



Ag Water Board
of Whatcom County

February 29, 2024

Robin McPherson, Manager
Water Resources Program - Adjudications Unit
PO Box 47600
Olympia, WA 98504-7600

RE: Comments on Draft Adjudication Claims Forms & Instructions

Dear Robin,

The Whatcom Ag Water Board (“AWB”) consists of the six Watershed Improvement Districts (WIDs) established in Whatcom County. The AWB works on a variety of issues impacting agricultural landowners in Whatcom County, including water quality, water resources, drainage, and habitat improvement. The AWB worked with other water resource interests in 2022 and 2023 on the legislation establishing this process public review and comment process regarding Ecology’s adjudication claims forms, and appreciates the opportunity to provide these comments.

Comments on Draft Instructions Document

1. The Instructions document should include a short and plain statement explaining to water users that they must file a claims form or forms for all of their water uses, or else they will lose the ability use water. Page 1 states “All direct water users . . . need to file a court claim to verify their legal right to use water.” The average citizen may read this and conclude “I am not interested in *verifying* my water right.” Ecology must be more explicit as to the legal consequence if a person does not file a water right claim or claims.
2. Similar to comment 1, Ecology’s comments in public information documents or events should not imply that water users do not need to hire water resource consultants, attorneys, other otherwise retain qualified advice. The proposed Nooksack Adjudication is at its core a lawsuit, and it is inappropriate for the Plaintiff in a lawsuit (Ecology) to tell the Defendants (water users) that legal advice or representation is unnecessary.

3. The term “direct water users” is an awkward term that is not part of the water code or that is generally understood by the public. The instructions should include a more understandable explanation of who must file claims forms, and could also include examples of the types of water use that require the filing of claims forms compared to those that do not.
4. The term “source their own water” is awkward, and should be simplified to use a term that is more typically used like “withdraw,” “divert” or some other type of term.
5. The term “water service” is awkward (“If you only use water as a customer of a water service . . .”) and not a term typically used. “Water system” is the more commonly understood term.
6. The Small Use Court Claim description should be clarified as follows: “If you use more than 500 gallons per day (GPD) for human domestic uses and domestic animals at your home, please use the Full-Length Court Claim Form to describe this use.”
7. The Full-Length Court Claim description is misleading as it implies that filing the court claim will ensure that the water user will be able to use the water right in the future: “If your water use has multiple water rights with different numbers, you will need to submit separate Full-Length Court Claim Forms for each right to ensure future use of all legally allowed water under all water rights.” (Pg. 4) Properly submitting claims forms does not “ensure” the right use water.
8. The description of exempt uses under RCW 90.44.050 (“What if I do not have a water right documents? Pg. 5) should include the phrase “single or group domestic” in the first bullet.
9. In the History of Water Use section, the well log information should be clarified. The 3rd bullet on Page 5 states “If you have a well log, the log will list the date the well was drilled.” This should be clarified that this date may relate to the current or existing well, but that a prior well without a well-log may have existed, indicating an earlier priority date.
10. The section describing “Water for Stock Watering” does not accurately reflect existing case law on the stockwater exemption in RCW 90.44.050. This section, at Pg. 8, states that “stock watering is drinking water for livestock, such as cattle.” This statement conflicts with the decision of the Pollution Control Hearings Board in *Devries v. Ecology*, PCHB 01-073 (2001) which concluded that the groundwater exemption for stockwatering purposes (plural) included more uses than solely the water consumed by livestock:

“A single purpose might lead to the conclusion that only water for drinking was envisioned. Since more than one purpose is contemplated, water use for stockwatering purposes covers all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to,

drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them.”

In *Five Corners Family Farmers v. Ecology*, 173 Wn.2d 296 (2011), the State Supreme Court modified various legal conclusions from the DeVries decision, but did not provide a definition of “stockwatering,” leaving the DeVries PCHB decision as the leading authority on this question.

11. The chart on Page 8 regarding Ecology estimates of water use by different types of animals exceeds Ecology’s authority in the claim form or instructions under RCW 90.03.140. In addition to lacking legal authority, these water use estimates do not cite to any source of authority and are lower than many industry or government guidances on the same issue.

12. The section titled “Water use for Municipalities” is odd. There is no authority in the water code for Ecology to create “special instructions” as indicated on Page 8 of the instructions. The Full Length Claim Form on Page 8 includes a number of specific question relating to municipal water rights, but it is unclear how any “special instructions” would apply to these questions. Ecology should include information for all claims filing in the instructions document or claims forms to ensure public education and transparency in the adjudication process.

Additional Comments on Small Use Claim Form

1. Creating a new process for small water users is a question for the Superior Court, not for Ecology to create. RCW 90.03.160(3) provides that “[t]he **superior court** may adopt special rules of procedure for an adjudication of water rights under this chapter, including simplified procedures for claimants of small uses of water.” (emphasis added). This statute clearly directs only the Superior Court, not Ecology, to adopt provisions for small water users, and further provides that the authority relates only to “simplified procedures.”

In contrast, Ecology is creating substantive changes in the water code by allowing outdoor irrigation of up to ½ acre to be exempt from any proof of usage, quantification, consideration of priority date, or challenge by other water users. Based on Ecology’s estimate that up to 20,000 exempt well claimants could be within the adjudication areas, this could mean 20,000 acre feet or more of outdoor irrigation is functionally exempt from the adjudication and the water code itself – potentially to the detriment of other water users.

2. If Ecology is going to propose a process for small water users, it must comply with the limit in RCW 90.03.160(3) that it relates to “procedures” within the adjudication, but not favor these types of water uses over others. In addition, any Ecology proposal in this regard should make clear to homeowners relying on the groundwater exemption that a decision to use a simplified approach (and limit water use to 500 gallons per day) becomes a permanent, future limit at the home, including on any future owner or

occupant of the property. Ecology's Small Use process may appear tempting to homeowners who do not understand the long-term consequences of this process in limiting future water use.

Additional Comments on Full Length Claim Form

1. The claims filing process should be based on parcel numbers, not water right document numbers. This will be most understandable to landowners, especially when a parcel has multiple water uses, some of which may have specific places of use on water right documents while others may not.

2. The question on Page 3 "Legal Basis of Water Right" should include an explanation of the term "Water Right Document." This could include a specific list of water right documents that could be responsive or examples of document types.

3. The question on Page 3 "When did this use begin?" likely is seeking information about the priority date, but the date of water use is not the priority date, which is based on the date of application or for some uses, the relation-back doctrine.

Thank you for your consideration of these comments. We will continue to provide Ecology with comments and questions we receive from farmers and rural landowners regarding the claims forms and instructions.

Sincerely,

A handwritten signature in black ink, appearing to read "BRader", with a long horizontal line extending to the right.

Brad Rader
President, Ag Water Board