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Section Report

By Stacy A. Bjordahl, ELUL Section Chair

Thanks again to everyone who either attended or participated in the Midyear Meeting and CLE at the Ocean Shores Conference Center in Ocean Shores in May. We are pleased to announce that the Section made a profit of $3,840.83(!), which is no small feat in this economic climate. Speaking of money and budgets … the Executive Committee anguished for quite some time, but ultimately decided to raise the annual Section dues to $35, effective January 1, 2011. This increase was largely prompted by the Bar Association increasing its "per-member charge" from $12 to $13.25 (translation: the Section will receive only $21.75 from your Section dues). The Committee considered that, from 2000 to 2010, there was only one increase in the ELUL dues which occurred in 2006. Because of the Bar's increase in the per-member charge and the fact that expenses have increased substantially since 2006, the Executive Committee decided it needed to increase dues to ensure we are able to continue to provide our members with outstanding benefits. These include, among other benefits, 3 free one-hour CLEs each year with hosted receptions, the Midyear program, and of course, our Section Newsletter.

At the annual Section meeting in May, we received 10 nominees for the four open Executive Committee/Director positions. By the time this Newsletter hits your desk, the election results will be known and we look forward to

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Editor's Message

By Michael P. O'Connell, Newsletter Editor

This issue of the Newsletter includes a wide variety of articles. The lead articles by Tim Trohiovich from one perspective and Jay Derr and Tadas Kisilieus from another provide point-counterpoint perspective on the successes, failures and potential reforms for the Growth Management Act, now that the Act has been law for twenty years. Steve Jones reviews the U.S. Supreme Court's reassertion of the injunction standard in the National Environmental Policy Act (NEPA) cases and a recent Ninth Circuit decision regarding the injunction standard in NEPA cases. Roger Pearce examines the question of "judicial takings" raised by a plurality of the U.S. Supreme Court in Stop the Beach Renourishment and what it means for Washington law regarding littoral and riparian rights. Thedda Braddock and Olivia Frazao write on ecosystem system credit markets. Harry Seely follows with an article on water right valuation in Washington.

Thanks to all authors and to the Editorial Board members who are responsible for the content of this Newsletter issue. The Newsletter relies on members of the Editorial Board to produce articles and other contributions to the Newsletter – either by authoring articles or updates or by soliciting others to contribute articles. Editorial Board members also determine as a group what articles may be timely and informative to Section members.

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In This Issue

The Growth Management Act at 20: What Reforms Are Needed to Get Ready for the Next 20 Years?

By Tim Trohimovich, Futurewise

The Growth Management Act (GMA) has achieved some notable successes in its first 20 years. The amount of cropland converted to strip malls has slowed compared to the nation as a whole.[1] Growth has been channeled into urban growth areas, saving taxpayers money and increasing protection for water quality, fish and wildlife, farmers, foresters, ranchers, and those who desire a rural lifestyle.[2] Cities and urban areas have increased their residential densities again saving taxpayers money and making more affordable housing possible.[3]

While the GMA addressed many of the problems and opportunities of the last twenty years, what reforms are needed for the next twenty? This article includes the author's top ten countdown of needed GMA reforms.

Number 10: Adopt a state growth strategy and smart growth investment strategy. Urban growth areas work more efficiently if there is a statewide strategy or plan to guide them.[4] The GMA should be amended to require a statewide plan prepared and adopted by Washington State. A statewide plan will also give more specific policy direction on where growth should be encouraged, natural resource lands conserved, and state infrastructure investments made. This strategy should also include an economic development element to help generate family wage jobs and provide for statewide prosperity. To reinforce the state growth strategy, the state should target state grants, loans, facilities, and spending to existing downtowns, town centers, well located and designed urban growth areas, industrial areas, and other smart growth sites.

Number 9: Set standards for transit-oriented communities. One of the ways to provide for smart growth is by encouraging transit-oriented communities.[5] These are mixed-use, mixed-income communities well served by frequent bus, light rail, and commuter transit. They include minimum residential densities, services, retail uses, parks, and other amenities. The GMA should be amended to include standards for transit-oriented communities so the state and local governments can benefit from the social, economic, and environmental benefits of transit oriented-communities. The amendment should also clarify that local governments benefiting from large federal and regional transit investments are to incorporate transit-oriented communities into their comprehensive plans and development regulations.

Number 8: Make it easier to grow in designated urban growth areas. Form-based codes and other measures can streamline regulations in appropriate parts of the urban growth area to encourage development where we all want it. The GMA should be amended to provide incentives and funding to help update development regulations to remove barriers to development in urban growth areas.

Number 7: Strengthen the requirements for affordable housing. The requirements for affordable housing are very general. They should be clarified so that we are able to produce more of the affordable housing we need. Counties and cities should both determine the housing needed for all income groups and adopt policies, regulations, and programs to help produce this housing.

Number 6: Increase protection for working farms, working forests, and mineral resource lands. While the available studies have shown that Washington is helping to protect farmland, the Census of Agriculture also shows that Washington lost 753,218 acres of land in farms between 1992 and 2007.[6] Washington has also lost forest land.[7] So the GMA has not fully achieved its goal of protecting the land bases for the agricultural, forest, and the mineral resource industries. The GMA should be amended to clarify that these important lands must be protected. The GMA should require that all productive resource lands must be analyzed for whether they should be designated. The long-term commercial significance criteria should be clarified so they address the factors that truly affect long-term, sustainable resource use.

Number 5: Stop premature vesting. Premature vesting thwarts the goals of the GMA. Even 20 years after adoption of the GMA, some counties have not seen the benefits of the GMA on the ground because so much of their rural lands are already platted into urban–style lots that are vested under the state's permissive vesting laws. The Puget Sound Regional Council has analyzed development on vested lots in Kitsap and Snohomish counties. The Council concluded that "[t]he preliminary results of the analysis indicate that a surprisingly large proportion of the new housing permitted in rural areas is occurring on vested lots, providing evidence that pre-GMA vesting may indeed have played a role in recent development patterns deviating from the planned distribution of growth under the counties' original growth targets."[8] The legislature should adopt revisions to Washington's vested rights doctrine by granting vested rights upon permit approval rather than application and by clarifying the regulations to which vesting applies. Short subdivisions should be subject to the same time limits as long subdivisions. Vesting should also not be allowed for projects that rely on a comprehensive plan or development regulation found to violate the GMA.

Number 4: Adopt a development excise tax to fund growth management planning. High quality and effective planning can lead both to smart growth and more efficient permitting. This reduces development costs. A development excise tax, a tax paid during the development process, will allow local governments to effectively do this work.

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Growth Management Act at 20 Years: A Counterpoint

By Jay Derr and Tadas Kisielius, GordonDerr, LLP[1]

In the twenty years since its adoption, the Growth Management Act ("GMA"), while achieving many notable successes, also failed to achieve several of its fundamental objectives. GMA was not simply a law to regulate or limit growth, but also a law to accommodate growth and ensure affordable housing, adequate provision of public facilities and infrastructure and a healthy economy for Washington's citizens. While GMA has perhaps done fairly well on the regulatory front, it has fallen short in satisfying the goals and mandates related to public infrastructure, housing, and economic development.[2] In the midst of the recent "Great Recession," these inadequacies are only exacerbated. In any evaluation of GMA's "success," what remains to be achieved and what changes could be recommended require recognition of these fundamental unmet needs. More regulations, or more state-level oversight of more regulations, will not ensure that the GMA vision will be achieved.

Affordable Housing

Affordable housing is not addressed simply by increasing the number or percentage of new housing units being constructed within the urban areas as compared to rural areas, when the price of these new housing units is not affordable to the median incomes for the new residents who will live there—for rent or for purchase.[3] Failure of the affordable housing goal leads to failure of other GMA goals. Adequate and affordable housing is required to support a locally available workforce with skills required by a diverse and healthy local economy, which, in turn, generates income and tax revenues to fund public facilities and services.[4] If the only affordable housing is pushed further away from the urban employment centers, sprawl increases, costly expansion of public infrastructure is required, and greenhouse gas emissions increase with increased commute distances. Many would argue that growth management regulations that limit the location of development and encourage density in urban areas (without recognition of construction costs associated with such density) place an upward pressure on housing prices and accelerate gentrification.[5]

Availability of Infrastructure to Support Development

Currently many jurisdictions face deficiencies in infrastructure necessary to serve existing development, including roads and utilities, not to mention the demands from growth. But for perhaps a brief shot of federal stimulus funds for "shovel-ready" projects, public infrastructure funding is not likely to grow significantly in the near term. Relying on impact fees or other methods to "tax" new construction for these infrastructure needs will only add to the housing affordability gap noted above. New, enduring and substantial sources of money must be identified to achieve this GMA goal. At a time when the economy continues to struggle, new taxes are not likely to be a favored solution.

Economic Development

The recent economic recession has triggered a collapse in public revenues. While few would argue with the premise that a robust economy generates more revenues for housing, infrastructure investment and, thus, satisfaction of these GMA goals, few also have identified the strategy, regulatory or otherwise, that will restore that economy and the corresponding revenue stream. At least in the near term, new taxes or new regulations are not likely to achieve the vision of this GMA goal.

Top Ten Counterpoint

This commentary now turns to a response to the "top ten" priorities identified in the Futurewise commentary prepared by Tim Trohimovich. While there are some points of common ground, the differences are probably best summed up as a fundamental disagreement over the degree to which increased or more limited regulatory structure is the appropriate mechanism to address the problems of the unmet GMA vision. New regulations bring increased costs to implement—both on the property owner and on the local government—at a time when increased costs are counter-productive to GMA's objectives.

Number 10: State growth and investment strategy. A statewide growth investment strategy probably makes good sense, particularly in these difficult economic times. However, such a strategy ought to focus on stimulating the private market economy and local initiatives and decisions, not on developing new state-level policies or rules on where growth should be encouraged or permitted or what additional lands can or cannot be developed.

Number 9: Encourage transit-oriented communities. Regional coordination and encouragement of transit-oriented communities is a great idea. However, non-regulatory means should be the emphasis—retaining local communities and local markets as the decision makers—rather than seeking to regulate them into existence or set uniform minimum densities that may or may not meet market demand or local political acceptance, as was attempted in the last legislative session.

Number 8: Make it easier to grow in designated urban areas. Futurewise does not go far enough with this priority. Lack of form-based codes is not the problem. Unnecessary and sometimes duplicative review processes are bigger impediments to easy growth in the urban areas. Exempting or at least significantly streamlining State Environmental

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Number 3: Increase compliance and reduce costs to local governments. States with growth management laws similar to Washington's often require state approval of county and city comprehensive plans and development regulations.[9] Effective and consistent enforcement is needed to effectively implement growth management programs; citizen based enforcement, on which Washington relies, is inconsistent.[10] State review and approval has the potential to reduce the need for citizen appeals, increase consistency, and save time and money for local governments and other participants. The GMA should be amended to require state review and approval of local government comprehensive plans and development regulations, like the approval role the Department of Ecology has for Shoreline Master Program updates.

