

## A Legal Framework for Water Resources Management in the Palouse Basin

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The following white paper on the legal framework is intended to follow the political framework outlined by Patrick Wilson and to incorporate the same theme by illustrating specific legal components of the overlapping and, at times, conflicting jurisdiction of the various levels of government.

### I. Introduction

John Wesley Powell, when surveying the arid regions of the western United States in the late 1800's, recognized that the major rivers would control development.<sup>1</sup> He recommended that the federal government eliminate the straight line rectangular survey so dear to the engineer, and draw property boundaries along topographic divides.<sup>2</sup> Congress did not follow his recommendations. Although dependent on groundwater supplies, rather than one of the West's major rivers, the Palouse basin serves as an excellent example of the problems created by the failure to integrate hydrologic reality in political boundary definition. In short, the Washington/Idaho border dissects the basin. Furthermore, Powell recognized that in the arid west, water would be the limiting factor on population and development. Yet our political framework mimics that of the eastern United States in which land use decisions are made at the local level and water allocation decisions are made at the state level, completely separating management of population growth from management of water development.

This paper will build on the theme set forth in the proceeding section on "Policy Considerations," by detailing the legal framework resulting from both the failure to recognize hydrologic boundaries in drawing political boundaries and the failure to integrate development and water allocation decision-making. This discussion of the existing framework sets the stage for initial research on legal/policy changes necessary to move the Palouse basin toward sustainable use of its resource and included as Appendix A. Because the political hierarchy and divide between water allocation and land use is prevalent throughout the western U.S., this research will have implications beyond the Palouse basin.

### II. Legal Framework

The following discussion will set forth the laws that define jurisdiction over water and water-related issues at the federal, state, and local level, and the current effort to provide a forum for coordination.

#### A. Federal Level

Federal authority affecting water use and development decisions that is pertinent to the Palouse basin includes: federal authority over water quality under the Clean Water Act,<sup>3</sup> and Safe Drinking Water Act;<sup>4</sup> federal authority

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<sup>1</sup> WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 229 (U. of Nebraska Press, 1953). For discussion of the fact that the rivers of the West controlled where Native Americans chose to live, see, e.g., BARBARA T. ANDREWS AND MARIE SANSONE, *WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST* 168 (Stanford Envtl. L. Society, 1983) (referring to the fifteenth century canal systems of the Hohokum Indians); Maria Rosa Garcia-Acevedo, *The Confluence of Water, Patterns of Settlement, and Constructions of the Border in the Imperial and Mexicali Valleys (1900-1999)* in *REFLECTIONS ON WATER* 59 ("the Colorado River was 'the most important natural factor influencing native cultures in the delta'" [citations omitted]).

<sup>2</sup> Stegner, *supra* note 1, at 227. See also, MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 49 (Viking Penguin, Inc. 1987) (noting that Powell recommended that state boundaries follow the boundaries of the major water basins.)

<sup>3</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

<sup>4</sup> Public Health Service Act, 42 U.S.C. §§ 300f to 300j-26.

over endangered species under the Endangered Species Act;<sup>5</sup> and federal authority to either resolve disputes between states concerning water allocation,<sup>6</sup> or to approve interstate agreements governing water allocation or management.<sup>7</sup>

## 1. Clean Water and Safe Drinking Water Acts

The Clean Water Act (CWA)<sup>8</sup> begins with the ambitious goal “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” Prior to the CWA, issues of both water allocation and quality primarily rested under the authority of the states. The CWA was, in part, a federal response to both the failure of states to protect water quality,<sup>9</sup> and the inability of states to do so, given the fact that our major surface water sources cross state lines.<sup>10</sup> To accomplish this goal, the CWA, among other things, both prohibits “discharge of any pollutant”<sup>11</sup> defined as “any addition of any pollutant to navigable waters,”<sup>12</sup> except as permitted by the CWA, and “discharge of dredge or fill material into the navigable waters”<sup>13</sup> except as permitted by the CWA.

Because the primary focus of the CWA is surface water, it has limited implications for the existing framework in the Palouse basin. However, should future water supply solutions rely on surface water, or dredge and fill associated with surface water sources, understanding of the CWA may become important.

The Safe Drinking Water Act regulates the water quality of public water systems, defined as: “a system for the provision to the public of water for human consumption . . . if such system has a least fifteen service connections or regularly serves at least twenty-five individuals . . .”<sup>14</sup> Municipal water supplies within the Palouse basin meet this definition. The Act authorizes state implementation of drinking water regulation. Idaho Department of Environmental Quality implements this through the Idaho Rules for Public Drinking Water Systems,<sup>15</sup> and Washington Department of Health establishes rules regulating public water supplies.<sup>16</sup> The Act also provides for designation of a “sole source aquifer” if “the Administrator [of the EPA] determines . . . that an

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<sup>5</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531 to 1599.

<sup>6</sup> United States Constitution, Article III, § 2, Clauses 1 and 2 (Clause 1: “The judicial power [of the U.S. courts] shall extend to all cases, in law and equity . . . between two or more states . . .” Clause 2: “In all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction.”)

<sup>7</sup> United States Constitution, Article I, § 10 (“No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state . . .”)

<sup>8</sup> Formally known as the “Federal Water Pollution Control Act” 33 USC §§ 1251 to 1387

<sup>9</sup> See e.g., *The Cities: The Price of Optimism*, Time Magazine, August 1, 1969 at 41. This Time Magazine story on the 1969 burning of the Cuyahoga River, showing an earlier fire in 1952, is credited with bringing national attention to what was considered locally to be a “run of the mill” problem, and fueling the call for federal action. Jonathan Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Env’tl L. J. 89 (2002).

