

Confluence Law, PLLC

Please see comments attached.

Lathrop, Winbauer, Harrel & Slothower L.L.P.

Attorneys at Law

Post Office Box 1088/415 E. Mountain View Ave., Ste. 302, Ellensburg, WA 98926

*F. Steven Lathrop, P.S.
John P. Winbauer
Susan K. Harrel
Jeff Slothower
Douglas W. Nicholson*

*Jeff Slothower
jslothower@lwbsd.com*

*Tel (509) 925-6916
Direct Fax (509) 343-3206
www.lwbsd.com*

February 15, 2024

(Via Email Only)

Robin.mcpherson@ecy.wa.gov

Robin McPherson
Washington State Department of Ecology

Matt.janz@atg.wa.gov

Matt Janz
Assistant Attorney General

RE: Nooksack Adjudication
Claim Form and Instructions

Dear Robin and Matt:

The purpose of this letter is for the undersigned counsel to provide comments to the Washington State Department of Ecology (Ecology) on the proposed claim forms and instructions for the claim forms to be used in the Nooksack Adjudication.

The undersigned represent a group of raspberry, blueberry, potato, and row crop farmers who rely on irrigation water to raise crops within the Nooksack Basin. Together the group of agricultural producers comprises approximately 20% of the irrigated agriculture in the Nooksack Basin. These agricultural producers have agreed to coordinate efforts in preparing for the adjudication and in the adjudication on issues that affect them all.

There are several issues that we believe exist relating to the claim forms and the instructions on the claim forms. The purpose of this letter is to address those and also provide you with detailed comments on the claim forms and instructions which are attached to this letter.

We do not believe that Ecology has the authority under the adjudication statute to make the decision to divide claims in the manner that Ecology is currently suggesting. RCW 90.03.160, provides, in part, that “the superior court may adopt special rules of procedure...”. The statute doesn’t confer on Ecology the ability to adopt special rules of procedure, including creating two sets of procedures, one for small claims and one for larger claims.

Robin McPherson
Matt Janz
February 15, 2024
Page 2

Specifically, we believe that the Whatcom County Superior Court Judge, who will preside over the adjudication, is the only individual who has the authority to establish procedures for the orderly conduct of the adjudication. We request that Ecology provide the specific authority Ecology is relying on to create two groups of claimants prior to the commencement of the adjudication.

Also attached is a claim form we suggest Ecology consider using. This claim form complies with RCW 90.03.140 and is similar to claim forms used in other adjudications.

We would be willing to sit down with Ecology and work through how the case should be processed and, where we can agree, present those agreed processes and procedures to the court via stipulation. To the extent we cannot agree, once the adjudication commences, we can, through motions practice, establish the process and procedures to use in submitting claims and processing those claims.

As far as specific comments on the proposed claim forms are concerned, please see the attached document. If Ecology would like to further discuss the issues we raised in this letter and in our comments, please let us know.

Very truly yours,



Jeff Slothower
Lathrop, Winbauer, Harrel & Slothower, LLP



Jamie Morin
Confluence Law, PLLC



Adam Gravley
Van Ness Feldman, LLP



Jessica Kuchan
Confluence Law, PLLC

Attachments

Comments on Ecology's Claims forms package:

General Comment(s):

A Water Rights Adjudication is an inherently legal proceeding. What does this mean?