The case-by-case approach to urban and rural densities creates significant uncertainty, increases appeals, and increases costs for local governments. The legislature can reduce these uncertainties by adopting maximum rural densities and minimum urban densities to increase certainty and reduce costs. It will also increase protection for water quality and rural character.

Number 2: Clarify the periodic update review and revise requirement. RCW 36.70A.130(1)(a) requires that counties and cities "shall take legislative action to review and, if needed, revise [their] comprehensive land use plan[s] and development regulations to ensure the plan and regulations comply with the requirements of this chapter …." Despite this relatively clear (for the GMA) mandate, the Washington State Supreme Court read in a requirement that the challenged provisions must be "directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated …."[11] This requirement has three problems. First, it is nowhere in the text of the GMA. Second, it writes the requirement that comprehensive plan and development regulations must be updated to comply with the GMA goals right out of the Act. Third it means that comprehensive plans can be allowed to go out of date and residents and property owners have no recourse. The GMA should be amended to clarify that RCW 36.70A.130 requires counties and cities to review and revise their comprehensive plans and that failing to update these comprehensive plans and development regulations can be appealed.

Number 1: Affirm that comprehensive plans and development regulations must address global warming. The *Impacts of Climate Change on Washington's Economy* concluded that: "Climate change impacts are visible in Washington State and their economic effects are becoming apparent."[12] Planning can both contribute to reductions in greenhouse gas pollution and help communities address the adverse effects that are already taking place.[13] While the GMA already requires counties and cities to address greenhouse gas pollution and to adapt to the ongoing adverse impacts of global warming as part of their comprehensive planning,[14] affirming that the GMA includes these requirements would increase certainty for all parties.

Tim Trohimovich is a graduate of Willamette University and the Lewis & Clark College, Northwestern School of Law, cum laude. *Tim is currently the co-director of planning & law for Futurewise a public interest group that works to effectively implement the Growth Management Act. He has been a professional planner in Washington state for over 25 years. He is a member of the American Institute of Certified Planners (AICP) and the Washington State Bar Association. At Futurewise he focuses on land use and environmental policy studies, education, technical assistance, policy advocacy, and land use and environmental law.*

1 U.S. Department of Agriculture, *Summary Report: 2007 National Resources Inventory* pp. 43 – 44 (Natural Resources Conservation Service, Washington, DC, and Center for Survey Statistics and Methodology, Iowa State University, Ames, Iowa: 2009). Accessed on July 19, 2010 at: *http://www.nrcs.usda.gov/technical/nri/*.

2 Lin Robinson, Joshua P. Newell, John M. Marzluff, *Twenty-five years of sprawl in the Seattle Region: growth management responses and implications for conservation*, 71 Landscape and Urban Planning 51, 67 – 68 (2005).

3 State of Washington Department of Community Trade and Economic Development, *Buildable Lands Program: 2007 Evaluation Report – A Summary of Findings* p. 8 (August 2008). Accessed on July 19, 2010, at: *http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=6386&MId=944&wversion=Staging*.

4 Robert W. Wassmer, *The Influence of Local Urban Containment Policies and Statewide Growth Management on the Size of United States Urban Growth Areas*, 46 Journal of Regional Science 25, 56 (2006).

5 Sara Nikolic, *et al. Transit-Oriented Communities: A Blueprint for Washington State* pp. 21 – 33 (Futurewise, GGLO & Transportation Choices Coalition: October 2009). Available at: *http://futurewise.org/resources/publications/index_html*.

6 United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series • Part 47* Chapter 1: State Data, Table 1. Historical Highlights: 2007 and Earlier Census Years p. 7 (February 2009). Accessed on April 2, 2010 at: *http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_State_Level/Washington/st53_1_001_001.pdf*.

7 *Summary Report: 2007 National Resources Inventory* pp. 43 – 44.

8 Puget Sound Regional Council, *VISION 2020 + 20 Update Informational Paper on: Pre-GMA Vested Development in Rural Areas of the Central Puget Sound Region* p. 7 (December 2005). Accessed on April 2, 2010 at: *http://www.psrc.org/assets/2031/appIF13-vesting.pdf*.

9 John M. DeGrove, *Planning Policy and Politics: Smart Growth and the States* p. 14, p. 52 p. 190 (Lincoln Institute of Land Policy, Cambridge, MA: 2005).

10 John I. Carruthers, *The Impacts of State Growth Management Programmes: A Comparative Analysis* 39 Urban Studies 1959, 1978 (2002).

11 *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 344, 190 P.3d 38, 45 (2008).

12 Washington Economic Steering Committee and the Climate Leadership Initiative Institute for a Sustainable Environment University of Oregon, *Impacts of Climate Change on Washington's Economy: A Preliminary Assessment of Risks and Opportunities* p. 7 (November 2006). Accessed on October 28, 2009 at: *http://www.ecy.wa.gov/pubs/0701010.pdf*.

13 See for example *Leading the Way: A Comprehensive Approach to Reducing Greenhouse Gases in Washington State Recommendations of the Washington*

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PolicyAct ("SEPA") review of projects within an Urban Growth Area that are consistent with the comprehensive plan should be adopted. Eliminating duplicative SEPA review of environmental issues that are addressed by critical areas or storm water regulations that are consistent with GMA and National Pollutant Discharge Eliminations System requirements should be changed from "optional" under current SEPA regulations to "required" as a way to ease growth in the urban area.

Number 7: Encourage affordable housing. Significantly more needs to be done to promote affordable housing. However, the solution is not to add regulations to require affordable housing or to collect more impact fees. Those proposals are more likely to further delay developing affordable housing and to increase costs. Costs of new regulations and increases in impact fees to pay for needed infrastructure simply add to the price of housing rather than make it more affordable. At a minimum, payment of impacts fees should be deferred until sale or occupancy, when the impact actually occurs. This would reduce or eliminate carrying costs and financing complications with the current timing of impact fee payments. Adding density does not necessarily lead to affordable housing because it ignores the higher construction costs associated with higher densities in urban areas, and may accelerate gentrification, with associated increased housing prices. The programs that have probably made the most contribution to affordable housing over the past 20 years are the non-profit and housing levy programs where the general public as a whole steps up to meet this need and obligation—not imposition of new regulations or new fees on housing.

Number 6: Protection for natural resource lands. A core value of the GMA is the preservation of resource lands. However, statistics regarding "loss" of acreage masks the facts behind those reductions by ignoring the circumstances relevant to commercial viability that extend beyond physical soils and yield characteristics that are used to designate land as "prime" for natural resource production. Lands may be enrolled in natural resource conservation programs with limited, if any, potential, to ever being returned to commercial production. Thus, many of these enrolled lands have already been "removed" from long-term commercial production. In addition, new regulations on natural resource operations or increases of critical area buffers can make continual commercial timber or agricultural production untenable. Existing GMA provisions strike an appropriate balanced consideration of these issues. Attempts to adopt any type of "no net loss" of acreage, or attempts to eliminate commercial significance as a component of natural resource land designation and protection runs the risk of over-simplifying or ignoring these factors.

Number 5: Vesting. Futurewise's proposal to erode the vesting doctrine in Washington will undermine the GMA goal of providing certainty in the approval process and providing the development and infrastructure investment necessary to serve the next 20 years of growth required by GMA. Indeed, with the current economy, it may be appropriate to stimulate economic investment in new projects by clarifying and expand vesting laws in the RCW to extend the benefits of vesting to earlier stages of the development approval process, including phased Planned Unit Developments and Master Planned Developments. Vesting should include impact fees, as well as land use regulations to support certainty and investment in new development.

Number 4: Excise tax to fund GMA planning. While more dollars for planning would be helpful, imposing more charges on development is more likely to frustrate new construction, increase costs of housing and restrict, not stimulate, economic development and job growth. Instead, the state should seek to stimulate the real estate economy, which would, in turn, generate jobs and tax revenues.[6]

Number 3: Increase compliance and reduce costs to local governments. While the general goal of increasing compliance and reducing costs to local governments from appeals and compliance efforts is laudable, requiring state review and approval of all plans is fundamentally inconsistent with the GMA's emphasis on local discretion. The state-directed approach to GMA planning was rejected 20 years ago. It is not clear how increased state-level decision-making on local land use would do more to increase citizen satisfaction and reduce appeals, as it does not address the fundamental disputes over how best to satisfy GMA requirements. This suggestion would more likely change the forum of the legal battles, rather than reduce them. It could be more effective to reduce appeals and compliance costs to limit GMA participation standing to those who are residents or property owners of the local jurisdiction, or to eliminate GMA participation standing altogether and rely on the SEPA standing which requires a demonstration of actual harm from the challenged plan or regulation.

Number 2: Scope of appeals of mandatory seven year updates. This proposal to expand the scope of appeals of the mandatory 7-year comprehensive plan update will increase costs to local jurisdictions by adding more opportunity for recurring appeals and challenges, even if prior challenges

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Climate Advisory Team p. 57 – 58 (February 1, 2008). Accessed on October 28, 2009 at: *http://www.ecy.wa.gov/pubs/0801008b.pdf*.

14 Tim Trohimovich, *What Role Does the GMA Play in Reducing Greenhouse Gas Emissions? The GMA Requires Communities to Mitigate and Adapt to Global Warming* in *The Eighteen Annual Conference on Washington's Growth Management Act* pp. 10:11 – 10:17 (Law Seminars International, Seattle, WA: Nov. 19 – 20, 2009). Updated version available at: *http://futurewise.org/resources/publications/index_html*.

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were unsuccessful or not pursued. The ballot box and the local legislative process are the more appropriate mechanisms for seeking a change to plans or regulations adopted under prior GMA mandates and deadlines.

Number 1: Global warming: Local land use plans and regulations may play an important, but admittedly only a very small role, in changing global greenhouse gas emissions (through reductions in vehicle miles travelled ("VMT") or energy efficient construction). New regulations to address those concerns, particularly when standards for measuring or mitigating impacts remains unresolved, would add costs to housing and development, with uncertain or unmeasureable benefit. Moreover, as described above, more regulations, especially in urban centers, could easily lead to more affordable housing outside of urban centers, pushing growth into surrounding communities and increasing VMT. Existing statutes and programs to address greenhouse gas emission reductions should be used rather than new amendments or mandates. Such measures include existing SEPA analysis, local adoption of model electrical vehicle ordinances, application of energy codes, and demonstration programs and incentives for energy efficient construction.

Jay Derr is the Managing Partner at GordonDerr LLP, a Seattle law firm whose practice emphasizes real estate, land use, environmental, and water law and related litigation. For almost 30 years, Jay's practice has mixed the public and private sectors, advising clients on complex and often controversial development projects as well as long-range Growth Management Act plans and regulations. Jay has represented both the private- and public-sector clients before State trial and appellate courts, including several trips to the Washington State Supreme Court on land use and Growth Management Act issues of statewide significance.