<sup>10</sup> See e.g., *Missouri v. Illinois*, 200 U.S. 496 (1906) (The Court refused to enjoin the dumping of 1500 tons/day of sewage from Chicago into a tributary to the Mississippi River, in part due to the broad policy implications of the suit, stating “[a]s to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity.”)

<sup>11</sup> 33 USC § 1311(a).

<sup>12</sup> 33 USC § 1362(12)(A). The full text of the definition is: “(12) The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to any waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”

<sup>13</sup> 33 USC § 1344(a). Although the CWA is primarily implemented by EPA, the dredge and fill portions of the Act are administered by the Army Corp of Engineers, 33 USC § 1344(d), for reasons of history discussed below.

<sup>14</sup> 42 U.S.C. § 300f (4)

<sup>15</sup> Idaho Administrative Rules § 58.01.08, available at, <http://adm.idaho.gov/adminrules/rules/idapa58/0108.pdf> last visited Aug. 9, 2007.

<sup>16</sup> Washington Administrative Code § 246-290

area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health . . .”<sup>17</sup> Interestingly, the aquifers in the Palouse basin are not among the three designations of “sole source aquifer” in Idaho.<sup>18</sup> In addition, the Act authorizes federal oversight of state wellhead protection plans designed to prevent contamination of wells used for drinking water.<sup>19</sup> Idaho implements this through the Idaho DEQ Wellhead Protection Program. Finally, the Act was amended in 1996 to provide for state development of source water assessment plans.<sup>20</sup> The Washington Department of Health<sup>21</sup> and the Idaho Department of Environmental Quality<sup>22</sup> implement these provisions.

In addition to the requirement that the municipal water suppliers in the Palouse basin comply with their state’s drinking water standards, the various source water and wellhead protection programs will have implications for any solution involving groundwater recharge.

## 2. Endangered Species Act

The surface water source in the Palouse basin – the Palouse River – does not itself provide habitat for endangered species. Anadromous fish are prevented from migrating up the river into the basin by the Palouse Falls. However, the river is tributary to the Snake River upstream of its confluence with the Columbia River. Current listings of salmon species found in the Columbia Basin are: Snake River Sockeye (endangered), Lower Columbia River Chinook (threatened), Upper Columbia River spring-run Chinook (endangered), Snake River fall-run Chinook (threatened), Snake River spring/summer-run Chinook (threatened), Lower Columbia River Coho (threatened), Columbia River Chum (threatened), Upper Columbia River steelhead (threatened), Middle Columbia River steelhead (threatened), Lower Columbia River steelhead (threatened), Snake River Basin steelhead (threatened).<sup>23</sup>

In general, salmon and steelhead spend their adulthood in the ocean and return to the natal stream to spawn, forming nests in gravel beds referred to as redds.<sup>24</sup> However, there is considerable variability in this process. For example, chinook salmon are long distance swimmers, some returning to the far reaches of the Columbia basin to spawn.<sup>25</sup> They may return from the ocean anywhere from two to eight years, migrating in either spring, summer or fall runs.<sup>26</sup> Coho rarely make it as far up the basin as Idaho,<sup>27</sup> but are thought to have been present historically.<sup>28</sup> Sockeye young spend their first year in a freshwater lake, thus the adult must reach the gravel

<sup>17</sup> 42 U.S.C. § 300h-3(e)

<sup>18</sup> Idaho Department of Water Quality listing of sole source aquifers, *available at*, [http://www.deq.state.id.us/water/prog\\_issues/ground\\_water/aquifers.cfm#sole](http://www.deq.state.id.us/water/prog_issues/ground_water/aquifers.cfm#sole) last visited Aug. 9, 2007.

<sup>19</sup> 42 U.S.C. § 300h-7

<sup>20</sup> 42 U.S.C. §300j-13

<sup>21</sup> Washington Administrative Code § 246-290-135

<sup>22</sup> See [http://www.deq.state.id.us/water/prog\\_issues/source\\_water/assessment.cfm](http://www.deq.state.id.us/water/prog_issues/source_water/assessment.cfm) last visited Aug. 9, 2007.

<sup>23</sup> Final Listing Determinations for 16 ESU’s of West Coast Salmon, 70 Fed. Reg. 37160, 37193 (June 28, 2005). Four ESU’s of steelhead in the Columbia Basin are listed at, 71 Fed. Reg. 834 (Jan. 5, 2006). Northwest Regional Office, NOAA’s National Marine Fisheries Service at <http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Alsea-Response/Steelhead-ESA-Listings.cfm> last visited Aug. 9, 2007.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Even within the various runs there are complexities. For example, early-fall chinook are recognized in the Clearwater drainage and have a life history similar to mid-Columbia summer chinook, but not to Snake River summer chinook. Northwest Power and Conservation Council (formerly Northwest Power Planning Council, Clearwater Subbasin Plan at 289, November 2003, *available at* <http://www.nwcouncil.org/fw/subbasinplanning/clearwater/plan/> (last visited Dec. 18, 2005). The Northwest Power and Conservation Council was established by the Pacific Northwest Electric Power Planning and Conservation Act of 1980, Pub.L. 96-501, with representatives from each of the states in the Columbia Basin, to develop a regional energy plan and fish and wildlife plan for the Columbia Basin.

<sup>27</sup> *Spirit of the Salmon*, *supra* note 84.

