

# The Tap



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## President's Pipeline

It has been some time since I have written the message for the President's Pipeline. Some months ago, I invited the other executive board members to share the great privilege of speaking to you from our newsletter. I looked at it as a way of changing up the format and message. Others may have viewed it as a mitigation measure on how many articles I have to write. Well enough of that.

The next thing is deciding what to write about. I have pondered on this topic since the last time I wrote an article for the newsletter (hence my mitigating how many I actually write). I have decided to start with a Quiz.

*What are the marine and freshwater, ray-finned, food fish that return to Washington State rivers and streams to spawn?*  
Answer: Salmon

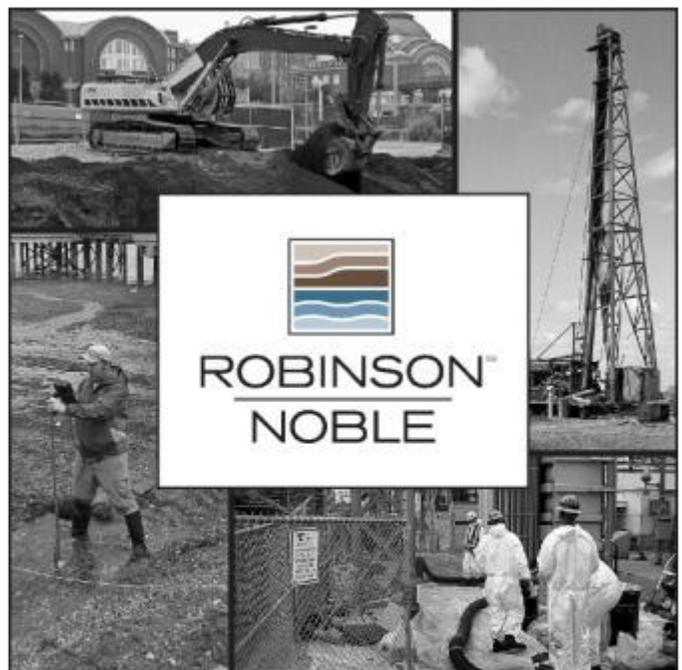
*Who is Isaac Stevens?*  
Answer: He was the first Washington State Governor from 1853 – 1857 and was appointed by President Franklin Pierce to be in charge of "Indian Affairs." Governor Stevens negotiated five treaties between the

United States and various Washington tribes (1854 through 1856) which described the reserved tribal fishing rights in common with citizens of the territory.

*What is the Boldt Decision?* Answer: a court decision that clarified these five treaties, with regard to allocation of salmon harvests between tribal and non-tribal fishers, holding that tribes

are entitled to a fifty percent share of the harvestable run of fish. It reaffirmed the reserved right of Native American tribes in the state of Washington to act alongside the State as co-managers of salmon and other fish, and to continue harvesting them in accordance with the various treaties that the United States had signed

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## President's Pipeline

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with the tribes. The tribes of Washington had ceded their land to the United States but had reserved the right to fish as they had always done, including fishing at their traditional locations that were off the designated reservations. *Hoh v. Baldrige*, a subsequent case, established the principle that fishery management plans must take into account returns to individual streams if the fisheries might affect an individual tribe, thus establishing another key management principle of river-by-river or run-by-run management.

### What is a culvert?

Answer: A drain crossing under a road or railroad.

### What is the Culvert Case?

Answer: A lawsuit filed February 16, 2001 by the United States and 21 tribes claiming the treaty right of taking fish imposes on the State's duty to avoid adverse habitat modifications that reduce number of fish available for tribal fishers. The suit focused on State-owned culverts that impede fish passage, citing that 1,000 lineal miles of salmon bearing streams have been impacted and, if these culverts were repaired or replaced, hundreds of thousands of additional mature salmon would be produced each year.

After several years of talks, an injunction was issued March 29, 2013 that ordered WSDOT and

other agencies to repair or replace any State-owned culverts that prohibit free passage of fish to spawning grounds. High-priority blocking culverts must be replaced within 17 years and lower priority culverts replaced at the end of their useful life.

In June of 2016, the 9th Circuit Court affirmed the injunction. The treaty right to a moderate living from fishing must include protection of fishery from man-made degradation. Such degradation includes blocking culverts owned by the State. Salmon stocks have declined precipitously since 1985. Repairing or replacing these blocking culverts would provide the most cost-effective method in salmon restoration. The State's own reports demonstrated that its culverts diminished salmon runs.

The Washington State Attorney General argued that the treaty did not mention impacts of future development on fisheries and that Governor Stevens did not promise continued access to fishing places. WSDOT culverts were designed to federal standards and approved by the Corps of Engineers, and the cost of replacement will be \$1.88 billion dollars.