TadasKisieleus is an associate at GordonDerr LLP where he represents public and private clients on issues pertaining to land use and water resources law. He has worked with public clients in drafting, adopting and defending regulations required by the Growth Management Act and the State Environmental Policy Act and has represented private clients in their efforts to secure land use approvals for development projects throughout the state. Tadas's water law practice includes permitting of new appropriations, transfers and changes of existing water rights, and water rights transactions.

1 The views stated below come from the perspective of attorneys who have helped both local jurisdictions and private parties navigate the GMA for the last twenty years. However, the views included in this article are the personal views of these authors (particularly as those views may be stimulated by Tim Trohimovich, Futurewise's counterpoint) and do not reflect the views of any particular firm client.

2 GMA also includes a goal related to property rights, which many would argue has been ignored. However, since the Growth Management Hearings Board has determined it does not have jurisdiction to discuss property rights issues, and in the interests of brevity in this publication, these authors will take the same course and ignore commentary on that GMA goal.

3 Affordable Housing Advisory Board, 2010 – 2015 Housing Advisory Plan, 5-11, Feb. 10, 2010 (noting that buying a home is largely out of reach for first-time homebuyers in most counties and the gap is not likely to be addressed, even with the recent recession, since home prices are expected to start to increase before and in excess of incomes). *http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=8329&MId=870&wversion=Staging*.

4 Washington Research Council, Policy Brief, Housing for Economic Development, PB 05-12, Nov. 22, 2005 at 3-7.

5 *See* DeLisle, James R., Sustainable Growth Management: A Market Based Approach, at 13-14.

6 Indeed, before the recession, the housing market accounted for 24% of the state's employment and a significant portion of state tax revenues in sales, property, business and occupation, and real estate excise taxes. *See,* Affordable Housing Advisory Board, 2010-2015 Housing Advisory Plan at 14. *See also* Washington Research Council Policy Brief, Housing for Economic Development, PB 05-12 November 22, 2005 at 3-4.

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welcoming the new directors at our September 16 Executive Committee meeting. We will be sad to say goodbye to outgoing Committee members Maia Bellon, Susan Drummond and Kaleen Cottingham. Thank you to each of you for all your time and commitment to the Section!

Finally, I remind you to please mark your calendars for Thursday, September 16, 2010, which will be our next one-hour CLE which is *free* to our Section members. The CLE is entitled "Land Use Mediation - Can It Work?" and is certain to be an outstanding program.

Editor's Message *from page 1*

The Editorial Board has an opening. Board Member Tisha Pagalilauan is moving-on to other responsibilities after 8 years on the Editorial Board. We are particularly interested in Editorial Board members interested in reviewing and writing updates on federal environmental decisions. Please send expressions of interest me by September 30. My contact information is on the back cover of the Newsletter. Thanks to Tisha for her service to the Section membership.

The Editorial Board will soon be developing the content for the next issue of the Newsletter. Anyone who would like to contribute an article for the next or any future issue, or who has questions, comments, or suggestions regarding the Newsletter, its content, or the Editorial Board, is encouraged to contact me or any member of the Editorial Board listed on the back cover of this issue. Thank you for your interest in the Newsletter!

Supreme Court Reasserts Standard for Injunctive Relief in NEPA Cases

By Steve Jones, Marten Law

Reversing a nationwide injunction, the United States Supreme Court reiterated the four-part standard for injunctive relief it announced in 2008, confirming that this same standard applies in cases arising under NEPA. In 7-1 opinion[1] delivered by Justice Alito in *Monsanto Co. v. Geertson Seed Farms* (*Monsanto*),[2] the Court relied on its earlier opinions in *Winter v. Natural Resources Defense Council*,[3] and *eBay Inc. v. MercExchange, L.L.C.*,[4] holding that showings of irreparable injury, inadequacy of legal remedies, a balance of hardships tipping in favor of the party seeking the injunction and consideration of the public interest are all necessary before an injunction may issue.[5]

Background

Monsanto presented the issue of whether cases arising under the National Environmental Policy Act (NEPA) are subject to a standard for injunctive relief that is more favorable to NEPA plaintiffs, effectively affording project opponents with a presumption of irreparable harm. In the case below, the Ninth Circuit upheld a district court's decision to permanently enjoin the planting of genetically modified "Roundup Ready" alfalfa (RRA) nationwide, pending preparation of an environmental impact statement (EIS) under NEPA.[6]

In *Monsanto*, the Court relied heavily on its 2008 opinion in *Winter v. Natural Resources Defense Council*, another NEPA case.[7] The Ninth Circuit issued its opinion in *Monsanto* before the Supreme Court reiterated the standard for preliminary injunctions in *Winter* – in that case, the Court held that injunctive relief required a showing of: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities between the parties; and (4) that the public interest would not be disserved.[8] Petitioners in *Monsanto* alleged that the Ninth Circuit applied the wrong standard for permanent injunctive relief, threatening to make blanket injunctions all but automatic in NEPA cases.

Monsanto's Petition to Deregulate Roundup Ready Alfalfa

In April 2004, Monsanto and Forage Genetics petitioned the Animal and Plant Health Inspection Service (a division of the USDA) (APHIS) to deregulate RRA. Geertson Seed Farms and other alfalfa growers, along with the Center for Food Safety, Center for Biological Diversity, Western Organization of Resource Councils, Sierra Club and other non-profit organizations, opposed the petition. They argued that: (1) RRA would contaminate conventional and organic alfalfa through gene transmission; (2) due to contamination, deregulation could prohibit farmers from marketing natural products as organic or non-genetically engineered; (3) contamination would also impact organic livestock sellers; and (4) RRA would negatively impact the export market.

In response to the deregulation petition, APHIS prepared an environmental assessment under NEPA, issued a Finding of No Significant Impact, and then granted the petition. In February 2006, Geertson Seed, another conventional alfalfa seed producer, and several environmental groups filed suit against the Secretary of the USDA, APHIS and the U.S. Environmental Protection Agency, challenging the decision to deregulate RRA. The court allowed Monsanto, Forage Genetics, and three individuals to intervene as defendants.

The District Court's Injunction

Plaintiffs in *Geertson Seed* brought claims under NEPA, the Endangered Species Act, and the Plant Protection Act. In a February 2007 order, Judge Charles Breyer found that the petition raised "substantial questions" as to whether: (1) "deregulation of RRA without any geographic restrictions will lead to the transmission of the engineered gene to organic and conventional alfalfa; (2) the possible extent of such transmission; (3) farmers' ability to protect their crops from acquiring the genetically engineered gene; [and (4)] the extent to which RRA will contribute to the development of Roundup-resistant weeds … and how farmers will address such weeds." He reserved consideration of plaintiffs' other claims pending APHIS' preparation of an EIS. Based on those findings, and without holding an evidentiary hearing, Judge Breyer vacated the federal defendants' decision deregulating RRA and enjoined all future planting of RRA nationwide, pending APHIS' completion of an EIS.[9]

The Ninth Circuit's Opinion

Monsanto appealed the injunction to the Ninth Circuit, arguing that: (1) the district court should have held an evidentiary hearing before issuing a nationwide injunction; and (2) the district court "erred in ordering injunctive relief because it improperly presumed irreparable injury instead of applying the traditional four-factor test for the issuance of a permanent injunction, as required under *eBay v. MercExchange, L.L.C.*" and, as a result, ordered overbroad injunctive relief.[10]

The Ninth Circuit affirmed the lower court. It held that, under *eBay*, to obtain permanent injunctive relief a plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

injunction."[11] The court held that this "traditional balancing of harms" also applies in the environmental context, and that courts cannot categorically grant or deny injunctive relief without applying the *eBay* test. The Ninth Circuit found that the district court properly applied that test.[12] In affirming the district court's decision not to hold an evidentiary hearing, the Ninth Circuit conceded that, a district court must generally hold such a hearing before issuing a permanent injunction "unless the adverse party has waived its right to a hearing or the facts are undisputed."[13]

The Ninth Circuit found, however, that the injunction in the case "is not a typical permanent injunction." Instead, the court determined that, because the injunction was designed to ensure compliance with NEPA, it was more limited in "purpose and duration." Citing judicial economy and the district court's consideration of extensive documentary submissions in the remedy phase, the Ninth Circuit held that the district court did not err by declining to hold an evidentiary hearing before enjoining RRA planting nationwide. The court found that an evidentiary hearing would have required the district court "to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS," and that the appellants "in effect" were asking the court "to accept its truncated EIS without the benefit of the development of all the relevant data and … without the opportunity for and consideration of public comment."[14]

A Dissent in the Ninth Circuit Draws Notice from the Supreme Court

In a dissent specifically referenced in Justice Alito's opinion,[15] Circuit Judge N. Randy Smith noted that the nationwide injunction imposed "severe economic consequences" on the appellants, as well as farmers and distributors across the country. Judge Smith stated that, by affirming the district court's decision not to hold an evidentiary hearing, the majority effectively created "a third exception to the evidentiary hearing requirement." According to Judge Smith, a court may not forego an evidentiary hearing "simply because (1) the injunction may dissolve at some point and (2) the issues, to be raised at the hearing, overlap with the issues the agency must consider." Describing the majority's "deference" to the district court as a "mistake" – particularly in light of the district court's "wholesale rejection" of the agency's position – Judge Smith opined that "[t]here aren't many environmental cases that don't fit into the majority's newly-created exception."[16]

The Supreme Court Requires a Showing of Irreparable Harm, Even Under NEPA

The Supreme Court noted that the district court's injunction sought to remedy APHIS' NEPA violation in three ways: (1) by vacating the agency's decision completely deregulating RRA; (2) by enjoining APHIS from deregulating RRA in any fashion until it completed an EIS; and (3) by entering a nationwide injunction prohibiting almost all planting of RRA.[17] In rejecting this approach, the Court made clear that its "traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation."[18]

In reversing the injunction, the Supreme Court rejected the approach taken by both the Ninth Circuit and the district court. The district court had held that "in the run of the mill NEPA case," an injunction delaying the contemplated government project is proper "until the NEPA violation is cured."[19] Both the district court and Ninth Circuit stated that "in unusual circumstances, an injunction may be withheld, or, more likely, limited in scope" in NEPA cases.[20] While acknowledging that both of those decisions pre-dated the Court's opinion in *Winter*, the Court pointedly noted that the approach taken by both the district court and the Ninth Circuit "invert the proper mode of analysis."[21] Concluding that both lower courts had it backwards, Justice Alito stated:

> [T]he statements above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. … It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather a court must determine that an injunction *should* issue under the traditional four-factor test set out above.[22]

The District Court Acted Prematurely in Enjoining the Agency Before It Exercised Its Authority

The Court also held that the district court abused its discretion in enjoining APHIS from pursuing any deregulation of RRA whatsoever, since the agency had not taken final action in determining the breadth of its deregulation decision. "Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene. Indeed, the broad injunction entered here essentially pre-empts the very procedure by which the agency could determine, independently of the pending EIS process for assessing the effects of a *complete* deregulation, that a *limited* deregulation would not pose any appreciable risk of environmental harm."[23]

Standing

In addition to reaffirming the injunctive standards in *Winter* and *eBay*, the Court also rejected challenges advanced by both petitioners and respondents, each of whom argued that the other lacked standing. The Court held that the possibility that the petitioners could not sell or license RRA to prospective customers and that their injuries could be redressed by an order from the Court constituted a concrete, particularized, imminent injury that was traceable to the challenged action, thereby creating Article III standing.[24] Similarly, the respondents "established a reasonable probability that their organic and conventional alfalfa crops will be infected with the engineered gene" contained in RRA,

if it was completely deregulated.[25] The Court held that "[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis."[26]

Justice Stevens' Dissent

Justice Steven filed a lone dissent, highlighting that "[w]hen a district court takes on the equitable role of adjusting legal obligations, we review the remedy it crafts for abuse of discretion. '[D]eference,' we have explained, 'is the hallmark of abuse-of-discretion review.' Although equitable remedies are 'not left to a trial court's inclination,' they are left to the court's 'judgment.'"[27] Justice Stevens would have sustained the district court's injunction as both an "equitable application of administrative law," and also as a "reasonable response to the nature of the risks posed by RRA."[28] Given the facts, Justice Stevens felt that "it was perfectly reasonable to wait for the EIS"[29] and he would, accordingly, have sustained the district court's approach.