<sup>28</sup> Clearwater Subbasin Plan, *supra* note 87 at 313.

beds of a lake's tributaries to spawn.<sup>29</sup> Unlike the other species, steelhead trout do not die after spawning, but will repeat the trip if they survive the long migration.<sup>30</sup> Migration of "smolts" back to the ocean may occur within several weeks or up to two years after hatching.<sup>31</sup>

Although a remarkable life history, the length of the salmon migration exposes the species to numerous threats and numerous jurisdictions. Chief among the threats identified are: blockage of migratory routes and slowing of water flow by hydropower dams, habitat destruction, competition with hatchery fish, and over harvesting.<sup>32</sup> Historic estimates put combined salmon runs at 5-11 million in the portion of the basin above Bonneville dam.<sup>33</sup> Today those runs have declined to half a million, with only 20% of these being wild fish (as opposed to hatchery bred).<sup>34</sup>

The Endangered Species Act subjects federal government action to consultation to ensure that the action will not endanger listed species, and state and private action to prohibitions on "take" of listed species.<sup>35</sup> Interpretation of "take" to include modification of habitat has been upheld by the U.S. Supreme Court.<sup>36</sup> Instream flow is a critical aspect of habitat for anadromous fish.<sup>37</sup> One of the critical stages in the life cycle of anadromous fish is the migration of smolts to the ocean.<sup>38</sup> Fast currents not only spare the energy of the fish, but reduce the time they are exposed to prey during migration. Thus, the contribution of the Palouse River to the flow of the Snake and Columbia during migration is subject to scrutiny under the ESA. The closures to new allocation of water recommended by the Washington Department of Fish and Wildlife to protect these species are discussed below under state level action.

### 3. Interstate apportionment/compacts

Water allocation decisions and even implementation of federal water quality laws, occurs at the state level. However, the U.S. Constitution provides three means for states to either resolve disputes on shared water resources or develop a means for management coordination. To date, Idaho and Washington have not pursued any of these means. Karl Dreher, former director of the IDWR has publicly indicated that Idaho is not interested in pursuing either of the methods that stem from an interstate agreement. The approaches available are described in the following paragraphs.

States seeking resolution of allocation of water between them have three avenues: a suit under the original jurisdiction of the United States Supreme Court;<sup>39</sup> congressional apportionment;<sup>40</sup> or negotiation of an interstate

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<sup>29</sup> *Spirit of the Salmon*, *supra* note 84 at; Northwest Power and Conservation Council, Salmon Subbasin Plan at 2-80, May 2004, available at <http://www.nwccouncil.org/fw/subbasinplanning/salmon/plan/> (Sockeye historically returned to the Stanley Basin in the upper Salmon in numbers estimated between 20,000 and 40,000. Today, only a Redfish Lake supports the occasional sockeye.) *Id.* at 2-81 and 2-82.

<sup>30</sup> *Spirit of the Salmon*, *supra* note 84 at

<sup>31</sup> Mary H. Ruckelhaus, Phil Levin, Jerald B. Johnson, and Peter M. Kareiva, *The Pacific Salmon Wars: What Science Brings to the Challenge of Recovering Species*, 33 *Am. Rev. Ecol. Syst.* 665, 667 (2002).

<sup>32</sup> *Id.* at 667;

<sup>33</sup> *Spirit of the Salmon*, *supra* note 84 at [http://www.critfc.org/oldsite/text/TRP\\_intro.htm#Executive%20Summary](http://www.critfc.org/oldsite/text/TRP_intro.htm#Executive%20Summary)

<sup>34</sup> *Id.*

<sup>35</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>36</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

<sup>37</sup> Anadromous fish are spawned in freshwater, spend their adult life in the ocean, and return to freshwater to spawn

<sup>38</sup> Kyle Dittmer, *Altered Flood Flow, Climate Change, and Rebuilding Pacific Salmon Stocks*, Spring 2006 Report for the Columbia Inter-Tribal Fish Commission, available at [http://www.critfc.org/tech/tech\\_rep.html](http://www.critfc.org/tech/tech_rep.html) last visited Aug. 9, 2007

<sup>39</sup> See, e.g., *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Kansas v. Colorado*, 206 U.S. 46 (1907).

<sup>40</sup> See, e.g., *Arizona v. California*, 373 U.S. 546 (1963) (interpreting the Boulder Canyon Project Act to apportion the Colorado River).

compact approved by Congress.<sup>41</sup> When the original jurisdiction of the United States Supreme Court is invoked for an equitable apportionment of interstate waters, the Court applies federal common law.<sup>42</sup> Thus, although the Court will weigh heavily the priority of water diversions within each state, "state law is not controlling."<sup>43</sup> Generally the Supreme Court requires interference with a substantial interest of the state invoking its original jurisdiction before it will enjoin action by the other state,<sup>44</sup> this avenue may only be useful once a crisis is reached. It is not a means to develop ongoing coordination of management.

Congressional apportionment and congressional approval of an interstate compact have relatively little distinction in modern practice. Prior to the 1963 ruling by the U.S. Supreme Court that Congress may, in the absence of an interstate agreement, apportion waters on an interstate river, and to the surprise of all, that it had done so on the Colorado River in the Boulder Canyon Act,<sup>45</sup> states assumed that congressional approval of an interstate agreement was the sole means of developing an apportionment without the assistance of the Court. Once the Court ruled that Congress could act absent an interstate agreement, the distinction between the two dissolved. Congress now waits for the states to submit a bill containing the elements of the agreement that would have been in an interstate compact. The one step that can be skipped is state legislative approval of the agreement.<sup>46</sup>

The advantage of an interstate compact over a judicial apportionment is that the compact may contain elements of management, dispute resolution, infrastructure development and funding, not present in a mere apportionment. Furthermore, the compact need not contain an actual quantified apportionment at all. It may simply cover coordination of management. This is particularly important in the case of groundwater where exact quantities are rarely known, but is also increasingly considered important for surface water to maintain flexibility in the face of climate change and changing demand for water. Finally, compacts need not be limited to water allocation or use, but may include water quality.<sup>47</sup>

As noted above, the state of Idaho is adverse to consideration of a compact. However, this may be due to observation of the rigid nature of historic compacts and congressional apportionments. Research recommended in Appendix A will include development of a model interstate agreement for use in small shared groundwater basins with careful attention to the need for flexibility and local control.