The Court concluded that tribes surrendered large amounts of land in exchange for these rights and that restoration of salmon runs will help non-tribal fishers as well. The court

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also concluded that the injunction was necessary due to the State's slow rate of barrier correction.

On May 19, 2017, the 9th Circuit Court of Appeals denied Washington State's petition for a rehearing of the court's earlier order, upholding the injunction which requires the State to repair or replace 817 state culverts found to block fish passage to spawning habitat.

As water purveyors, there are some lessons to be earned here. For example, treaty fishing rights are protected from man-made environmental degradation.

Approval or permits from federal agencies will not excuse a treaty violation. Potential areas of concern for future consideration might be storm water runoff into a salmon-bearing stream, water withdrawal or diversion, wastewater discharge, etc. As you can see, treaties are a complicated issue, and these are just a couple of things to consider as you plan for your next capital improvement project.

Good Luck!

*Larry Jones,  
General Manager,  
Firgrove Mutual and  
RWCPA President*

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## Legislative Update

While the 2017 State Legislature devoted considerable time to water resource legislation, it ultimately adjourned without passing bills to address either the Hirst v. Whatcom County GMA/exempt well decision, or the earlier Foster v. City of Yelm case impacting municipal water permitting. And while some discussions have continued during the summer and fall of 2017, it remains to be seen whether the Legislature can pass legislation on either subject.

### The Hirst Decision and Legislation.

In October 2016, the State Supreme Court reversed a Court of Appeals decision and ruled that local government land use decisions cannot rely on regulations adopted by the Department of Ecology. The case originated in Whatcom County, where Ecology adopted an instream flow rule in 1985 that did not apply to exempt wells being used for rural residential development. For decades, Whatcom County (and other counties with similar regulatory systems) had concluded that because exempt wells were not subject to Ecology's instream flow rule, and were not subject to impairment review under State law, that exempt wells met the test for legal water availability. This

legal water availability decision applies under RCW 58.17.110 for land subdivisions and under RCW 19.27.097 for building permit applications. The Supreme Court ruled that, in order to comply with the GMA's environmental protection goals, local governments must review new exempt wells for impairment—even though such wells are not subject to impairment review under the state's groundwater code. The leading bill on the Hirst issue throughout the 2017 Legislature was SB 5239, sponsored by Sen. Judy Warrick (R, 13th – Moses Lake). The State Senate passed SB 5239 on four occasions, during the regular session and during each special session. The House did not pass SB 5239 or any other Hirst bill in any form during the Legislature. A number of different House bills were introduced, including late-arriving bills that delay the implementation of the Hirst decision for 18 or 24 months.

Late in the last special session, a version of SB 5239 was negotiated by certain legislators. However, House leadership did not allow the bill on the floor for a full vote due to tribal opposition. This last-minute version included reliance on Ecology rules for water availability decisions (the law prior to the Hirst decision) and

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created a State program of \$10 million per biennium for instream flow restoration and mitigation projects. These projects would be funded by the State's Capital Budget or by a fee of up to \$1,500 on new exempt wells.

Throughout the Legislative Session, the position of Senate Republicans (and consistently articulated by Sen. Jim Honeyford) was that unless Hirst was resolved, there would be no State Capital Budget.

The Capital Budget includes approximately \$4 billion in capital spending for schools, parks, infrastructure, housing, and other programs. For the first time in recent history, the Legislature did not pass a Capital Budget during the regular budget year.

### The Foster Decision and Legislation.

The Supreme Court's 2015 Foster v. City of Yelm decision ruled that Ecology did not have authority to allow "out-of-kind" mitigation as part of approving water right permit decisions. This decision invalidated a comprehensive water resource and habitat mitigation program developed by the City of Yelm to address de minimus instream flow reductions during higher spring and winter flows. The instream flow impacts were not measurable impacts but, rather, were "modeled" impacts based on a groundwater-surface model.

The loss of mitigation

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# Legislative Update

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flexibility for Ecology under its “Overriding Considerations of Public Interest” authority has resulted in numerous pending permit applications being put on hold. This is because, under Foster, even immeasurable de minimus impacts to instream flows could be considered to be “impairment” even if the applicant proposes a mitigation plan that, as in the case of the City of Yelm’s, provides an overall net benefit for fish and aquatic resources.