The Ninth Circuit Attempts to Reinstate Its Sliding Scale in *Alliance for the Wild Rockies*

Following issuance of the Supreme Court's opinion in *Monsanto*, on July 28, 2010, a Ninth Circuit panel reasserted the viability of a "sliding scale" approach to injunctive relief in an opinion issued in *Alliance for the Wild Rockies v. Cottrell* (*Wild Rockies*).[30] In its opinion in *Wild Rockies*, the Ninth Circuit concluded that the Supreme Court had not addressed the question of whether various flexible approaches to injunctive relief survived Winter. The panel held that preliminary injunctive relief is still allowed on a weaker showing on the merits, so long as the balance of hardships imposed by an injunction "tips sharply" toward the plaintiffs.[31] The court also put great weight on what some courts might consider relatively modest claims of environmental harm, suggesting an ongoing sympathy to preliminary injunctive relief in environmental cases.

In *Wild Rockies*, the Ninth Circuit applied an arguably different and lower standard that that announced in *Winter* and upheld in *Monsanto*, holding that the sliding-scale "serious questions" test still applies. Under this approach, a court may issue a preliminary injunction by balancing the four Winter's factors, such that "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits … where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'"[32] The court seems to equate raising "serious questions" with demonstrating probability of success on the merits – even though in the pre-Winter's formulation of the test, "serious questions" equated to the lesser standard of "possibility of success on the merits." In fact, it was issuance of an injunction on the basis of only a possibility of success that was the basis for the Supreme Court's reversal in *Winter's*. Under *Wild Rockies*, the bar for irreparable injury also appears lower than that set forth by the Supreme Court, and courts in the Ninth Circuit can grant the extraordinary remedy of injunctive relief should they decide that one factor in the test outweighs another and equity favors the plaintiffs. If the opinion stands, injunctive relief will continue to be an easier remedy for environmental plaintiffs to obtain in the Ninth Circuit than in some other circuits.

Conclusion

Having reiterated its four-part standard for injunctive relief in both 2006 and again in 2008, the Supreme Court has once again emphasized that those same principles apply across the board, and that NEPA cases do not present an exception to their application. With its opinion in *Wild Rockies*, however, the Ninth Circuit still seems to be attempting to retain the sliding scale approach where there are "serious questions going to the merits."

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1 Justice Stevens authored the lone dissent. Justice Breyer did not participate because his brother, Northern District of California Judge Charles J. Breyer, authored the district court opinion in the case.

2 No. 09-475, __S.Ct.___, 2010 WL 2451057 (June 21, 2010). All citations in this article are to the version of the opinion appearing on Westlaw.

3 555 U.S. ___, 129 S.Ct. 365, 380-82 (2008).

4 547 U.S. 388, 391 (2006).

5 *Monsanto*, 2010 WL 2471057, * 11.

6 *See Geertson Seed Farms v. Monsanto Co.*, 570 F.3d 1130 (9th Cir. 2009). The Ninth Circuit issued its first decision in *Geertson* in September 2008 before the Supreme Court decided *Winter*, then withdrew that opinion and re-issued the opinion in 2009. Citations are to the later (2009) version of the opinion.

7 129 S.Ct. 365 (2008).

8 *Winter*, 129 S.Ct. at 380-82.

9 *Geertson Farms Inc. v. Johanns*, No. 06-01075, 2007 WL 776146, (N.D. Cal. Mar 12, 2007), reconsideration denied, 2007 WL 1302981 (N.D. Cal. May 03, 2007), order and scope of injunctive relief modified (upon Rule 59(e) motion by defendants and defendant-intervenors), 2007 WL 1839894 (N.D. Cal. 2007).

10 Geertson Seed, 570 F.3d at 1136 (citing *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

11 *Id.* (quoting *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007); eBay, 547 U.S. at 391).

12 The lower court found the following: (1) with respect to harm, genetic contamination of organic and conventional alfalfa had already occurred; (2) the harm was sufficient to merit "broad injunctive relief"; (3) the harm to growers of non-genetically engineered alfalfa (and consumers) outweighed the financial hardships to Monsanto, Forage Genetics and growers; and (4) it would be in the public interest to enjoin use of RRA before the USDA studies its impact, as failing to do so could make non-genetically engineered alfalfa unavailable in the marketplace. Id.

13 *Id.* at 1139.

14 *Id.*

15 *See Monsanto*, 2010 WL 2471057, * 7.

16 *Geertson Seed*, 570 F.3d at 1141-42 (Smith, J., dissenting).

17 *Monsanto*, 2010 WL 2471057, * 11.

18 *Id.* (citing *Winter,* 129 S.Ct. at 380-82).

19 *Monsanto*, 2010 WL 2471057, * 11 (quoting Monsanto's cert. petition, which in turn quoted the District Court's permanent injunction).

20 *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722, 737 n 18 (9th Cir. 2001)).

21 *Id.* at * 12.

22 *Id.* (italics in original opinion).

23 *Id.* at * 16 (italics in original opinion).

24 *Id.* at * 8.

25 *Id.* at * 10 (quoting the appendix to the Petition for Cert., which in turn, quoted the District Court's order).

26 *Id.*

27 *Id.* at * 21 (Stevens, J., dissenting) (citing *General Elec. Co. v. Joiner*, 422 U.S. 405, 416 (1975)).

28 *Id.* at * 22, * 24

29 *Id.* at * 24.

30 No. 9-35756, 2010 WL 2926463 (9th Cir. July 28, 2010).

31 *Id.* at * 5, * 7.

32 *Id.* at * 4.

The United States Supreme Court Takes Up Takings Again in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*

By Roger A. Pearce, Foster Pepper PLLC

The recent opinion of the United States Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protectio*n[1] turned on a fairly narrow question regarding Florida property law. In a unanimous 8-0 portion of the Court's opinion,[2] the Court had no problem determining that the beach renourishment projects undertaken by two Florida municipalities, and upheld by the Florida Supreme Court, were not a taking under the Fifth Amendment of the United States Constitution because no property right had been taken.

The Court took the opportunity of this case, however, to explore the question of whether the decisions of state court judges could ever constitute a "judicial taking" and, if so, what would be the standard to determine whether a judicial taking had occurred. In fact, Justice Scalia's opinion frames the issue in the case as whether "the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth." A four-Justice plurality, including the Chief Justice and Justices Scalia, Alito and Thomas, endorsed the idea that the Fifth Amendment's Takings Clause applied to all branches of state government and that the judicial branch could certainly be the instrument of a taking of property without just compensation. The plurality further endorsed the idea that the standard for such a taking should be whether a court declares what was once an established property right no longer existed. There was no fifth vote for either of the plurality's positions, however, so the question of whether a judicial taking can take place remains unresolved.

I. Background Florida Law of Littoral Rights.

Littoral rights have been the subject of considerable litigation and legislation in Florida, as might be imagined in a state with so much waterfront property and a history of beach erosion through storms. The State of Florida owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore, which consists of the land up to the mean high-water line.[3] This mean high-water line is commonly the line of ownership between the private beachfront property (called the littoral[4] property) and the state-owned property.

In addition to rights shared by the general public, Florida's littoral owners have a number of special rights that Florida law considers akin to easements – called littoral rights – by virtue of the fact that their property abuts the water.[5] These littoral rights include the right to access the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions.[6] The littoral rights regarding accretions and relictions are central to the Court's opinion.

As explained in the Court's opinion, "accretions" are gradual additions to upland waterfront land by the deposition of sand, sediment or other materials. "Relictions" are lands that were once covered by water that become dry land because the water gradually receded. Most commonly, both of these processes of adding to uplands are called "accretions." To meet the definition, the process must happen gradually and imperceptibly. An "avulsion" on the other hand is the sudden and perceptible loss of land, or addition to land, by a sudden change in the bed of a lake (or ocean) or by the change in course of a stream. Under Florida law, as under old English common law, a littoral owner automatically takes title to the dry land added by accretions, and the property line becomes the new line of ordinary high water. However, if formerly submerged land becomes dry land by avulsion, then the land that has become dry land continues to belong to the owner of the former seabed (or lake or river bed); and the property line does not change to the new line of ordinary high water.

II. The Florida Beach and Shore Preservation Act.

Because many Florida beaches were experiencing significant erosion, the Florida Legislature passed the Beach and Shore Preservation Act in 1961.[7] The Act establishes procedures for beach restoration and renourishment. Under the Act, a local government can apply to the Florida Department of Environmental Protection for funds and necessary permits for beach restoration. If fill in submerged land is undertaken, approval from the Board of Trustees of the Internal Improvement Trust Fund (the "Board") is also required. When a restoration project is undertaken, the Board sets an "erosion control line" which is typically the existing mean high water line. Once the erosion control line is recorded, it replaces the fluctuating mean high water line as the boundary between the littoral property and the state-owned property. As a result, the common law rule allowing littoral owners to receive accretions ceases to apply, although the other common law littoral rights still apply. Should the beach erode back further than the erosion control line, the Board may (or must in some cases) return the beach to the condition envisioned by the project. If that is not done within one year, the project is canceled.

III. The Florida Court of Appeals and Florida Supreme Court Decisions.

In 2003, the City of Destin and Walton County applied to restore 6.9 miles of beach.[8] The project would add approximately 75 feet of dry sand seaward of the ordinary high water line, which was defined as the erosion control line. Petitioner Stop the Beach Renourishment, composed of beachfront owners, challenged the action and claimed that their littoral rights were being taken without compensation.