1. First, that the Superior Court must be ready to proceed:
 - a. Whatcom County Superior Court does not currently use an electronic filing system. Ecology should not file its Petition for Adjudication of the Nooksack Basin until the Court's electronic filing system is completed and tested.
 - b. Ecology's process needs to take into consideration the Superior Court's operational procedures. The Superior Court has recently adopted emergency rules which specify how claims are to be filed, including a "guide and file" option. None of that information is included in Ecology's Draft Instructions.
 - c. Ecology should coordinate with the court and wait to file the adjudication when the electronic filing system is fully operational, an electronic claim storage place is available to review claims by others in a user friendly manner, and the filing system is tested and vetted. At that point, it would be logical to re-issue draft instructions that are accurate and aligned with the Court's rules.
2. Second, when the Superior Court is ready to proceed, the Superior Court will dictate some of what Ecology is presuming:
 - a. For instance, Ecology does not have the authority to determine whether there is going to be a "pathway" for "small claims" and a "pathway" for larger claims. It is inappropriate for Ecology to determine there should be two pathways absent court order. However, this could be a "threshold" matter to put before the court after filing the adjudication.
 - b. The "small claims" pathway may put small claimants at risk to underclaim water uses. Additionally, the "small claims" pathway may overestimate water use putting other claimants at risk of injury.
 - c. Additionally, while an initial claim form(s) may be provided by the Department, the claim forms must be presented to the Superior Court and the Superior Court must make the final determination as to the form and content of the form. In other words the claim forms should not be sent to those named in the petition until the court approves the claim form(s), and in this case the instructions.
3. Additionally, the instructions and draft claim forms appear to call out and apply only to a subset of claimants which creates an uneven process and implicates due process issues. There is no reference to claims for federally reserved water right claims, treaty or executive order information, instream flow claims or other claims that may relate to various classes of claimants. Again, a uniform and transparent claim form should be used for all parties involved, including those parties who will be filing federal claims in the state adjudication pursuant to the McCarran Amendment.
4. Finally, the claim forms are vital to the process; each claim form serves a role similar to the filing of a legal answer or counterclaim. Ecology must ensure that its instructions for claimants use terminology consistent with state law and procedure, and provide adequate guidance to claimants on how to file claims.

Specific Comments:

On “DRAFT INSTRUCTIONS; How to File a Court Claim”:

“Who needs to file a court claim?”:

The description of/use of the term “direct water users” is confusing. It may be better to define claimants as water users that do not receive their potable, industrial, commercial and/or irrigation water from a municipality, a special district, an irrigation district, the PUD, or another managed system.

“Which court claim form do I use?”:

Page 2, bullet 4, the term should be “lawn or noncommercial garden” to be consistent with RCW 90.44.050.

“Instructions for Completing a Court Claim Form”: (pgs 2-3)

Page 2, Again, the phrase “directly use water” is confusing.

Comment: It may be better to define claimants as water users that do not receive their potable, industrial, commercial and/or irrigation water from a municipality, a special district, an irrigation district, the PUD, or another managed system.

Page 3, First and Third Bullet: In the section of the instructions on who is the claimant, the instructions indicate “... water is diverted from a pump or well ...” at a different location than where it is used, the owners of all parcels involved need to sign as separate claimants.”

Comment: This is inconsistent terminology. “Diverted” typically refers to surface water, “withdrawn” typically refers groundwater. Pump can implicate surface or groundwater, while a well is groundwater.

Suggested Edit: “if water is diverted or withdrawn (from a surface water diversion pump or groundwater well) “

Page 3, Third Bullet: In the section of the instructions on who is the claimant, the instructions indicate “If water is diverted (from a pump or well) at a different location than where it is used, *the owners of all parcels involved need to sign as separate claimants.*”

Comment: Water rights are frequently diverted or withdrawn on property that may not be owned by the beneficial water users. Claimant should be the owner of the real property to which the water right is appurtenant. If documentation of permission to withdraw or divert from the property owner is required, this is an evidentiary question which could be addressed differently. Furthermore, this question is a private property matter outside of Ecology’s water rights jurisdiction.

Suggested Edit: Strike the Third Bullet in its entirety.

“LEGAL BASIS FOR CLAIMING WATER USE”

Page 3: “If you use more than 500 gallons per day (GPD) for animals at your home, please use the Full...”

Comment: This is confusing, more clear to say “if you use more than 500 gallons per day (GPD) for all in home uses including animals,”

Page 3: "The Small Use Court Claim Form is for uses of up to ½ of an acre per day at the time of highest use, in addition to the 500 GPD maximum indoor use."

Comment: Strike: "per day" as this implies rotational irrigation is allowed. Furthermore, the legal source of the 500 GPD per house is unclear. How did Ecology determine 500 GPD (at 60 GPD/Person, this equals 8.3 persons per house...which seems unlikely). Finally, the instream flow regulation amendment (WAC 173-501-065) further limits wells installed after the date of the instream flow rule, which is not addressed in the instructions.