## B. State Level

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<sup>41</sup> See, e.g., Yellowstone River Compact, published at § 85-20-101 Mont. Code Ann.; *Texas v. New Mexico*, 462 U.S. 554 (1983) (dispute concerning the Pecos River Compact); see also, Reid, *supra* note 92, at 156-166 (summarizing the avenues open to California and Nevada to apportion the Truckee River). Note that authority for Compacts between states is found in the U.S. CONST. art. I, § 10, cl. 3.

<sup>42</sup> *Colorado v. New Mexico*, 459 U.S. at 183; see also, E. Leif Reid, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 Stan. Env'tl. L.J. 145, 156-158 (1995).

<sup>43</sup> *Colorado v. New Mexico*, 459 U.S. at 184; see also, *Nebraska v. Wyoming*, 325 U.S. at 619 (1945) (refusing to apportion water strictly along the lines of priority when inefficiency of conveyance makes it unlikely water not taken by upstream diversions in Colorado will reach downstream diversions in Nebraska and when "the priority system would disturb and disrupt long established uses."). Note that California, like Nebraska, is a combined riparian and prior appropriation state. WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. I, Chap. 7 226 and Vol. II, Chap. 10, 6-14 (Misc. Pub. No. 1206, Natural Resource Economics Div., Economic Research Service, USDA (1971).

<sup>44</sup> See e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907)

<sup>45</sup> *Arizona v. California*, 373 U.S. 546 (1963)

<sup>46</sup> See e.g., The Truckee-Carson-Pyramid Lake Water Settlement Act of 1990, Sec. 204, reprinted in, CALIFORNIA DEPARTMENT OF WATER RESOURCES, TRUCKEE RIVER ATLAS, app. 1, at 103 (June 1991).

<sup>47</sup> See e.g., *State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) concerning the Ohio River Valley Water Sanitation Compact among eight states.

In addition to state implementation of the federal water quality acts discussed above, states have primary authority over water allocation. States are also subject to the “take” provisions of the ESA. Idaho and Washington law and administration of water allocation and Washington’s fish flows are discussed in the following paragraphs.

### 1. Water Allocation

Both Idaho and Washington follow the doctrine of prior appropriation for both surface water and groundwater.<sup>48</sup> In Idaho this is a matter of constitutional law, whereas the Washington Constitution has no mention of prior appropriation. One of the interesting aspects of the prior appropriation doctrine is that at its inception in the late 1800’s, it included aspects that reflected the scientific understanding of the resource at the time. The doctrine in its simplest form acknowledges the reality of the water resource in the arid west not only by allowing diversion out of the basin of origin to the place where it can be put to use, but by incorporating a mechanism for allocation that recognizes that no one needs water 24/7 and thus, on paper, more uses can be given rights to water than the supply would appear to allow. Thus, a water user may only seek curtailment of a junior water right when they can actually put water to use.

However, two factors associated with the doctrine of prior appropriation as currently interpreted by most state courts, present barriers to efficient management of the water resource. First, although initial judicial rules developed to define the doctrine integrated a basic understanding of the resource at the time, the interpretation by courts that the scientific aspects of the doctrine became part of the property right locked the doctrine in a 19<sup>th</sup> Century understanding of the resource. At that time groundwater use was limited, and the relation between ground and surface water poorly understood. Research on the impact of this problem on conjunctive management and a possible opening for the Idaho Supreme Court to allow the doctrine in Idaho to evolve with scientific understanding is currently underway by Professor Cosens. Because some of the historically understood scientific aspects of the resource have been incorporated into constitutional provisions in Idaho, addressing the integration of modern science may be more difficult in that state.

Second, the doctrine was developed at a time when the west was primarily a place of economic exploitation, not community. Thus, the doctrine does not adapt to social and ecological needs that do not reflect an economic interest and has a tendency to promote an aristocracy of the inheritors of early water rights. As water becomes scarce, this aristocracy can exercise a level of control over the future of the western states not normally associated with democracies. Research on this aspect of the problem is not currently underway.

This paper will focus on the following aspects of each states’ implementation of the doctrine of prior appropriation and identify some of the differences between the two states: (a) permitting programs for acquisition of a water right, including exemptions for domestic wells; (b) adjudication of existing water rights; (c) enforcement of water rights; and (d) avenues for groundwater management.