The Florida Court of Appeals agreed with the petitioner and held that approval of the project had eliminated two of the littoral rights held by members of the petitioner: (1) the right to receive accretions to their property and (2) the right to have their property's contact with the water remain intact.[9] The Court of Appeals certified to the Florida Supreme Court the question of whether the Act unconstitutionally deprives upland owners of littoral rights without just compensation.

The Florida Supreme Court answered the certified question in the negative and quashed the Court of Appeals remand. The Florida Supreme Court held that there is no littoral right to be in contact with the water apart from the right to access, which the Act did not infringe. The Florida Supreme Court also held that the right to accretions was a future contingent interest, not a vested property right, and faulted the Court of Appeals for not considering the doctrine of avulsion. In the Florida Supreme Court's view, the filling of the state-owned submerged land was an avulsion or sudden change in the ordinary high water line, which did not change the former property line between private property and state-owned property.

IV. The United States Supreme Court Upholds the Florida Supreme Court Based on Florida Property Law.

The appeal to the United States Supreme Court focused on challenging the decision of the Florida Supreme Court, claiming that the decision of that court affected a taking by unexpectedly changing Florida property law. After a long discussion of whether a judicial taking could ever occur (see discussion below), the Court had no difficulty in upholding the Florida Supreme Court's decision. In a rather brief Section IV of the opinion, all eight of the participating Justices agreed that the littoral owners could not show that they had any right to future accretions and contact with the water that were superior to the State of Florida's right to fill its submerged land.

Like the Florida Supreme Court, the Court's decision relied on the doctrine of avulsion. If an avulsion exposes land seaward of the littoral property (seaward of the ordinary high water line or line of ordinary high tide), that land continued to belong to the State of Florida. Florida law made no exception to avulsions caused by the State of Florida. Accordingly, the Florida Supreme Court decision was consistent with the "background principles of state property law."[10] Petitioners did not suffer a taking because they did not own the property rights claimed.

V. The Question of Judicial Takings.

Since *Lucas v. South Carolina Coastal Council*[11] in 1992, property rights activists had been looking for a "judicial taking" case to present to the United States Supreme Court. As mentioned above, the *Lucas* decision held that a regulation of property did not affect a taking if that regulation accomplished no more than the "background principles of the State's law of property and nuisance already place upon land ownership."[12] In other words, if the regulated owner did not have a property right to begin with, there could be no taking of that property right. And if a regulation does no more than duplicate the result that could be achieved in the courts by adjacent landowners or the state under the law of nuisance, then there is also no taking.

Some property rights activists have theorized that state courts have avoided takings by judicially expanding the background principles of state property law. Two well-known examples of such state court decisions arguably expanded the rights of the general public to use private, upland beaches. In *Matthews v. Bay Head,*[13] for example, the New Jersey Supreme Court held that New Jersey's public trust doctrine allowed public access to and use of private beaches as reasonably necessary for bathing, swimming and other shore activities. In *Glass v. Goeckel,*[14] the Michigan Supreme Court similarly allowed access to privately owned beaches, but to a lesser extent than the New Jersey decision. An unpublished decision by Division Two of the Washington State Court of Appeals declined to follow these out-of-state precedents.[15]

The plurality of justices in *Stop the Beach Renourishment* came out strongly in support of finding a judicial taking under the right circumstances. As Justice Scalia wrote, the Takings Clause bars "*the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." His argument relied on Supreme Court precedents such as *Prune Yard Shopping Center v. Robins*,[16] in which the California Supreme Court had overruled earlier precedent and found that the California Constitution allowed individuals to petition for signatures in parts of private shopping centers regularly held open to the public, subject to reasonable regulations adopted by the shopping centers. Justice Scalia also relied on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[17] in which the Florida Supreme Court construed a Florida statute to mean that interest on monies in the registry of the county circuit court belonged to the county. He argued that the Justices not joining him needed to grapple with the question of what would constitute a judicial taking, because "[o]ne cannot know whether a takings claim is invalid without knowing what standard it has failed to meet."

The plurality went on to discuss what standard should be applied to determine whether a judicial taking had occurred. They rejected petitioner's argument that a judicial taking would occur if the state court's decision was a sudden and unpredictable change in state law. The plurality settled on a stricter test. A judicial taking would occur if the state court declared that what was once an established right of private property no longer exists.

There was no fifth vote either for the concept of judicial takings or for defining what standard would apply to determine such takings. Justice Kennedy, joined by Justice Sotomayor, concurred in part of the plurality opinion and in the judgment. With respect to judicial takings, Justice Kennedy thought it would raise a number of difficult questions, and it was not necessary to address those questions in this particular case. One difficulty would be how a judicial takings claim would be raised. Presumably all state court remedies would have to be exhausted before certiorari to the United States Supreme Court would lie. Another difficult question is who would pay. As Justice Kennedy stated, the typical remedy after finding a taking is the payment of damages. Even for an interim taking, it is unclear which branch of state government would provide compensation for a judicial taking. Another difficulty would be whether the doctrine of judicial takings would constrain or embolden activist state court judges. Presumably the doctrine of judicial takings is asserted in order to restrain judges from changing settled property law. But if judges knew that just compensation would be paid in any case, they might feel less constrained to make what they felt to be beneficial changes in property rights to meet the needs of more modern times.

As a practical matter, Justice Kennedy argued that if a court acted to eliminate property rights without direction from the executive or legislature, that decision would likely be arbitrary and irrational action that would violate the Due Process Clause, which is where the remedy for such action would lie. Finally, Justice Kennedy reminded the more conservative members of the Court that the Framers likely viewed the Takings Clause only as applying to physical appropriation of property, and the Court should take care not to further extend takings jurisprudence from that original historical framework.

Justice Breyer, joined by Justice Ginsburg, also concurred in part of the plurality opinion and in the judgment. Since all justices agreed that no property rights were taken in this case, Justice Breyer concluded it was not necessary to speculate on whether a judicial takings claim could occur or what standard would apply.

The back and forth arguments between these concurrences and Justice Scalia writing for the plurality is interesting reading for fans of takings law, and especially for fans of Justice Scalia's writing. For the foreseeable future, however, there does not appear to be a fifth vote on the Court for establishing a doctrine of judicial takings.

VI. What *Stop the Beach Renourishment* Means for Washington Law.

Unless the plurality in the *Stop the Beach Renourishment* opinion can garner a fifth vote in some future case, that opinion should not significantly impact Washington law. The law of littoral rights is not as developed in Washington as in Florida, and Washington law does not give as many easement-like rights to upland owners as under Florida law.

Many rights that would otherwise be governed by common law riparian or littoral rights doctrines are governed by legislation in Washington. Many rights of property owners to use and build in and along shorelands or other major water bodies, for example, are now governed by the Washington Shorelines Management Act.[18]

With respect to non-navigable lakes, Washington decisions have recognized the littoral rights of access, swimming, fishing, bathing and boating by virtue of ownership of land abutting the non-navigable lake, so long as those rights are exercised reasonably.[19]

With respect to navigable lakes and rivers, a series of Washington decisions have recognized that upland owners had the right to receive accretions and relictions.[20] The leading case is probably *Ghione v. State*, in which the Washington Supreme Court distinguished Washington Constitution Article XVII.[21] That provision of the Washington Constitution provides that the State of Washington owns the beds and shores of all navigable waters in the state up to the line of ordinary high tide.[22] The *Ghione* court explained that the Washington Constitution did not change the general rule about where the property line was with respect to the shifting line of ordinary high tide. The *Ghione* court also distinguished a Washington statute that provided that, if the state sold tidelands or shorelands, the state would own any accretions to those lands.[23] The court interpreted this

statute to apply only to tidelands and shorelands below the line of ordinary high tide, and not to accretions in the usual sense.

The Washington law on littoral rights has also been complicated by the fact that many tidelands were sold in the past to private owners, and some of those tideland tracts were subsequently severed from the adjacent upland parcels. A number of cases deal with the respective rights of these types of owners and recognize that the upland owner retains no rights over the tidelands, including no right to access open water at low tide.[24]

With respect to littoral rights along the ocean shores of the state, the case law is not entirely settled. Most of the cases have arisen in Pacific County, which has experienced very large accretions over the past century. One study from the City of Long Beach reported approximately 575 feet of accreted dunes between 1968 and 1990.[25] Because of these large accretions, title companies began demanding quiet title actions before issuing insurance on the accreted property. Many of the resulting lawsuits were determined against the littoral owners. One such case went up to the Washington Supreme Court. In *Hughes v. State*,[26] the Washington Supreme Court held that the State of Washington's unique interest in these tideland properties prevented application of the common law rule vesting accretions in the upland owner. The *Hughes* court distinguished *Ghione* and other cases as being applicable to lakes and not to oceanfront tidelands. The *Hughes* decision was appealed to the United States Supreme Court, which overturned the Washington State Supreme Court based on the fact that the plaintiff in *Hughes* derived her title from a U. S. Government patent that predated statehood. Accordingly, federal common law applied, and the accretions for the property conveyed by federal patent pre-statehood belonged to the upland owner.[27] The only relevant litigation since that date was the *Columbia Rentals* case, which was brought by a number of hopeful property owners who had previously lost their littoral right to accretions in quiet title actions.[28] Those cases sought to overturn the prior decisions based on the United States Supreme Court decision in *Hughes*, but their suits were barred by res judicata.[29]

Because there has been little litigation since *Hughes* and *Columbia Rentals*, there is a question as to whether the *Hughes* decision would apply a fixed boundary (as of statehood) to properties that were not transferred by federal patent pre-statehood. The practice of the Washington Department of Natural Resources, however, seems to be that accretions and relictions are dealt with in the same manner as under common law.[30]

All of this is to say that the Washington law with respect to littoral and riparian rights is considerably less liberal to property owners than the law of Florida. If as a result of the *Stop the Beach Renourishment* decision, the State of Washington took the highly unlikely decision to institute a similar beach restoration program to fill lands owned by the State, there would not seem to be anything unique in Washington riparian and littoral rights law that would prohibit such a program.

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1 560 U.S. ____, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010).

2 In a somewhat surprising turn of events, Justice Stevens recused himself just prior to oral argument of the case. Justice Stevens declined to comment, but it came to light in the blogs that Justice Stevens owned condominium property in Fort Lauderdale that was located in a renourishment zone similar to the properties in the case before the Court.

3 Fla. Const., Art. X, §11. With respect to tidal waters, the term mean high water line is used interchangeably with the term line of mean high tide.

4 Traditionally, the term "riparian" rights is associated with those rights enjoyed by virtue of owing land abutting a river or stream; and the term "littoral" rights is associated with those rights enjoyed by virtue of owning land abutting a lake or the ocean. Frequently, the term "riparian" is used to designate both types of rights. *See Hefferline v. Langkow*, 15 Wn. App. 896, 899, 552 P.2d 1079 (1976). In the *Stop the Beach Renourishment* opinion, the term "littoral rights" is used, so this article uses that term.

