and *City of Roswell* decisions.[105] Thus, the DNRC held that downstream users may appropriate effluent, but that appropriation is always subject to the preference of the discharger as to whether to discharge.[106] The agency concludes the decision by stating that if the municipality wishes to beneficially use the effluent outside the city limits, it must apply for a change of place of use permit, but its intent simply to land-apply the effluent for water quality purposes does not require such a permit application.[107] And even if required, it does not appear from the text of the decision that this change of place of use application would analyze the effect on downstream users, since those users have no right to compel sewage effluent releases.

Idaho. Idaho offers an example of a state that follows this expanded common-law right to reuse, but without any case law or legislation clearly denoting adherence to the rule. Court decisions in Idaho have established that "surface waste and seepage water may be appropriated … subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use."[108] This right to reuse is limited to the beneficial use and property boundaries denoted in the initial appropriation.[109] Additionally, the wastewater must be captured before it re-enters a public waterway.[110] This right, and associated restrictions, has been employed by Idaho municipalities for reusing their sewage effluent.[111] This has been effective in large part because municipal water rights in Idaho are viewed as entirely consumptive, making possible the reuse of effluent that historically has been discharged to a watercourse without enlarging the water right or impairing the rights of downstream water appropriators.[112] While this allows municipalities to make more intensive use of their water rights over time, it prohibits use on or sale to other property or for other beneficial uses without a new water right.[113]

V. Role of Capture and Reuse Doctrine

Like the "wastewater rule," upon which many of the common-law decisions are founded, the common-law "capture and reuse" doctrine allows the right holder to retain his right to appropriated water while it is still on his land and to reapply it to the same area and for the same use as it initially was used. Traditionally, this common-law doctrine pertains to irrigated lands and operates as a means of maximizing the beneficial use of diverted water. The spirit of the

[103] *Id*.
[104] *Id.* at 3.
[105] *Id.* at 4-8.
[106] *Id.* at 10.
[107] *Id.* at 11.
[108] Sebern v. Moore, 258 P. 176, 178 (1927).
[109] Telephone Interview with Shelley Keen, Idaho Dep't of Water Res. (August 24, 2007).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*

doctrine is to promote efficient water use by encouraging farmers to reuse captured irrigation runoff as a replacement for greater surface water diversions or to improve usage of a poor or inadequate water supply. Yet, the letter of the doctrine, which remains consistent with the prior appropriation system, states that the captured water is to be used only on the same land and for the same beneficial use as it was originally applied, effectively limiting consumptive use only to what is permitted under the water right.

As seen above, some state courts have invoked the spirit over the letter of this common-law right to reuse, expanding it to include not just irrigation water or individual users, but also municipal wastewater effluent. However, states like Washington, with express statutory provisions protecting the rights of downstream users, have stuck to the letter of the doctrine. All references to capture and reuse in Washington lead back to the seminal 1909 decision in *Miller v. Wheeler*. While the case primarily concerned rights to foreign water, the court addressed the right of a farmer to his irrigation runoff, holding that "the rights to it while still upon the lands of the owners can be sustained by the same reasoning which under the common law gave a landowner a right to impound for his own use the water percolating through his own soil."[114]

As recently as 1996, Washington courts have affirmed this right of farmers to reuse their own water allocations, but only on the fields to which the water was originally applied.[115] Additionally, in January 2007, the Department of Ecology issued its interpretation of the law surrounding capture and reuse. This document outlines the water conservation objectives of the doctrine, but also the need for the farmer to have some specific documentation of a water right, the possibility that an additional water right or change of use permit may be needed for capture and reuse, the restriction on use to the purposes authorized by the water right and on the acreage where the water was originally applied, and the prohibition against increasing consumptive use.[116] Thus, while the common-law right to reuse has been interpreted in other jurisdictions to apply to more than just irrigation return flows, such an expansive reading has not been adopted to date in Washington.

VI. Reclaimers' Rights to Foreign Water

Another common-law rule, which has withstood statutory changes in state water law in many instances, is the appropriator's absolute right to reuse "foreign" flows, i.e., those originally appropriated from another water basin. While the common-law rule allows downstream users to appropriate foreign water once it is discharged by the initial appropriator, the downstream user of those discharges has no right to compel future discharges from that water source. This provides the initial appropriator with an absolute right to reuse all of the water that he appropriated from another basin, regardless of the amount and duration of past discharges and subsequent reliance by downstream users.

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[114] Miller v. Wheeler, 103 P. 641, 643 (1909).
[115] *See* In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, in Accordance with the Provisions of Chapter 90.03, Revised Code of Washington, The State of Washington, Department of Ecology, Plaintiff, v. James J. Acquavella, No. 77-2-01484-5, 3 (Memorandum Opinion Re: Return Flow Exceptions of Harry Masterson and Mary Lou Masterson) (Wash. July 16, 1996).
[116] WASH. STATE DEP'T OF ECOLOGY, FOCUS ON CAPTURE AND REUSE OF IRRIGATION WATER (2007).

A. In Washington

Washington has left unaltered this common-law rule regarding rights to foreign water, despite its numerous statutory revisions to other areas of water law. The old but often cited decision of *Miller v. Wheeler* provided a precedent in the state for this rule. The *Miller* court held that the

> waters being the result of the landowners' energy and effort, it would seem but just to say that, so long as he used them or could impound the overflow or waste upon his own land, although for use on other land, one asserting a right of appropriation in no way dependent upon the artificial flow, but made without reference to it, should have no cause to complain.[117]

Thus, a downstream appropriator of water that includes wastewater from lands irrigated by foreign flows cannot compel continued release of water originating from another basin.