Page 4: "The Department of Ecology follows the EPA guideline of 60 GPD per person for use in a home."

Comment: How is this relevant here? Recommend this sentence be struck unless this guideline is memorialized in a statute, rule or policy. This can be confusing to claimants because they may only claim for the current residents, but what happens if a three bedroom home currently occupied by two people is sold or rented and then there are four or six residents? In addition, it is contrary to the "small claim" presumption being made at 500 gpd.

"FOR FULL-LENGTH COURT CLAIM FORM ONLY"

Page 4: "if your water use has multiple water rights with different numbers, you will need to submit separate Full-Length Court Claims Forms of each right to ensure future use of all legally allowed water under all water rights."

Comment: The right to the use of water attaches to real property after the water has been put to beneficial use and becomes appurtenant "to the land or place upon which the same is used." RCW 90.03.380(1); Geddis v. Parrish, 1 Wash. 587 (1890). Claim forms should be by parcel or groups of parcels to which the claimed water right is appurtenant. Many properties or municipalities have multiple water rights, with overlapping and variable attributes, including additive and non-additive quantities. It will be difficult to track the interrelationships between multiple water rights on the basis of individual claims based on Ecology water right records. A more streamlined approach would be to allow claims by place of use, whether one parcel or multiple parcels. Claims by parcel avoids the complication of the signature requirements where the historic place of use is owned by different parties who may not be inclined to cooperate with each other in the filing of a claim form. In a court proceeding, the claimant should be summoned to court once – not multiple times for all the differing claims suggested in this process. Finally, claims by parcel allows for a common claim process for permit-exempt uses which would not otherwise have a water right number to track.

"What if I do not have a water right document?":

Page 5: "permit-exempt" withdrawals.

Comment: We recommend additional language to clarify that "permit-exempt" water users still have to file a claim in the adjudication to protect permit-exempt water use in the priority system.

"HISTORY OF WATER USE"

Page 5: Date of First Use on Small Use Court Claim Forms: "The Small Use Court Claim form is for homes. If you know when a home was first built on this well, enter that date."

Comment: Here Ecology appears to be making a legal conclusion that the priority date for an exempt well is the date the home was built, which is not found in statute or case law. This implicates a relation back theory in the case of homes built prior to the well which may have historically used a surface water source; or a relation back for replacement wells. Additionally, if an older home was replaced with a newer home, the form may illicit an inaccurate response. Importantly, the date a home was built is not a substitute for Ecology requesting evidence of the first steps taken to put water to beneficial use, and evidence of the date construction of withdrawal and diversion works began and were completed. (RCW 90.03.140(1)(c)-(d).)

Page 5 Date of First Use on the Full-Length Court Claim From:

Comment: Does this mean priority date? “if you have a water right certificate... likely lists the date water was put to beneficial use.” The date of beneficial use is not a water right priority date. This is confusing and problematic for claimants who might not understand the relevance of priority date. Recommend revision: The priority date for water rights relate back to the date of the date of first action, which may be the application for state issued water rights and may be another action for pre-code or exempt water users.

“WATER USE”

Page 7, Water Use for Irrigation: “Irrigation is water made available for agricultural purposes.”

Comment: Ecology is making a legal conclusion as to the definition of “irrigation” being limited to irrigation for agricultural purposes. A distinction not found in statute or case law. “Agricultural purposes” is defined in various contexts in Washington (although not in Title 90 RCW). For instance, RCW 82.08.065 defines “agricultural purposes” to mean “the performance of activities directly related to the growing, raising, or producing of agricultural products.” Irrigation can be used for noncommercial purposes such as landscaping or lawns which are separate and distinct from agricultural purposes.

Page 8: Water for Stock Watering: “Stock watering is drinking water for livestock,”

Comment: Again, Ecology is making a legal conclusion as to the definition of “stock watering” which is not found in statute or case law. Instead, the specific exemption in RCW 90.44.050 allows the withdrawal of “any quantity of water for stock watering purposes.” (See also *Five Corners Family Farmers v Ecology* 173 Wn.2d 296 (2011) wherein the court declined to define the phrase “stock watering purposes”).