While the Hirst decision was the focus of the Legislature’s attention in 2017, many legislators are increasingly aware of the nonsensical nature of the Foster decision and how it will limit mitigation and permitting options. Senator Warnick’s bill, SB 5239, included versions of Foster language at different times during the

Legislature. The Republican-controlled Senate has sought to keep Foster language included in the Hirst bill, but the issue faces tougher prospects in the House. Municipal water groups, including the RWCP, Association of Washington Cities, the PUD Association, and Washington Association of Sewer & Water Districts, continue to work on language to address Foster in whatever legislation ultimately moves forward. Legislation addressing Hirst but not Foster would be an ironic outcome, as the Legislature would be responding to a GMA court decision (Hirst) by providing water for rural growth but not for urban growth, contrary to the fundamental purpose of the GMA itself.

**Where’s Ecology, Where’s the Governor, and What Happens in 2018?**



The intensity of the political nature of both the Hirst and Foster legislation was clear from the start of the 2017 Legislative Session. Due to the level of controversy, neither Ecology nor the Governor’s Office proactively proposed legislation on either subject, and generally sought to maintain a more neutral role of providing “technical assistance” as legislators proposed different concepts and bill language. While the executive branch has acknowledged that legislation on both subjects is needed, it remains unlikely to enter the fray with proposed solutions. The process on water resource legislation has been occasionally directionless, though leaders of all legislative caucuses and the executive branch remain committed to finding a resolution.

increasingly unlikely, as a proposal from House Democrats has been months in the making. Both the timing and substance of legislation will be impacted by change in control of the State Senate to Democrats. In November, the Democratic candidate Mankha Dinghra was elected to fill the seat of the late Sen. Andy Hill (R). Democrats will now control the State Senate 25 – 24. Senate Democrats met in mid-November and named Sen. Kevin Van De Wege of Sequim (D – 24th) as Chair of the new Agriculture, Water, Natural Resource, & Parks Committee. This new committee combines the water and agriculture issues from Sen. Warnick’s committee with the Natural Resource and Parks Committee. The 2018 Legislature begins on January 8.

*Bill Clarke,  
Lobbyist for Regional Water Cooperative of Pierce County*

During the summer and fall of 2017, a number of legislators have continued working on concepts to resolve the Hirst and Foster issues, with hope of an early December special session. However, that timing seems

*Brett Wise*

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## The Foster Decision and the City of Sumner

Benjamin Franklin once said, “When the well is dry, we know the worth of water.” Like many cities, Sumner has invested a significant amount of time and money in planning and preparing for the future water needs of its citizens, so our wells will not go dry. Until recently, the costs associated with obtaining water rights were somewhat defined, and the outcomes were fairly certain. In recent years, however, several key water right decisions have made, obtaining or changing water rights much more expensive and far less certain, especially in light of the recent Foster v. Ecology decision.

In Foster, a citizen activist appealed the City of Yelm’s new municipal water permit. As part of the permit application, Yelm submitted an extensive regional mitigation plan (in cooperation with the cities of Olympia and Lacey) designed to offset impacts to the “minimum instream flow water rights” in the Deschutes and Nisqually Basins. Yelm’s mitigation measures included both in-kind mitigation (reclaimed water to recharge aquifers and retirement of irrigation water rights previously acquired by the cities) and out-of-kind mitigation (protection of riparian areas, fish habitat restoration, etc.) This kind of mixed mitigation was common, as was Ecology’s use of OCPI

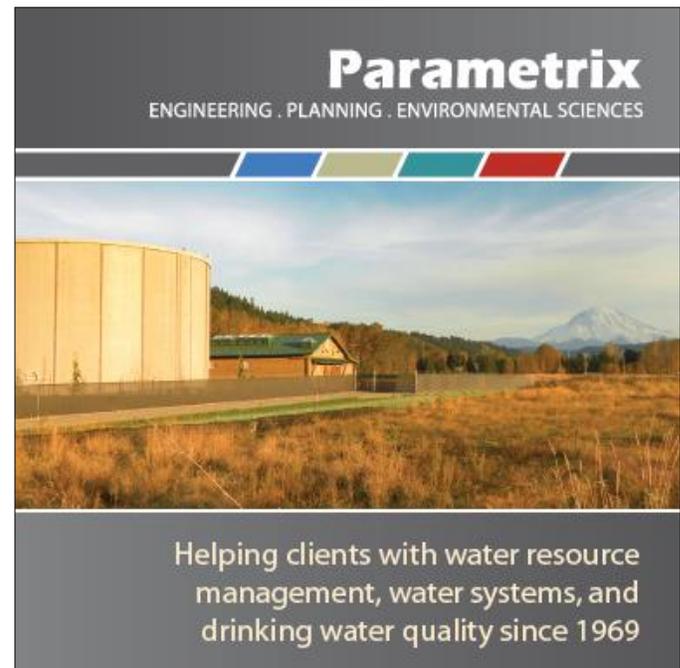
findings (overriding considerations of the public interest) as a statutory safeguard for out-of-kind mitigation. Until Foster, the OCPI statute allowed Ecology to make water decisions that affect minimum flows when the public benefits clearly outweigh the environmental impacts. Ecology approved the permits for all three cities based on the same OCPI finding, but only Yelm’s was appealed. It was ultimately struck down by the Washington Supreme Court in the Foster decision.