In 1986, the Washington Court of Appeals again confirmed the place of this common-law rule in Washington law. In *Dodge v. Ellensburg Water Co.*, the court held that using return flow of foreign water in one year does not give the user the right to use that water the next year.[118] In that case, the watercourse at issue was naturally fed only by snowmelt runoff, so the only water present there after June was foreign water from one of the three canals feeding it.[119] The Ellensburg Water Company would appropriate all of the summer flows, including water from its canal and the water left from the other two canals, leaving nothing for Dodge.[120] The court held that the first taker of foreign water, in this case the Ellensburg Water Company, had the right to that water.[121] Referencing *Elgin v. Weatherstone*, the court stated that "foreign water, once abandoned by its developer, does not become part of the natural flow of the drainage area where it is discharged and may be used by the first person who takes it."[122] Thus, in Washington, foreign flows remain distinct from natural flows in many aspects of state water law.

B. In California

California also follows the common-law rule for rights to foreign flows. The California Supreme Court's decision in *Stevens v. Oakdale Irrigation District*, , which was cited in the *Dodge* decision in Washington, set the precedent for this rule in California. The Court held that releasing foreign flows into an adjacent watercourse does not constitute "abandonment of a water right, but merely an abandonment of specific portions of water."[123] Therefore, "past abandonment … of certain water, as distinguished from a water right, [does] not confer[] … any right to compel a like abandonment in the future."[124] More recently, the decision in *Los Angeles*

[117] 103 P. 641, 642 (1909).
[118] 729 P.2d 631, 635 (1986).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 635-636.
[123] Stevens v. Oakdale Irrig. Dist., 90 P.2d 58, 61-62 (1939).
[124] *Id.*

v. City of San Fernando[125] reaffirmed this point of law, holding that foreign water is not subject to downstream claims. California court decisions have also been clear that riparian rights do not include foreign flows.

However, California does not draw as clear a distinction between foreign and natural flows as does Washington. One example of this is in the appropriation of foreign flow discharges. In several administrative adjudications, the California State Water Resources Control Board (SWRCB) has held that "a holder of a prior appropriative right has first claim to foreign water introduced into" a watercourse.[126]

In other administrative adjudications, the SWRCB has taken the extra step of expressly limiting a permit so as not to include foreign flows, using language such as "To the extent that water available for use under this permit is foreign water, this permit shall not be construed as giving any assurance that such supply will continue."[127] While such a provision may indicate some uncertainty in the law in California, it could serve as a valuable means of providing notice and preventing reliance on foreign flows by downstream users. This could be useful language for appropriation permits in any state that limits the rights of downstream users to foreign flows.

VII. Reclaimers' Rights to Groundwater

Just as the source of water can determine an appropriator's right to reuse it in the context of foreign flows, the same can be true for groundwater. In practice, this depends on whether ground and surface waters are integrated in a state's legal system. For example, the fact that California separately regulates surface and groundwater usage guided the decision in *Los Angeles v. Glendale*, where the court held that downstream appropriators of surface water cannot claim a right to wastewater originally extracted from a groundwater source.[128]

While this outcome can be beneficial for promoting water reclamation, the distinct legal systems for the two water sources can harm the overall objective of water resource preservation. Since groundwater and surface waters are often hydrologically interrelated, differences in the law can create perverse incentives and unintended consequences in one or the other water source. For example, more lenient regulations of groundwater use than surface water use can result in a substantial drawdown of the aquifer and a reduction in seepage into the surface waters. When designing incentives for water reclamation and reuse, the value of legally integrating hydrologically interdependent water sources should not be overlooked.

VIII. Conclusion

Realistically, Washington State Legislature and Department of Ecology are somewhat limited in their options for promoting water reclamation and reuse by prior legislative

[125] 14 Cal.3d 199 (1975).
[126] In the Matter of Application 25153, SWRCB (1979).
[127] In the Matter of Applications 23838 and 23690, and Permit 1514-O (Application 22102) of South Sutter Water District to Appropriate from Yankee Slough, East Side Canal, King Slough, Pleasant Grove Creek, and Curry Creek in Placer and Sutter Counties, SWRCB (1976).
[128] 142 P.2d 289 (1943).

enactments in this subject area. Like California, the state has strongly protected existing water rights, and if the veto of Section 4 of Senate Bill 6117 is any indication, efforts to back away from this position, even at the margins, could prove difficult. Furthermore, unlike the circumstances in Arizona and the other states that are guided more by case law, Washington's reclamation statutes are so comprehensive and so recent that the state courts are unlikely to establish an absolute right to reuse municipal wastewater effluent. Therefore, Washington's position on the policy spectrum is closer to other states that strongly protect water rights holders, and the readily available regulatory options may be more procedural than substantive.

Yet, as demonstrated in Oregon and elsewhere, this situation does not rule out procedures that strongly favor the proponent of the water reclamation and reuse project. The requirements for a water reuse permit application can determine the speed of the process for the applicant, the extent of the substantive review by the agency, and who bears the burden of identifying and proving water right impairment. Simplifying these requirements can streamline the process and make it more feasible and economical than an application for a new appropriation permit, thus encouraging reclamation and reuse over new appropriation. But doing so also may decrease the upfront protections of water right holders and potentially increase the chance of subsequent lawsuits, thus reducing the security in the applicant's right to reclaim and reuse the water.

Washington has taken some steps to streamline its reuse permitting process, but more could be done on this front. Other western states provide potential guidance as to how these applications can be handled. The tools with which to craft these procedures are available; the challenge for the legislature and the agency is the precise construction.