#### a. Permitting

Similar to most western states, historically water rights were created in both states simply by diversion and application to a beneficial use. However, also similar to most western states, both Idaho and Washington have instituted permit processes as the sole means for acquisition of a water right.<sup>49</sup> Both states exempt domestic wells from this requirement.<sup>50</sup> The definition of what is exempt differs between the two states. Idaho exempts

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<sup>48</sup> Idaho Constitution Art. XV §3, Idaho Code §42-106. RCW §90.03.010

<sup>49</sup> Idaho Code §42-103, 201 (surface water), Idaho Code §42-229 (groundwater), RCW §90.03.250 (surface water), RCW §90.44.050 (groundwater)

<sup>50</sup> Idaho Code §42-227, RCW §90.44.050

domestic wells for less than or equal to 13,000 gallons per day and use on no more than a half acre.<sup>51</sup> Washington exempts domestic wells of less than or equal to 5000 gallons per day and use on no more than a half acre.<sup>52</sup> Historically, the domestic well exemption arose both from the belief that the impact of small uses is minor and that the amounts were typical of a subsistence lifestyle. As will be noted below, IDWR has recognized the need to identify uses of this size in the Palouse basin in an adjudication. Eliminating the exemption for basins like the Palouse may be one area to focus research on legislative changes.

In Idaho, applicants for a water permit must apply to the Idaho Department of Water Resources (IDWR), and in Washington, applicants must apply to the Washington Department of Ecology. In Idaho, the establishment of IDWR and delegation of authority over water allocation to that agency is a matter of state constitutional law.<sup>53</sup> Washington's constitution contains no similar provisions.<sup>54</sup> Thus, Washington may have greater flexibility and ease of introducing changes through legislation than Idaho.

#### b. Adjudication

Adjudication is a process for defining and obtaining a database on water rights created prior to development of a permit system. For Washington, permitting of surface water began in 1917, and of groundwater in June 6, 1945.<sup>55</sup> In Idaho, although permitting began early, it did not become the exclusive means of obtaining a surface water right until 1971, and for groundwater permitting began in 1963.

The two states have slightly different processes for adjudication of water rights, however adjudication occurs in the trial-level courts in both states (called district court in Idaho, and superior court in Washington), with the water resource agencies acting in an informational capacity.<sup>56</sup> Washington has not commenced an adjudication of the Palouse basin, however Washington law required registration of claims to surface and groundwater with the Department of Ecology.<sup>57</sup> The registration is not considered an adjudication of the claim.<sup>58</sup> The Idaho legislature has authorized expenditures for adjudication of the Idaho portion of the Palouse basin, but adjudication has not begun and is currently scheduled to follow commencement of adjudication in the Rathdrum Prairie area. IDWR representatives have indicated that, unlike the Snake River Basin adjudication, domestic wells will not be exempt from filing in the adjudication process in the Palouse basin.

Because any effort to actively manage groundwater in the basin will require a clear understanding of both water rights and water use, lack of adjudication in Washington may hinder efforts. It should also be noted that a cataloging of water rights in an adjudication does not provide information on actual water use. A water right indicates the maximum rate or volume of use. Actual use does not always achieve maximum at any one time and does not generally occur around the clock.

#### c. Enforcement

Both states enforce water rights through their water resource agencies.<sup>59</sup> Both states rely on the appointment of water masters by the state agency for actual on-the-ground enforcement.<sup>60</sup>

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<sup>51</sup> Idaho Code §42-111

<sup>52</sup> RCW §90.44.050

<sup>53</sup> Article XV, §7 Idaho Constitution

<sup>54</sup> The sole provision in the Washington Constitution addressing water and water rights is Article XXI, Section 1 stating "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use." In contrast the Idaho Constitution has seven sections setting forth many of the attributes of a water right.

<sup>55</sup> RCW §90.44.050

<sup>56</sup> Idaho Code §§42-1405, 1410-1412, RCW §90.03.010

<sup>57</sup> RCW §90.14.041

<sup>58</sup> RCW §90.14.081

<sup>59</sup> Idaho Code §42-602, RCW §43.21A.064

d. Groundwater Management

Washington law requires limitations on groundwater use to maintain a safe yield and prevent overdraft “so far as is feasible.”<sup>61</sup> Idaho law prohibits “mining” of groundwater, defined as use that exceeds natural recharge, unless the director of IDWR finds it is in the public interest to allow pumping to continue and a plan is in place to either decrease future withdrawals or increase recharge.<sup>62</sup> Both states also have statutes addressing the problem that occurs when new deep wells, although not technically “mining” the aquifer, create a cone of depression that adversely impacts older shallow wells. In Washington only “reasonable pump levels” are protected,<sup>63</sup> which takes into account modern technology for pump lift.<sup>64</sup> Similarly, Idaho law only protects “reasonable ground water pumping levels” and authorizes the director of IDWR to determine what the reasonable level is.<sup>65</sup>

Both states have provisions allowing groundwater management in an area experiencing groundwater problems. Because this is of particular relevance to the Palouse basin, the following paragraphs will detail both the Idaho and Washington process, followed by a description of recent denial of requests for groundwater management within the Idaho portion of the basin.

Washington law provides for designation by Ecology of groundwater management areas.<sup>66</sup> Specifically, Washington law provides that criteria for determining the need for a groundwater management area may include:

“The criteria to guide identification of the ground water areas or sub-areas shall include but not be limited to, the following:

- (a) Aquifer systems that are declining due to restricted recharge or over-utilization;
- (b) Aquifer systems in which over-appropriation may have occurred and adjudication of water rights has not yet been completed;
- (c) Aquifer systems currently being considered for water supply reservation under chapter 90.54 RCW for future beneficial uses;
- (d) Aquifers identified as the primary source of supply for public water supply systems;
- (e) Aquifers designated as a sole source aquifer by the federal environmental protection agency; and
- (f) Geographical areas where land use may result in contamination or degradation of the ground water quality.”<sup>67</sup>