Page 8 Water use for Municipalities: “special instructions”

Comment: There is not a statutory exception for municipal claim filing. There should be a uniform claimant filing process, not “special instructions” carved out for municipalities. This applies to municipalities, special districts, tribes, irrigation companies, the federal government, tribal governments, similar larger entities, and to the State of Washington for instream flow set by regulation which are treated as water rights in the priority scheme. Instructions should be transparent to all parties, so that objections can also easily be filed.

“COMPLETING THE FORM”

Page 9, Filing this form.

Comment: This needs to be consistent with the Court’s emergency rule. No. 24-2-00001-37. Additionally, it’s unclear how a claimant would file a “signed original claim” via an online intake, which by nature of it being an electronic filing is a copy. The electronic filing system must be designed such that all claimants receive and can download a conforming copy of their filed claims at filing. And additionally, be designed such that all parties may access not just their own claim, but claims by competing water users as well.

“COURT CLAIM FORM FOR SMALL USE (RESIDENTIAL GROUNDWATER UP TO 500 GALLONS PER DAY)”

Comment: The Small Use Court Claim Form allows the filing for uses for up to 500 gallons per day and outdoor irrigation of ½ of an acre or less of lawn or noncommercial garden. The assumption is that each home uses 500 gallons per day, but Ecology has not provided the legal basis or technical information to substantiate the 500 gpd value.

Additionally, the inclusion of ½ acre of irrigated area has large implications for water availability that need to be considered in context with all water right claims. The Washington Irrigation Guide estimates that ½ acre of turf in Bellingham requires 174,058.7 gallons per season. Assuming an efficient conveyance system with 10 percent nonconsumptive use, that use would need to withdraw 191,464.6 gallons per season. The local WIG estimates that irrigation is needed from May through September (152 days) (191,464.6/152=1,259 gallons per day). This use would be 1,759.6 gallons per day (373,964.6 gallons per year or 1.15 AF per year). Ecology has estimated that there are approximately 20,000 small claimants. This could mean that over 20,000 AF of water from the watershed could be filed under this form, which is not *de minimis* water use.

Comment: The Court Claim for Small Use does not include a question about the “date of beginning of the construction of wells . . .” (RCW 90.03.140(1)(c)), maximum amount of land ever under irrigation (RCW 90.03.140(1)(e)), or whether a claim was filed (RCW 90.03.140(1)(k)).

Comment: Ecology needs to specify how it will handle a situation in which a claimant files on the wrong form. Will Ecology seek the court’s approval to conform the claim to the correct form?

Recommendation. The Court Claim for Small Use is not simpler than the long form. Further, it does not contain substantially the information required by RCW 90.03.140(1). All parties should file the same uniform form.

“COURT CLAIM OF WATER RIGHT FULL-LENGTH COURT CLAIM”

No. 2 “Water Right Document”

Comment: Define “Water Right Document”.

No. 3. When did this use begin?

Comment: This question becomes the basis for the priority date, but nowhere does it ask when the application was filed. This question does not relate to establishing the priority date. Instead,

the claim form should track RCW 90.03.340, and use the date of the permit application. We recommend the following revision to the third item in this section:

“The date the first steps were taken to put water to beneficial use, including filing of the original application with the department.”

No. 9. What is Water Used For?

Comment: The claim form identifies questions for the annual quantity of water currently used for irrigation; maximum annual quantity of water ever used for irrigation; annual quantity of water claimed for this purpose. Shouldn't it just be the quantity of water the applicant is claiming?

Comment: Why is the question on page 8 about “... supplementary, additive ...”to other water rights only posed to municipal water users? This question should be posed to all water right claimants regarding purposes of use.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE WHATCOM COUNTY SUPERIOR COURT, STATE OF WASHINGTON

IN THE MATTER OF THE
DETERMINATION OF THE RIGHTS TO
THE USE OF THE WATERS OF THE
NOOKSACK RIVER DRAINAGE BASIN,
WRIA 1, IN ACCORDANCE WITH THE
PROVISIONS OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON,

NO. _____

STATEMENT OF CLAIM

Court Claim No. _____

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

_____, et. al.,

Defendants.