5 *Broward v. Marbry*, 568 Fla. 398, 50 So. 826 (1909).

6 *Board of Trustees of Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, (Fla. 1987).

7 Fla. Stat. §§161.011-161.045 (2007).

8 The City of Destin is located in the Emerald Coast region of the Florida Panhandle on a narrow peninsula between the Gulf of Mexico and Choctawhatchee Bay.

9 *Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection*, 27 So.3d 48 (2006).

10 Citing to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1008, 1028-1029, 112 S.Ct 2886, 120 L.Ed.2d 798 (1992).

11 *Id.*

12 505 U.S. at 1029.

13 471 A.2d 355 (N.J. 1984).

14 703 N.W.2d 58 (Mich. 2005).

15 *Kellogg v. Harrington*, 149 Wn. App. 1054 (2009).

16 447 U.S. 74 (1980).

17 449 U.S. 155 (1980).

18 RCW Ch. 90.58; *see e.g. May v. Robertson*, 153 Wn. App. 57, 218 P.3d 211 (2009).

19 *Hefferline v. Langkow*, 15 Wn. App. 896, 552, P.2d 1079 (1976).

20 *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946).

21 *Id.*

22 Wash. Const. Art. XVII, §1.

23 1927 Wash. Laws, Ch. 255. This statute as amended is now codified at RCW 79.125.440.

24 *E.g., Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944). There is an excellent discussion, on which this article relies, of the fluctuating boundary cases in The Washington Real Property Deskbook, Chap. 116 (State-Owned Public Lands) by M. Grossemann, P. O'Brien, S. Reneaud, E. Rushing, J. Schwartz, J. Shorin and C. Thompson.

25 City of Long Beach Dune Management Report (City of Long Beach, March 2000).

26 67 Wn.2d 799, 410 P.2d 20 (1966).

27 *Hughes v. State of Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).

28 *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 576 P.2d 62 (1978).

29 *Id.* As a result, the land ownership pattern in some parts of the Pacific County beachfront is somewhat gap-toothed, with some private ownerships including hundreds of feet of accreted dunes, and with other dunelands owned by the State of Washington.

30 *See* WAC 332-30-106 (1) and (5).

Ecosystem Service Credit Markets

By Theda Braddock with Olivia Frazao, Mission Markets, Inc.

This article presents an overview of ecosystem service markets, with a special focus on the three ecosystem services most relevant to the Pacific Northwest: carbon, wetlands, and fisheries catch shares. There are many other ecosystem credit types, including water quality or nutrient credits, water temperature credits, water quantity credits, renewable energy credits, endangered species conservation banks, transferable development rights, and conservation easements. Stormwater runoff impacts will be offset by nutrient credits.

Ecosystem service credit markets are markets in which a buyer and seller trade ecosystem service credits with the objective of, in the typical buyer's case, offsetting a regulated impact, and, in the seller's case, realizing a profit while restoring the environment.[1] These markets allocate ownership and pricing of the services that nature has been providing for free, resulting in the "internalization" of their value into our economy. Internalizing what used to be negative or positive externalities allows companies and individuals alike to take nature's services into consideration when conducting business. It creates opportunities in which those who can conserve ecosystem services can gain economically by doing so. In 2009, the voluntary carbon markets were at $387.4 million, a 47% decrease from 2008 blamed on the recession and Congress' lack of leadership.[2] The *State of the Biodiversity Markets*[3] reported the 2008 value of wetlands markets in the U.S. in a range between $1.1 - $1.8 billion.

Ecosystem markets can be managed, and thus priced, in three ways. First, governmental entities may price the ecosystem service in question, and fine those that damage it, or pay those who protect the service.[4] Second, pricing can arise through a voluntary, single transaction. This isolated transaction, however, does not indicate the existence of a market as a "market," by definition, requires multiple buyers and sellers establishing a price through a constant supply-and-demand process. Multiple voluntary transactions, on the other hand, may succeed in establishing a market over time. Third, ecosystem markets can be regulated by the government through a cap-and-trade system, which then creates a market in which multiple buyers and sellers determine price through supply-and-demand of what the government, by fiat, has established as a scarce resource.

Carbon

The concept of trading carbon credits was formalized in the Kyoto Protocol[5] with the goal of creating economic incentives to lessen the amount of carbon emitted into the atmosphere. Carbon credits assign a value to carbon emissions so that one carbon credit equals one ton of carbon dioxide. Because carbon is a greenhouse gas that contributes to global warming, assigning carbon a value that can be used economically allows the market to internalize what was before an externality: carbon emissions. In order to be accepted as legitimate, carbon reductions must be verifiable, permanent, and have "additionality" in which carbon reduction is ensured to have occurred not as a business-as-usual scenario, but instead as an additional endeavor that would not have happened without the project at hand.[6]

Carbon trading occurs both in regulatory and voluntary markets.[7] Regulatory, or "cap and trade," markets such as the European Union Emission Trading Scheme, work under a "cap" which limits the total amount of carbon that can be emitted in the country or region. This cap requires each of its market actors themselves to emit a limited amount of carbon. If a country emits more carbon than its allowance, the individual source-companies within that country must buy carbon credits to offset their emissions. If, on the other hand, a company is able to invest in new technology that allows it to lower its carbon emissions so as to stay within allowable bounds, it will do so as long as such an investment is less costly than simply buying carbon credits to offset its emissions. Companies that find it economically worthwhile to invest in carbon saving technologies can do so, and sell their extra carbon allowances to those companies for whom the credits are less expensive than investing in lowering their own emissions, thus creating the carbon trading market. For a successful carbon reduction, caps are designed to successively lower through the years, driving up the price of carbon credits, thus making it more difficult to avoid investing in lowering emissions.

The United States did not sign the Kyoto Protocol. To date, carbon markets in this country exist on a purely voluntary basis. A variety of activities and programs, such as those relating to forestry, agriculture, and transportation, can result in the creation of carbon credits that can be sold on these voluntary carbon markets. There is no national exchange, but some regional exchanges are quite sizeable.[8]

Carbon credits may be generated through "afforestation," the planting of a new forest where one did not exist before 1990, and "reforestation," or bringing a forest back to existence in an area in which it had previously been destroyed.[9] In addition, "improved forest management," allows for an increase in the carbon stock of a forest and a decrease in the amount of carbon emitted into the atmosphere.[10] In the agricultural sector, soil carbon sequestration practices, including best management practices such as reducing tilling and plowing land to conserve organic matter in soil, can generate carbon credits.[11]

Wetlands

Under the 1977 amendments to the 1948 Federal Water Pollution Control Act, the Act acquired its common name, the "Clean Water Act. Section 404, 33 USC §1344, of the Clean Water Act requires a permit to discharge dredged or

fill material into "waters of the United States," including wetlands. As relevant to ecosystem services, wetlands functions are recognized as providing an ecosystem service.

In the Section 404 permit process, after completing the sequencing required by 40 C.F.R. Part 230, unavoidable impacts must be mitigated, thus creating the unit of restoration. "Mitigation credits" may be developed *en masse* in a "mitigation bank" by completing, monitoring, and maintaining a large scale wetland restoration, rehabilitation, reestablishment, or, in some cases, creation project with the approval of an Interagency Review Team, or "IRT," chaired of the U.S. Army Corps of Engineers (Corps). Credits from the mitigation bank may be purchased to offset an equal amount of unavoided impact to another wetland so long as the impact and the bank are located in the same watershed. Many states and local jurisdictions have similar statutes and regulations.[12] Wetland mitigation credits may be purchased as part of the permitting process, or they may be purchased by environmentally-conscious investors on a voluntary basis.

In 2008, the U.S. Environmental Protection Agency (EPA) and the Corps issued 33 C.F.R. Part 332 declaring mitigation banking to be the preferred source of mitigation restoration credits over in lieu fee programs and individual restoration projects. This regulatory stimulus will only increase interest in developing more mitigation banks which, at the national level in 2005, stood at 450 approved mitigation banks (59 of which have sold out of credits) and an additional 198 banks in the proposal stage.[13]

Fisheries Catch Shares

Catch shares originated in the 1970's in Australia, New Zealand, and Iceland through Limited Access Privilege Programs (LAPPs). In the U.S., catch shares are now required by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 USC §1801 *et seq*.. Federal fishery management plans must establish annual catch limits and accountability measures by 2010 for stocks subject to overfishing, and by 2011 for all others. In December 2009, NOAA released a Draft Catch Share Policy determining catch shares going forward in 2011.[14]

Fisheries catch shares work under the typical cap and trade system used for other environmental services. In this case, the amount of each type of fish that each individual, organization, or community is allowed to catch is limited to an "Individual Fishing Quota" or "IFQ." These entities can either fish their own quotas, or, if these IFQs are the types that are considered an Individual Transferable Quota (ITQ), they can trade their quotas with one another, or even temporarily lease them to each other.[15]

Conclusion

The development stages of a restoration project necessarily require the developer to make a substantial up-front investment in the loss of the opportunity to use the restored property in what would have been destructive but lucrative ways, as well as incur negative cash flow from the costs of permitting and the actual restoration work.[16] Once the credits have been sold, revenues from selling credits return the developer's investment, pay for project maintenance, credit monitoring and verification, and the opportunity cost of not using the land in previously destructive ways.[17] The uncertainty, however, of being able to sell credits at a high enough price has served as a barrier to market-entry.

If a project developer had more ready access to capital and more assurance that the credits could be sold at a profit, more restoration projects would be developed. Until now, however, most of the transactions have occurred on an individual, private basis with no opportunity for transparency, price discovery, and public verifiability of the credits.

An organized, transparent marketplace is thus needed to facilitate these types of interactions. On the Chesapeake Bay, for example, the Bay Bank is organizing a regional marketplace for local ecosystem service credits. Markit conducts due diligence of credits and maintains a registry, but not a trading platform, of them. In 2008, the Willamette Partnership initiated its "Counting on the Environment" program to use a shared accounting system for quantifying impacts and benefits to ecosystem services; to complete pilot projects to demonstrate the environmental benefits of the functions-based accounting system and compare its results with those from other approaches; and to develop the tools farmers, foresters, and other land managers need to evaluate and participate in emerging ecosystem service markets, to prioritize restoration actions when making land management decisions, and to facilitate participation in the market for doing the right kind of restoration actions in the best places. There is, however, no local or regional trading platform for Puget Sound ecosystem credits.

At the national and international level, Mission Markets Earth, based in New York, is an online credit trading platform for all ecosystem service credits. Ecosystem service credits listed on the Mission Markets Earth webpage must be registered with Markit to ensure their credibility. Sellers list their projects and make project documentation and background information downloadable. Buyers and investors may browse the marketplace searching for ecosystem service credits by type or location. The objective of Mission Markets Earth in the creation of a central marketplace is to stimulate the development of a true market in ecosystem service credits.