Washington law encourages Ecology to work with or even delegate authority to local government for both development of management plans for groundwater management areas and for management implementation.<sup>68</sup> Ecology administrative rules allow local government to request designation of a groundwater management area, however, Ecology retains the authority to make the final determination on whether designation is warranted under the above criteria.<sup>69</sup> The administrative rules also provide for cooperative agreements where a groundwater source is shared with another state or Canada.<sup>70</sup> Groundwater management areas are required to include the following:

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<sup>60</sup> Idaho Code §42-602, RCW §90.03.060

<sup>61</sup> RCW §90.44.130

<sup>62</sup> Idaho Code §42-237a(g)

<sup>63</sup> WAC §173-150-050

<sup>64</sup> WAC §173-150-040

<sup>65</sup> Idaho Code §42-226

<sup>66</sup> RCW §90.44.400, WCA 173-100

<sup>67</sup> RCW §90.44.400(2)

<sup>68</sup> RCW §90.44.400

<sup>69</sup> WAC §173-100-050

<sup>70</sup> WAC §173-100-140

- “(a) A description of the specific ground water area or sub-areas, or separate depth zones within any such area or sub-area, and the relationship of this zone or area to the land use management responsibilities of county government;
- (b) A management program based on long-term monitoring and resource management objectives for the area or sub-area;
- (c) Identification of water resources and the allocation of the resources to meet state and local needs;
- (d) Projection of water supply needs for existing and future identified user groups and beneficial uses;
- (e) Identification of water resource management policies and/or practices that may impact the recharge of the designated area or policies that may affect the safe yield and quantity of water available for future appropriation;
- (f) Identification of land use and other activities that may impact the quality and efficient use of the ground water, including domestic, industrial, solid, and other waste disposal, underground storage facilities, or storm water management practices;
- (g) The design of the program necessary to manage the resource to assure long-term benefits to the citizens of the state;
- (h) Identification of water quality objectives for the aquifer system which recognize existing and future uses of the aquifer and that are in accordance with department of ecology and department of social and health services drinking and surface water quality standards;
- (i) Long-term policies and construction practices necessary to protect existing water rights and subsequent facilities installed in accordance with the ground water area or sub-area management programs and/or other water right procedures;
- (j) Annual withdrawal rates and safe yield guidelines which are directed by the long-term management programs that recognize annual variations in aquifer recharge;
- (k) A description of conditions and potential conflicts and identification of a program to resolve conflicts with existing water rights;
- (l) Alternative management programs to meet future needs and existing conditions, including water conservation plans; and
- (m) A process for the periodic review of the ground water management program and monitoring of the implementation of the program.”<sup>71</sup>

Of particular interest in these requirements are the recognition of the need to coordinate with land use practices apparent in sub-sections (f) and (i). Land use is generally left to local government and the gap between water allocation at the state level and land use planning at the local level is one of the challenges currently facing water resource managers. This topic will be discussed further under local government with recommendations for research.

Idaho law provides for two levels of designation by IDWR: a critical ground water area defined as: “any ground water basin . . . not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal or rates of withdrawal projected by consideration of valid and outstanding applications and permits . . .”<sup>72</sup> A ground water management area is defined as an area “approaching the conditions of a critical ground water area.”<sup>73</sup>

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<sup>71</sup> RCW §90.44.410

<sup>72</sup> Idaho Code §42-233a

<sup>73</sup> Idaho Code §42-233b

On November 21, 2003, five local groups<sup>74</sup> petitioned IDWR for designation of a critical ground water area in the lower aquifer (Grande Ronde) and ground water management area in the upper aquifer (Wanapum) and a moratorium on future groundwater development and new development under existing permits.<sup>75</sup> IDWR denied the petition due to: the existence of a plan for coordination across the state boundary (see section on PBAC below); IDWR's conclusion from the evidence presented that current understanding of the system is inadequate to determine if pumping exceeds recharge; and IDWR's interpretation that the data indicate a trend toward stabilization.<sup>76</sup>

## 2. Fish Flows

Washington law provides that “[i]t is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.”<sup>77</sup> To implement this policy, Ecology is required to provide notice to the director of the Washington Department of Fish and Wildlife of every application to divert or store water.<sup>78</sup> Although the final decision is left to Ecology, it may refuse a permit on the basis of impact on fish.<sup>79</sup> In addition, to implement these provisions, the Department of Fish and Wildlife has developed summer surface water source limitations to identify surface water sources on which new permits for diversion or storage of water should not be issued for the period of low summer flow. Due to the needs of anadromous fish on the Snake and Columbia Rivers discussed above, the Department of Fish and Wildlife considers the Palouse River to be one in which summer surface water source limitations are necessary.

These limitations would affect any solution for diversion or storage of water on the Palouse River during the summer months. The limitations are not binding on Idaho. However, as noted above, in addition to political remedies, Washington does have the ability to seek the original jurisdiction of the U.S. Supreme Court should it seek to stop any effort by Idaho to develop the Palouse River.

### C. Local Level

Two aspects of local government are relevant to the discussion of water supply on the Palouse basin. First, the largest water uses in the basin are by municipal water suppliers and the two universities. Special rules with respect to water rights apply to this type of water user. In addition, the municipalities are responsible for setting rates for use of the water they provide. Rate setting is one of the primary tools that should be researched and modeled as a means to alter demand. Municipalities also have the ability to establish rules for use of the water they supply and for use of conservation devices. These tools should also be a focus of further research and the savings they would be predicted to create can be input to a systems model. Finally, municipalities control both residential metering and methods for leak detection and repair of conveyance systems. Both metering and reduction of leaks have been found to be important factors in water conservation and should also be researched. These research recommendations are included in Appendix A.