1. Claimant Information.

1.1 Name: _____

1.2 Address (Street, P.O. Box, City, State, Zip): _____

1.3 Phone Number: _____

1.4 Email Address: _____

1.5 Contact Person (if different than Claimant):

1.5.1 Name: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1.5.2 Address: _____

1.5.3 Phone Number: _____

1.5.4 Fax Number: _____

1.5.5 Email Address: _____

2. Purpose(s) the Claimed Water is Used for: _____

3. The Annual and Instantaneous Quantity of Water Put to Beneficial Use.

3.1 Annual Quantity: _____ acre feet

3.2 Instantaneous Quantity: _____ gpm or _____ cfs

3.3 The Maximum Annual and Instantaneous Quantities of Water Ever Used:
_____ gpm _____ cfs _____ acre feet per year

4. The Dates Between Which Water is Used Annually: _____

5. The date the first steps were taken to put the water to beneficial use:

6. Place of Use.

6.1 Legal Description of the Place of Use: _____

6.2 Place of Use County Tax Parcel Number(s): _____

6.3 Maximum Amount of Land Ever Under Irrigation: _____

1 6.4 If water is Used for Power or Other Purposes, the Maximum Annual and
2 Instantaneous Quantities of Water Ever Used:
3 _____

4 7. The Amount of Land and The Annual and Instantaneous Quantities of Water Used
5 Thereon Claimed as a Present Right:
6 _____

7 8. The Legal Description and County Tax Parcel Number of Land on Which the Point of
8 Diversion or Withdrawal is Located:
9 _____

10 9. Point of Withdrawal GPS Coordinates

11 9.1 Latitude: _____

12 9.2 Longitude: _____

13 9.3 If There are Stockpond, Domestic or Other Uses Also Supplied from the Point of
14 Diversion, Describe: _____
15 _____

16 9.4 Means of Diversion:

17 [] Instream Pump

18 [] Gravity Flow from Ditch, Canal or Pipeline, Well or Other

19 9.5 Means of Conveyance:

20 [] Instream Pump

21 [] Gravity Flow from Ditch, Canal or Pipeline, Well or Other

22 10. Water Source

23 10.1 Surface Water Source: _____
24
25
26

Tributary to: _____

10.2 Groundwater

10.2.1 Well Tag ID No.: _____

10.2.2 Depth of Well(s): _____

11 Legal Basis for Claimed Right: _____

11.1 Application No.: _____

11.2 Documented by Permit? _____

11.3 Permit No(s): _____

11.4 Documented by Certificate? _____

11.5 Certificate No.: _____

11.6 RCW 90.14 Statement of Claim Filed? _____

11.7 Claim No.: _____

11.8 RCW 90.44 Declaration Filed? _____

11.9 Declaration No.: _____

11.10 Permit Exempt Groundwater Right

11.10.1 Basis for Exemption: _____

11.10.2 Quantity claimed as Exempt: _____

11.10.3 Date the Exempt use began: _____

11.10 Other Legal Basis for Claim: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

11. Has the Claimed Right Been Modified or Changed by a Ecology Change and Transfer Decision: Yes _____ No _____; if yes, ROE Ecology Control Number:_____

12. Attach Photographs, Maps or Sketches of the place of withdrawal and place of use if available:_____

13. Other Information Related to the Claim: _____

1 STATE OF WASHINGTON)
2) ss.
3 County of _____)

4 The undersigned, being first duly sworn upon oath, deposes and says:

5 That I am the claimant herein; that I have read the foregoing Statement of Claim, and the
6 information contained therein is true and accurate to the best of my knowledge and belief.

7 _____

8
9 SUBSCRIBED AND SWORN to before me this _____ day of _____,
10 202____.

11 _____
12 Printed Name: _____
13 Notary Public in and for the State of Washington
14 My appt. expires: _____