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1 *See* UNEP, *The Economics of Ecosystems and Biodiversity for National and International Policy Makers*, 2009.

2 Hamilton, Katherine, *et al.*, *Building Bridges: State of the Voluntary Carbon Markets 2010*, Bloomberg New Energy Finance and Ecosystems Marketplace, June 14, 2010.

3 *See* Madsen, Becca *et al.*, 2010, *State of Biodiversity Markets Report: Offset and Compensation Programs Worldwide*, available at http://www.Ecosystemmarketplace.com/documents.

4 These government incentives, however, have not proven strong enough to maintain necessary levels of conservation of ecosystem services. *See* Hartwell, Aylward, *et al.*, *Ecosystem Service Market Development: The Role and Opportunity for Finance*, Bullitt Foundation, March 2010.

5 The Kyoto Protocol was originally drafted in 1997. It became effective in 2005 upon the ratification by countries representing 55% of global greenhouse gas emissions, not including the United States.

6 *A Consumers Guide to Retail Carbon Offset Providers*, Clean Air-Cool Planet 2006.

7 Pollution Probe, *Emissions Trading Primer*, 2003.

8 Washington's regional market will be the Western Climate Initiative.

9 Voluntary Carbon Standard Association, *Tool for Agriculture, Forestry and Other Land Uses ("AFOLU") Methodological Issues*, 2008

10 *Id.*

11 *Id.*

12 In Washington, mitigation banks are regulated under WAC 173-700. Washington's IRT include staff from, the Corps, EPA, and the Washington Department of Ecology. Local governments, appropriate tribes, the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service may be invited when relevant.

13 As of March 2010, there were 19 approved mitigation banks in Washington with a handful more awaiting review and approval.

14 Available at http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/draft_noaa_cs_policy.pdf.

15 Twenty-eight fisheries in the U.S. have adopted individual transferrable quotas. As described in the South Atlantic Fisheries Management Council IFQ Factsheet, "IFQ/ITQ programs have been implemented in U.S. federal waters in the Alaska halibut and sablefish fisheries, the south Atlantic wreckfish fishery, and the mid- Atlantic surfclam and ocean quahog fishery. IFQ/ITQ or DAP/LAPP programs are currently being developed and/or implemented in the Gulf of Mexico red snapper and grouper fisheries, Alaska groundfish trawl fishery, and the Pacific trawl groundfish fishery."

16 *See* Hartwell, Aylward, *et al.*, *Ecosystem Service Market Development: The Role and Opportunity for Finance*, Bullitt Foundation, March 2010.

17 *Id.*

Water Right Valuation in the Northwest

By Harry Seely, WestWater Research

In most locations in the Pacific Northwest, available water supplies are fully appropriated. Opportunities to develop new water infrastructure to supply growing agricultural, urban, and industrial water needs are challenging due to high capital costs, extended planning and construction periods, environmental constraints, and scalability issues among other factors. Due to the limited availability of "new" water supplies, some are choosing to enter the water rights market in order to access water that has been previously allocated to another use or user. As a result, water right trading in the Pacific Northwest is becoming an increasingly important element of water supply planning and management.

While water right trading activity is increasing in many locations, the ability of water right markets to efficiently reallocate supplies is hampered by the same regulations and institutions that govern water rights. However, it is also worth noting that it is this same body of regulations that provide and protect the value of water rights. While water right regulations often limit the level of trading activity, one of the primary impediments to successfully completing water right transactions stems from vastly different price expectations between buyers and sellers. The general lack of reported water right price information and the heterogeneity among water rights and regional water markets makes it difficult for market participants to assess fair value. This article provides a brief summary of water right transaction activity to illustrate the primary factors affecting water right values. The lack of price transparency in the Pacific Northwest water rights markets makes understanding market trends and how they relate to a specific water right a critical element of negotiating a successful transaction and improving the efficacy of water right markets.

Water Right Prices in the Pacific Northwest

Contrary to claims by some, water and water rights are not the "next oil." Water rights are not a commodity with uniform characteristics that can be easily traded. In many cases, the potential trading partners for an individual water right are limited due primarily to regulatory policies limiting its mobility and potential application to new uses. As a result, arriving at a value for a water right can be a challenging task. It is rare that there are a large number of sales of similar water rights within a region from which to establish value. More often, there are relatively few sales in a region that involve water rights with significantly different physical and legal characteristics, making comparison

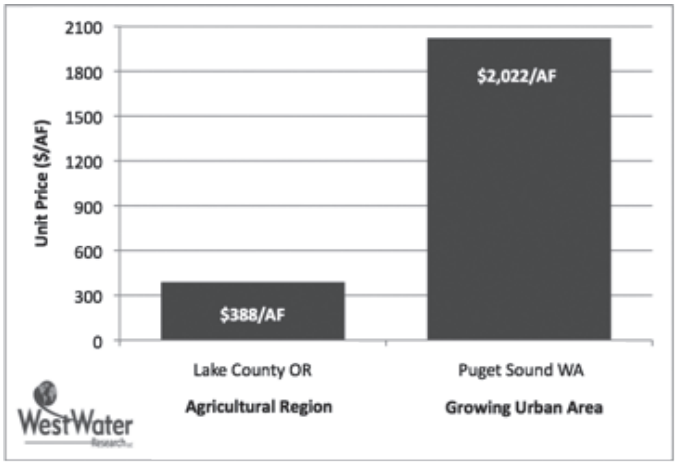
difficult. Under such circumstances, it is possible for market participants to arrive at greatly differing value conclusions even when relying upon the same set of information. Often, these differences arise due to the lack of a clear analysis and understanding of the factors influencing water right values. This article presents observed water right price information in order to highlight some of the important factors influencing water right values in the Northwest. These factors, among others, should be considered by water right market participants seeking to establish a reasonable asking or offer price and avoid prolonged or failed negotiations.

Location:

The geographic location of a water right is of primary importance when assessing its value. It is common in negotiations for one party to report prices from other markets as support for their assessment of value. If appropriate care is not exercised, this can result in values that are vastly different from the market realities relevant to the subject water right. The geographic location and water source associated with a water right define the market opportunities afforded the right and by extension its value. While policies governing changes to water rights differ some among the Pacific Northwest states and even within a state, they determine the extent to which the attributes of a water right can be changed. The geographic mobility of water rights is generally confined to a specific basin or aquifer. Further, it is often easier to move a surface water right downstream to a new point of diversion rather than upstream due to the potential injury to other water rights and public interests that could result from the upstream move. Groundwater right transfers can be equally complex due to potential effects on surface water systems. As a result, water right markets operate within confined geographic boundaries and application of water right values from one market to a water right located in another may be inappropriate due to differences in end use opportunities. For example, water rights situated in markets with limited growth in high valued end uses for water have lower values than those that can be transferred to meet growing municipal and industrial water needs.

Figure 1 shows the average prices for water rights traded in Washington's Puget Sound region and Lake County, Oregon. The Puget Sound region has experienced significant urban growth over the last decade and increasingly tight water supplies in some locations due primarily to concerns about impacts to instream flows. In comparison, Lake County has experienced limited population and industrial growth. Water use is primarily associated with agricultural production of hay crops and water right prices are driven by agricultural profit potential. As a result of these market differences, water right prices in Lake County are significantly lower than those in the urbanizing Puget Sound region. This highlights the importance of relying upon water right prices within a specific market when assessing value or, where necessary, drawing upon prices from markets with similar demand characteristics.

Figure 1: Potential End Use and Water Right Prices



Water Quantity:

Most water right markets show a consistent, negative relationship between volume traded and unit price.[1] That is, large water rights tend to attract lower per-unit prices than small water rights. These scale economies are attributable to stable transactions costs among water right transfers regardless of quantity transferred, and the low levels of demand that exist for large water rights. This relationship is particularly apparent in the market that is developing around exempt well mitigation requirements in Kittitas County, Washington and elsewhere. Currently, a large property developer in Kittitas County with excess water rights is marketing small volumes (less than one acre-foot) to residential home developers for more than ten times the market value observed for water right transactions in the region in excess of 100 acre-feet. The ability to capture these high prices is primarily due to the high transaction costs that would be incurred by the buyer to individually find, negotiate, and obtain regulatory approval for the transfer of an alternative water right. The need to accommodate the reallocation of water rights to end users with small water volume requirements is one of the factors influencing the development of "water banks" in the Pacific Northwest. Figures 2 and 3 show the relationship between transaction volume and water right prices in Washington and Idaho.

Figure 2: Transaction Volume and Water Right Prices in Eastern Idaho

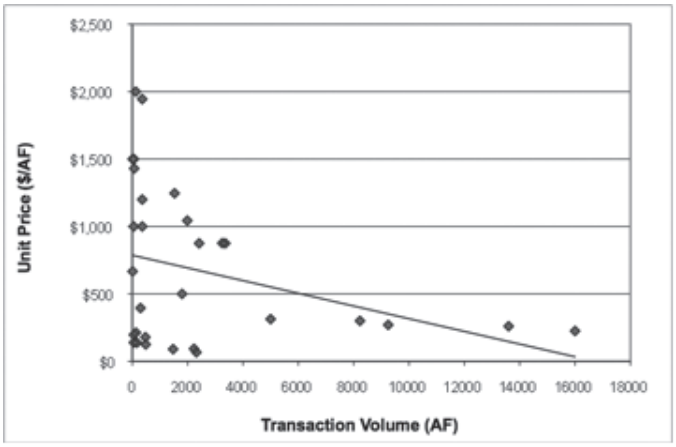
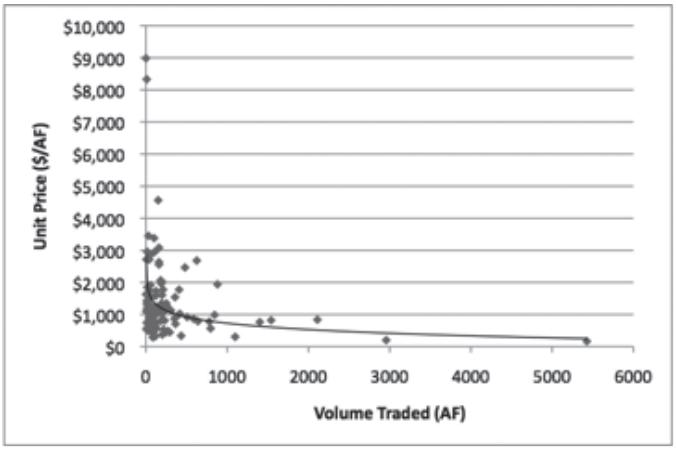
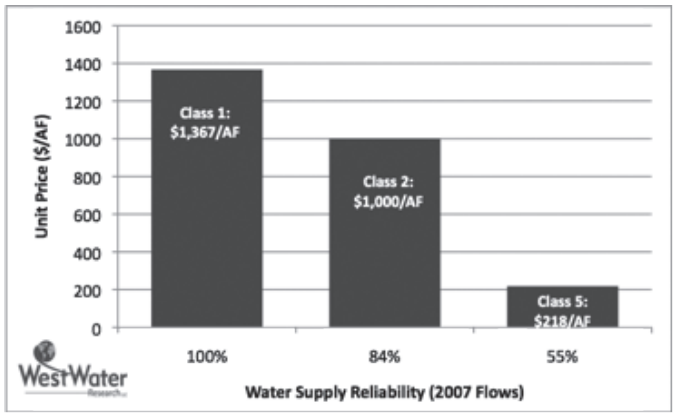