Second, local government controls land use planning and zoning. The gap between water allocation at the state level and land use planning at the local level is a barrier to effective water conservation strategies. The effort of local government in the Idaho portion of the Palouse basin to integrate the two failed. This failure will be

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<sup>74</sup> Petitioners were: Palouse Water Conservation Network, Friends of the Clearwater, Moscow Civic Association, Palouse Group of the Sierra Club, and Idaho Conservation League, North Idaho Office.

<sup>75</sup> *In re Petition Seeking Designation of a Critical Ground Water Area, designation of a Ground Water Management Area, Moratoriums on Approval of New Water Right Appropriations, and other Actions*, Order of IDWR, Dec., 1, 2004.

<sup>76</sup> *Id.*

<sup>77</sup> RCW §77.57.020

<sup>78</sup> RCW §77.57.020

<sup>79</sup> RCW §77.57.020

discussed below along with recommendations for research on alternative means to more effectively coordinate land use planning and water allocation.

1. Municipal water suppliers

In Idaho and Washington, as in most states, municipal providers are an exception to the rule that a water right may only be obtained for a use that will be implemented within a reasonable time period. Instead, municipal providers may obtain a water right for anticipated future needs by providing information on anticipated growth.<sup>80</sup> In Washington, technical assistance in municipal water resource planning for conservation and efficiency falls under the authority of the Department of Health.<sup>81</sup> Idaho does not appear to have a similar state level authority for assistance with water conservation. As mentioned above, the authority of municipalities to encourage/require conservation or alter rates is part of a research project recommended in Appendix A.

2. Land use planning and zoning

In the absence of irrigated agriculture on the Palouse, population growth and lifestyle are the primary drivers for increased water consumption. Thus, land use planning and zoning would appear to be the perfect avenue to plan for and manage growth in water use. However, the locus of water allocation at the state level and land use planning at the local level present a barrier to integration of the two.

On March 2, 2005, the Latah County Board of Commissioners enacted an emergency Ordinance No. 258 establishing the “Moscow Sub-basin Groundwater Management Overlay Zone. The ordinance was passed following preliminary approval by IDWR of an application for a relatively<sup>82</sup> large groundwater use for agriculture and clay processing by Naylor Farms. The ordinance prohibited the following land uses within the overlay zone: (1) “natural resource mineral extraction and processing;” (2) “confined animal feedlot operations exceeding 200 animal units . . .;” and (3) “golf courses.”<sup>83</sup> Naylor Farms challenged the ordinance in district court. Although district court Judge Carl Kerrick refused to interfere with the local government’s basis for finding an emergency, he found the ordinance to be in conflict with Article XII, section 2 of the Idaho Constitution which establishes that a valid exercise of police power by local government may not conflict with general laws. Judge Kerrick found the conflict with general law to lie in the preemption of local authority over water management by general laws placing that authority at the state level.<sup>84</sup> Although the county had argued that the ordinance merely regulated land use, the title of the ordinance – “Moscow Sub-basin Groundwater Management Overlay Zone” – led the court to find that argument to be “somewhat disingenuous.”<sup>85</sup>

Research recommended in Appendix A on ways to better integrate land use planning and water use must focus on local mechanisms that are truly tied to land use. Numerous cities in the western U.S. have been successful in placing conditions on new development that will assure a long term sustainable water supply. For example, research should look at assured supply laws that require new developments to find means to supply water that will not increase pumping. Although this is easier in an area in which new development is often associated with retirement of irrigated agriculture, numerous avenues exist such as requirements to contribute to conservation devices and landscaping for existing homes, contributions to leak detection and repair, and conservation measure and gray water use within new subdivisions.

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<sup>80</sup> Idaho Code §42-202(2), RCW 90.03.260(4) and (5)

<sup>81</sup> RCW 43.20.230

<sup>82</sup> For those accustomed to agricultural water right, the Naylor Farms application was quite small. However, for a basin with primarily domestic and municipal water use, the application represented a substantial increase in withdrawals.

<sup>83</sup> Latah Co. Ordinance 258, Section 2.

<sup>84</sup> *Naylor Farms v. Latah Co., ID*, CV 2005-670, Second Judicial District of Idaho, May 9, 2006.

<sup>85</sup> *Id.* at 20.

D. Effort to coordinate: PBAC

The Palouse Basin Aquifer Committee is a committee formed by intergovernmental agreement among the local governments and universities in the Palouse Basin. Specifically, PBAC has representatives from Pullman, WA, Moscow, ID, Latah Co., ID, Whitman Co., WA, University of Idaho, and Washington State University.<sup>86</sup> The intergovernmental agreement provides that the purpose of the committee is to:

- “(A) coordinate planning to assure a long-range supply of water to the entities;
- (B) retain the momentum and continue to update and expand the database already begun through previous studies;
- (C) encourage conservation to promote the life of the aquifer serving the entities;
- (D) investigate continuing and/or alternate sources of water;
- (E) educate and advise the entities on the quantity and quality of the public water supply for the water basin serving the Cities of Moscow, Pullman, and the surrounding area;
- (F) act as liaison between the Entities on water resource concerns; and
- (G) promote communication between the Entities, the Washington Department of Ecology, and the Idaho Department of Water Resources.”<sup>87</sup>

Thus, PBAC is established to obtain and disseminate information on the water resource and to provide a forum for the various local governments and universities that rely on the resource to communicate. To date, PBAC has both compiled and collected important data on the aquifers serving the Palouse basin, and on water use by the primary entities in the basin.<sup>88</sup> In April of 1992, Ecology and IDWR entered an Interagency Agreement in which they agreed to administer the groundwater in the Palouse basin consistent with the plan.