Ecology describes the Court’s ruling as follows:

“The Washington State Supreme Court made three key rulings in the case:

- (1) we [Ecology] cannot use OCPI (‘public interest’) to justify permanent allocations of water;
- (2) no level of impairment to instream flows is permissible, regardless of magnitude or ecological impact; and
- (3) we [Ecology] cannot use ‘out-of-kind’ mitigation strategies, such as habitat improvements, to address impairment of instream flows.”

Foster, in an instant, jeopardized all of Sumner’s, and other cities’, planning for future water right approvals. For several decades, Sumner has acquired seasonal



irrigation water rights to use as mitigation for new water rights needed to serve future growth. Sumner also planned and budgeted for significant out-of-kind mitigation projects to improve the riparian and riverine habitat of the White River, which supports many salmon species. However, as a result of Foster, Sumner now depends on legislation to restore authority to Ecology to allow some mitigation flexibility for impacts to minimum flows where precise water-for-water mitigation is unavailable.

Under the Supreme Court’s current interpretation of the OCPI statute, it is virtually impossible to mitigate for all the minute and diffuse effects of groundwater withdrawals on instream flows using year-round water-for-water replacement. Existing year-round water rights,

as opposed to seasonal irrigation water rights, are simply not available everywhere that today’s sophisticated computer models can locate and time impacts to minimum instream flows.

Creating water recharge basins and storing water in remote areas to achieve year-round mitigation to tributary streams is generally not financially feasible, and turns into a game of chasing molecules of water with buckets of money. Plus, it does nothing to improve the riparian and riverine habitat. The legislature needs to take a hard look at the impact on communities of the Supreme Court’s Foster decision and amend the water laws to accomplish the state’s fundamental water policy of making water available for both fish and people. See

## The Foster Decision, City of Sumner

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RCW 90.54.020. A policy shift is not needed, so much as a practical application of the State's existing water policy. However, for this to happen, legislators will need to work cooperatively to overcome the hurdles that are preventing water bills from reaching the House floor.

The Foster decision also impacts flexibility needed by municipal water suppliers to update water sources. Sumner filed water right change applications to permit a new well under its existing water rights, because its wells are no longer adequate to meet the City's needs during the peak summer season. Sumner drilled the new Central Well in a deep aquifer but, after six years of application processing, the Foster decision made a permanent water right

change decision too risky and expensive for the City. Our legal adviser (Tom Pors) and technical team decided to propose a temporary water right authorizing the Central Well mitigated with existing water rights for the summer and winter seasons. The temporary water right was issued but will only be in place until a permanent new water right is granted for the Central Well. That application will involve use of the new regional USGS groundwater model which is still not complete or calibrated for use in site-specific decision-making. It will also, of course, depend on a legislative fix to Foster.

*Brett Vinson, Sumner City Attorney, and*

*Tom Pors, Law Office of Thomas M. Pors*

**Please help us welcome our two newest Contributing Members to the Regional Water Cooperative of Pierce County:**

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## Thurston PUD Acquires New Water Systems

Thurston PUD finalized the acquisition of 140 water systems, doubling the number of connections the PUD serves. The PUD acquired the systems from H&R Waterworks, a for-profit company, on October 1, 2017. The acquisition added 140 water systems with 4,064 connections, increasing the total number of systems served by the PUD to 303 with 8,212 active connections.

Thurston PUD retained the staff members previously employed by H&R Waterworks, complementing the expertise and knowledge of existing PUD staff to effectively manage the newly acquired systems. Most of the systems are located in Thurston County, although there are systems located in adjacent Pierce, Mason, and Lewis counties as well as Kitsap and King Counties.

"This acquisition will provide existing Thurston PUD Customers and our

new customers with the benefits of not-for-profit service and greater efficiencies in system operations and maintenance," said PUD Commission President Linda Oosterman. "We are reaching out to our new customers to keep them informed as we transition the newly acquired water systems into the PUD's operations." The PUD plans on maintaining the newly acquired system's existing water rates through 2017 and gradually incorporating them into the PUD's existing rate structure.

The PUD is conducting public meetings to meet with customers and share information about the PUD and the transition.

*John Weidenfeller, General Manager, Thurston PUD*



Summer BBQ! August 2017



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