Figure 3: Transaction Volume and Water Right Prices in Eastern Washington



to assess the influence of seniority / reliability on value. One notable exception is the reverse auction for water rights to Manastash Creek held by Washington Rivers Conservancy (WRC) and Washington Department of Ecology (Ecology) in 2008. Manastash Creek, a tributary to the Yakima River, has historically run dry in sections due to upstream agricultural diversions. There is an ongoing effort to restore flows and allow passage for anadromous fish moving to and from spawning and rearing habitat located above the agricultural diversions. Water right purchases from willing sellers were pursued as one of the tools available to improve flows. WRC and Ecology held a reverse auction in an effort to promote participation and equity among water right holders and to minimize the costs of negotiation. As in many locations, water rights to Manastash Creek have varying priority dates and associated water supply reliability. Due to flow limitations, many of the water rights to the creek are curtailed beginning in July each year. As a result, water supply reliability played a leading role in determining prices in the reverse auction. As shown by Figure 4, the most reliable water rights purchased in the auction (Class 1) were priced significantly higher than the least reliable water rights purchased (Class 5).

Figure 4: Manastash Creek Reverse Auction



Seniority/Reliability:

The ability to access a reliable supply of water has been worth fighting for in the Pacific Northwest since the late 1800s. Water rights with the most senior priority dates to a specific source tend to be more valuable than those with later priority dates that are subject to curtailment during drought periods. In more active water markets, water right prices correspond to priority dates, with senior rights attracting higher prices than junior rights. In the Pacific Northwest, water right trading has been mostly limited to senior and reliable water rights. That is, buyers have had little interest in acquiring water rights with limited reliability as they would be required to augment supplies by developing storage facilities to "firm up" the supply. As a consequence, there is limited market information available

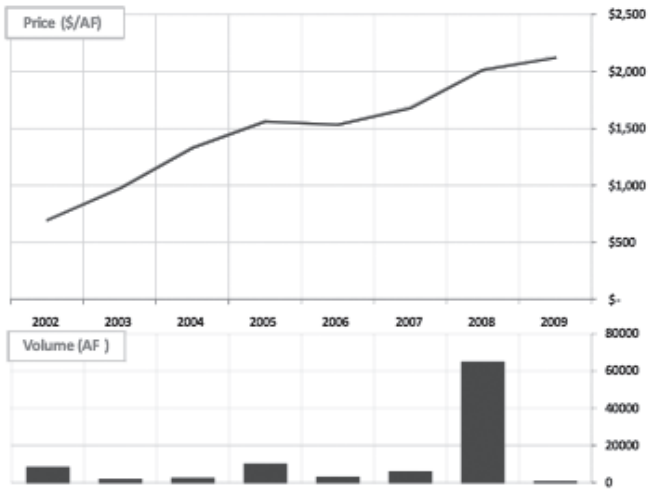
Water Right Price Appreciation:

There is a common sentiment that water right prices will always rise due to scarcity and growing demand. In many markets, there has been a persistent, upward trend in prices. More recently however, some formerly "hot" water right markets have experienced price declines matching or exceeding the real estate market. For example, in the Reno, Nevada market, water right prices averaged more than $30,000 per acre-foot in early 2006 at the height of the real estate boom. Since then, prices have fallen below $10,000 per acre-foot. In the Pacific Northwest, water right prices remain comparatively low. When compared to more active market regions, water right prices in the Pacific Northwest have significant opportunities for appreciation before they

will begin to track with the broader real estate market. As a result, market data indicate that water right prices have held their ground or increased in recent periods even though home and land values have declined. As shown by Figure 5, average water right prices in Washington increased at an annual rate of approximately 18% between 2002 and 2009. However, changes in average water right prices can overstate time trends in prices because they do not control for other factors influencing values. A preferable method for calculating water right appreciation rates is presented in the following section.

Due to the limited number of water right sales within a specific market, it is often necessary to rely upon older sales to establish value. While this can be dangerous as evidenced by the recent and precipitous decline in the real estate market, consideration of prices from previous periods can help to bolster confidence in values observed from more current transactions. Price changes obtained from market data offer one useful approach to incorporating price information from previous periods into current valuation assessments.

Figure 5: Trading Trends in Washington's Water Rights Market, 2002 - 2009



Statistical Analysis Techniques Applied to Water Right Sales Data

As demonstrated in the preceding section, several water right attributes and water market conditions determine water right values. However, summary statistics fail to provide complete information regarding the relative influence of each price determinant. To help address this limitation, a regression analysis was completed to simultaneously consider a number of price determinants. The price model developed quantifies water right prices in Washington according to a number of water right attributes and market characteristics. The analysis relies on a dataset of permanent water right sales in Washington. In addition, regression techniques applied to water right leasing data in the Yakima Basin estimate the influence of market conditions on annual lease rates. This section summarizes the results of the statistical analysis to facilitate understanding of the estimation results by non-econometricians.

Permanent Sale Price Model:

The first price model estimates prices for permanent water right transactions in Washington. The model looks at how price is influenced by important transactional characteristics such as transaction volume, year the transaction occurred, the buyer's end use, water source, location, and a variable separating predominately non-consumptive water rights (e.g., hydropower, stock water) from water rights with a high proportion of consumptive use (e.g., irrigation).

The price model results indicate that:

- Water right unit prices in Washington decline at a decreasing rate with increases in volume. That is, there is a relatively steep decline in prices as volume increases from low levels. However, the rate of price decline tends to diminish as volume increases. According to the results of our analysis, a water right to 5 acre-feet would have a unit price 26% higher than a water right to 50 acre-feet.
- As previously described, water right prices have been appreciating over time in Washington. The more simple analysis of average annual prices indicated an annual appreciation rate of approximately 18%. However, the price model shows that water right prices have been increasing at a more modest rate of 7.5% annually.
- The buyer's end use for a water right influences unit price. In general, water purchased in support of *agricultural* and *environmental* uses trade at lower unit prices. According to the results of the model, a water right purchased by an agricultural buyer is priced at 67% of the value that an urban buyer would pay. Similarly, environmental buyers have paid 55% of the prices paid by urban buyers.
- Groundwater rights tend to be priced 28% lower than surface water rights possibly due to the increase costs associated with accessing groundwater and the expanding mitigation market whereby buyers are retiring surface water rights to allow for increased groundwater withdrawals.
- Water right prices in western Washington tend to be 22% higher than those in eastern Washington.
- Water rights with a low proportion of consumptive use are priced lower than water rights with high levels of consumptive use due primarily to the different end

uses they can serve. Nonconsumptive water rights tend to only be purchased for environmental purposes (e.g., improve instream flow) whereas consumptive water rights can be changed to meet a variety of new uses. On average, fully nonconsumptive water rights are price at approximately one-third the value of consumptive rights.

Water Right Lease Price Model:

Water right leasing is a growing component of the Washington's water rights market. In fact, central Washington's Yakima River Basin is one of the more active water right lease markets in the Pacific Northwest. Irrigators and urban entities with junior ("proratable") water rights lease senior water rights for single years during droughts periods in order to maintain a firm supply. Environmental interests also participate in the Yakima lease market to improve instream flows in tributaries. This section describes a simple price model for the Yakima Basin lease market with a particular focus on the influence of climate conditions on lease prices.

Water right lease markets tend to be most active during dry years when some water right fall "out of priority" due to low flow conditions. Unlike permanent sale markets, lease market prices adjust to the severity of drought. That is, prices increase with the level of drought. The lease rate model expresses the natural logarithm of unit prices in lease agreements ($/acre-foot/year) as a function of transaction year, the buyer's end use for acquired water, and a measure of drought conditions called proration. In the Yakima Basin, water rights perfected subsequent to 1905 are "proratable," meaning that they are subject to curtailment in drought years. The variable "proration" is the percentage of full yield that proratable water rights were allocated during the year.

The price model results indicate that:

- Similar to the permanent price model presented above, the lease prices in the Yakima Basin have been increasing at an annual rate of 5.8%.
- While there have been relatively few leases by urban users, those that have occurred are priced significantly higher than leases by agricultural and environmental interests. On average, urban buyers have paid more than double the prices paid by agricultural and environmental interests.
- Climate conditions in the Yakima Basin influence leasing activity and annual prices. According to the results of the model, a one percent decrease in the water allocation to proratable water right holders results in a 0.52% increase in the lease price during that year.

Summary

Unlike most other assets, water rights in the Pacific Northwest are traded with limited price information. Often buyers and sellers are unwilling to be the first to establish a price in a negotiation for fear of paying too much or asking too little. Even water rights that are advertised for sale are often done so without listing the asking price. This price uncertainty can result in prolonged and failed negotiations which is costly to both parties in a transaction. Water right valuation is becoming increasingly important in the Pacific Northwest as water rights are traded with greater frequency to accommodate new agricultural, environmental, and urban water demands. As demonstrated in this article, water right values can vary widely as a result of differences in water right legal and market characteristics. A clear understanding of the factors that influence water right prices can assist in establishing price expectations for buyers and sellers and promote water right market efficiency. This article describes some of the primary factors influencing water right prices in the Pacific Northwest through presentation and analysis of market data. The results demonstrate that water right prices vary with transaction volume, potential new uses, reliability, and climate conditions among other factors. Market participants should account for each of these factors when establishing a price for a water right in order to accurately and fairly assess value.

Harry Seely is a principal with WestWater Research and has fifteen years of experience in agricultural and water resource economic analysis. He holds a M.S. in natural resource and agricultural economics from Oregon State University and a B.S. in economics from Pacific Lutheran University. Over the last decade, Mr. Seely has estimated the value of water in support of federal and state level feasibility studies, private water right transactions, and environmental flow restoration projects. He has developed a variety of economic models as part of interdisciplinary teams to assess the economic costs and benefits of water management programs and supply development projects throughout the West. In addition, he has conducted numerous water right appraisals and water market analyses for water market participants, lending institutions, and property investment groups in the Pacific Northwest.

1 There are some limited exceptions to this. For example, buyers in the Truckee River water rights market in Nevada paid a premium for larger blocks of water rights due to the costs required to assemble small water rights. Several brokers were operating in the region to aggregate small water rights and resell them at higher prices to real estate developers and municipal water providers.

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