The groundwater management plan developed in 1992 primarily calls for public education, monitoring, and further study.<sup>89</sup> The plan does set targets for total withdrawals by Moscow, Pullman and the two universities with a goal of aquifer stabilization by 2020, but does not address mechanisms for implementation or enforcement. To the extent solutions are addressed, they are limited to supply side solutions involving new water resources.<sup>90</sup> This absence of any specific action items or treatment of demand side solutions may be, in part, because the intergovernmental agreement does not provide a means to implement and enforce difficult decisions should water shortage occur, or to resolve disputes concerning water among the various entities across state lines. Research on means to retain the value of local control and communication provided by the structure of PBAC while enhancing the ability to make, implement, and enforce decisions is recommended in the following section and Appendix A.

III. Avenues for Further Research

Avenues for further research on: (1) cooperative transboundary groundwater management; (2) land and water use integration’ and (3) demand side solutions are attached as Appendix A.

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<sup>86</sup> Intergovernmental Agreement of Aug. 1, 1988 for what was originally called the Pullman-Moscow Water Resources Committee, available as Appendix A to the September 1992 *Groundwater Management Plan* of the Pullman-Moscow Water Resources Committee, available at [http://www.webs.uidaho.edu/pbac/GWMP/Ground\\_Water\\_Management\\_Plan\\_September\\_1992.pdf](http://www.webs.uidaho.edu/pbac/GWMP/Ground_Water_Management_Plan_September_1992.pdf) last visited Aug. 11, 2007.

<sup>87</sup> Id.

<sup>88</sup> See generally, website of the Palouse Basin Aquifer Committee at <http://www.webs.uidaho.edu/pbac/> last visited on Aug. 11, 2007.

<sup>89</sup> September 1992 *Groundwater Management Plan* of the Pullman-Moscow Water Resources Committee, available at [http://www.webs.uidaho.edu/pbac/GWMP/Ground\\_Water\\_Management\\_Plan\\_September\\_1992.pdf](http://www.webs.uidaho.edu/pbac/GWMP/Ground_Water_Management_Plan_September_1992.pdf) last visited Aug. 11, 2007.

<sup>90</sup> Id.

## Appendix A: Palouse Aquifer legal/policy research topics: 5-22-07

- I. Topic #1: Institutional Structure [M.S./J.D. student: Matt Darrington]
  - A. Analysis of the form of legal institutions given that the existing situation is both a reflection of the past and the point of departure for the future
    1. Analysis of existing institutions [supervised by Dr. Patrick Wilson]
      - Why did we create them
      - Why do they matter
      - How might we change them
      - a. IDWR/Ecology  
Possible analysis of the cultural differences between the two
      - b. PBAC/WRIA  
Contrast PBAC technical approach with the WRIA inclusive/public involvement approach
  - B. Models for Cooperative Transboundary GW Management [supervised by Professor Barbara Cosens – the following reflects preliminary research indicating that the primary model for this is international]
    1. Characteristics of the Palouse Aquifer  
[international efforts on transboundary gw management emphasize the need to tailor institutions to the type of aquifer – with an aquifer that appears to have little recharge requiring much more focus on both conservation and prevention of contamination]
    2. Model interstate water compact from Utton Study  
limited application to a small groundwater basin, but should be discussed
    3. Examples from other basins
      - a. Ogallala [have contacted all of the states and none have been successful in negotiating a cooperative agreement – this is a good example of what happens if you fail to do that]
      - b. Rocky Boy's/Fort Belknap compacts from Montana  
[cooperative state/tribal groundwater management in which each sovereign maintains jurisdiction over its own resource, but the other sovereign is provided data and an opportunity to challenge new development]
      - b. Franco-Swiss Genevise Aquifer  
[local cooperative aquifer management across an international boundary with approval by each nation state]
  - C. Application to the Palouse
    1. Model agreement tailored to the Palouse
    2. Methods for Binding Enforcement
      - a. Congressional Approval
      - b. State Legislation
      - c. Citizen Suits in federal court
- II. Topic #2: Land Use Law and Demand Side Solutions [M.S./J.D. student: Luke Marchant]
  - A. Analysis of why/how we have the divide between land use planning (done at the local level) and water allocation (done at the state level) and its relation or lack thereof to the ecological reality [supervised by Dr. Patrick Wilson]

- B. Analysis of existing situation [supervised by Professor Barbara Cosens – the following reflects some preliminary research]
  - 1. Separation between local land use zoning and state level water planning and permitting considerable law review-type literature on this
  - 2. Latah Co. attempt to incorporate water into land use
    - a. Naylor Farms
    - b. ordinance – attempt at including water allocation decisions in local land use decisions
    - c. law suit – ordinance found unconstitutional
  
- C. Demand Side Solutions [supervised by Professor Barbara Cosens]
  - 1. Reductions in per capita use
    - a. education
    - b. pricing
    - c. governmental properties: audit/reduction
    - d. provision of conservation devices/xeriscaping
    - e. regulation
  - 2. Re-use
    - a. legal limits
    - b. double piping
  - 3. Regulation of new hook-ups
    - a. assured supply laws
    - b. xeriscaping and device installment requirements
    - c. double piping
    - d. credits for providing reductions elsewhere
  
- D. Incorporation of Demand Side Solutions into land use planning [supervised by Professor Barbara Cosens and Professor Jerrold Long as committee member]
  - 1. Comprehensive Plan
  - 2. Subdivision laws