

# WATER LAW 101

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# Scope of Presentation:

The scope of this presentation is intended to provide attendees with a general overview of the history and regulation of water such that they obtain an improved ability to recognize and understand common legal issues associated with the use of water in Washington State.

“Whiskey is for drinking and water is for fighting over”

Mark Twain

# I. History

- Doctrine of Riparian Use
  - Originated in Europe
  - Common in Eastern United States
  - Right to use water contained on, adjacent to, or which flows across property
  - Owners may not impair other riparian owners
- Doctrine of Prior Appropriation
  - Developed in response to limited water availability in Western United States
  - First in time, first in right

## II. Washington Water Law

- Surface Water Code adopted 1917 and Ground Water Code adopted 1945
- Code identifies water as a resource of the People
- Confirmed prior appropriations (common law claims)
- Introduced application process to obtain a water right
- Authorized a process to change water right attributes
- Relinquishment statute adopted 1967

# III. Types of Water “Rights”

- Claims
- Permits
- Certificates
- Exempt withdrawals
- In-stream flows

# IV. Attributes of a Water Right

- Priority Date/Date of First Use – establishes seniority
- Source (Ground Water/Surface Water) & Location
- Volumes of Water (Instant & Annual)
- Type and Period of Use

# V. Claims

- Pre-code common law water right
- May or may not articulate all statutory attributes
- Water Code Requirements
  - Claim must be filed with the State (1998 final registry)
  - Claims must assert a date of first use prior to 1917(surface) or 1945(ground)
  - Claims may only become a right via a court adjudication process



# V. Claims - Continued

- May use change application process to change attributes of a claim
  - Tentative determination required to validate claim
  - Remains a claim until adjudicated
- Amendments
  - Correct errors in estimated quantities
  - Document changes in circumstances
  - Fix typographical errors

# VI. Issue Spotting

- Valid date of first use?
- Has a claim been filed with the state?
- Is current water use consistent with claim?
- Relinquishment or Abandonment?

# VII. Water Permits

- Applicants apply to Ecology and request authorization to “beneficially use” water
- Permits issued subject to water availability
  - Permits held as personal property and may be assigned
  - Provisions may restrict where & how water is used
  - Subject to proof inspection
  - Development schedule required

# VIII. Issue Spotting

- Who owns the permit?
- Is permit in compliance with Development Schedule?
  - May request extensions
  - Due diligence required
- Is perfected water use consistent with attributes of permit?

# IX. Water Certificates

- Issued following proof inspection of permitted use
- Priority date determined by application date
- Describes all attributes of a water right including applicable provisions
- Water certificates are a property right attached to land
- Attributes may be altered via a water right change application

# X. Issue Spotting

- De facto Changes
- Changes to property ownership
  - Title transfer
  - Reservation or transfer of water by deed
  - Subdivision
- Relinquishment or Abandonment

# XI. Exempt Wells

- Exempt from permit process, but not from the water code
- 5000gpd for domestic or industrial use and 0.5ac lawn and garden irrigation
- Unlimited stock water

# XII. Issue Spotting

- Closed basins
- Impairment
- Documentation of use/Priority date
- Relinquishment
- One exempt withdrawal per project (14 domestic connections)



# XIII. In-stream Flows

- Minimum stream flows set by law
- Have not been adopted for every basin
- Unclear exactly what they represent
- Recognized as a water right
- Priority date dependent upon date of adoption

# XIV. Hirst Decision

- Court held exempt wells may not impair senior water rights including in-stream flows
- Acknowledged relationship between ground water and surface water
- Placed burden on rural property owners to prove no impairment
- Chilling effect on rural development

# XV. Scope of the Problem

- >1% of homes in WA served by exempt wells
- Large percentage are 2<sup>nd</sup> homes
- Well often only source of water for many rural homes
- Most water returned to ground via septic system

# XVI. Legislative Fix

- Adopted January 2018
  - Defers regulation of exempt wells to in-stream flow rule adopted for each basin
- Exempt uses remain unchanged for most of Eastern WA and Pacific Coast counties
- Exempt quantities reduced and/or fees imposed for Puget Sound and some eastern Washington counties

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**Marc Marquis** is a founding partner at **Peterson & Marquis Law Office** which assists clients with all manner of legal services related to water rights including: water right assessments, water changes & transfers, water right transactions, water system agreements, trust donations and the formation of water & irrigation districts.