

Whatcom County Business and Commerce Committee
Summary Notes with Presentation Transcript
June 21, 2021

Voting Members present: Debbie Ahl, Ryan Allsop, Paul Burrill, Clark Campbell, Pete Dawson, Casey Diggs, Andrew Gamble, Troy Muljat, Bob Pritchett, Brad Rader, Sarah Rothenbuhler,

Nonvoting members present: Rud Browne, CJ Seitz

Don Goldberg, Michael Jones, Satpal Sidhu, Eva Schulte,

Public present: Jennifer Noveck, Gina Stark, Greg Ebe, Marty Maberry, Guy Occhiogrosso, Jed Holmes, Mauri Ingram, Mindy Pelton, John Michener, Cara Buckingham

Call to Order

Approved Meeting Minutes from May 12 and 17, 2021

Roll Call & Introductions

Asked for public comments and did introductions for all committee members, then members of the public.

Announcements

Rud leaving for another meeting at 11:55a. Asked to present earlier in meeting if possible.

Administrative Business

Approved Meeting Minutes from May 12 and 17, 2021

Motion introduced to streamline reporting while remaining in compliance with County public meeting protocols.

- Action: Motion not approved
- Discussion: Debbie proposed alternative motion to continue doing what committee does now, but figure something else out at July meeting.
- Action: Motion approved by all committee members
- Committee will revisit use of Zoom meeting recordings for capturing full meeting or presentations only.

Presentation: *Nooksack River Water Rights Adjudication – Implications to Whatcom County Farmers*, Marty Mayberry & Greg Ebe

Key Points

- MM: This is a very complicated issue. This is a legal process where the state sues every water user, and they have to defend their use in court. If you do not enter the process, you have no standing at the end, you lose what you have. There's two parts of this: adjudication at state level, where all water users have to defend user, where we feel Ecology should be the ones defending the decisions. The second is the tribal claim.
- MM: Almost all users will lose water, agriculture is particularly vulnerable due to the use it or lose it clause that can go back to 1967, if there is a 5-year period where it wasn't used or used less, that's your water rights. We do not think the majority of ag will survive the process. We got started on our farm, we have 120 different rights we will have to defend, some are small, some are large.
- MM: The second part is the tribal claim to the basin. This is one of the risks to the entire community. Right now, almost all water rights are senior to the state's min flow. If the tribes are granted, and they have strong legal grounds, they will be granted a certain percentage of the water flow, all other use becomes junior. So potentially, all users could be subject to curtailment. If the Nooksack and tributaries are running low, it could be shut off. Everybody has risk here.

Some of the longer-term risks to community and future, if ag goes away, our land use plan at the county level gets torn asunder. This will start an avalanche of legal cases and court cases that will take a long time.

- GE: Water law was set up that surface water. That was set up in 1917. We feel this process has no benefit to salmon if we are forced to use surface instead of ground. We are currently doing a lot of projects and we are trying to restore this habitat.
- GE: We have an abundance of water, it's really an issue of making sure the water is at the right place at the right time and this process does not do this at all.
- MM: One of the complications in the Yakima case, these flows will not be able to be met. We have no reservoirs. Yakima does. If there is a senior flow right, with no reservoirs, and we know what the water use is in this community, it will shut everything off and it won't meet those flows during the low flow period, because Nooksack is dominated by snow melt.
- MM: Our alternative is negotiated settlements. A couple were just done in the Puyallup and Dungeness so far it has been odd that Ecology has taken a negative view of a negotiated settlement.
- GE: Everyone needs to come to the table. We think it is the only way we have a future. And we feel fish recovery, salmon recovery, and agriculture are tied together. Ag allows green spaces, if we are paved over, it creates a lot of problems (flash flooding, etc.). We would like to have everyone come to the table. The tribes are concerned it won't be binding, but once you have one, it could be taken to court and made binding.
- GE: We really see rather than spending hundreds of millions of dollars and decades in court, other than everyone is decided to be senior or junior rights holders, why not spend some resources and time on developing alternatives and projects together? As Sarah mentioned, there is a disincentive for us to save water, disincentive for us to convert from surface to ground, which impacts salmon, that is a bit of a reservoir for us. Most of the winter we deal with flood fighting and drainage, it is only a short period of time in summer we are irrigating and have lower flows in the Nooksack, in August the average is 2000 CFS, we are using less than 200, so 90% of the flows are there for the salmon. It is ridiculous to think we are going to spend millions of dollars, decades, fighting for no real solution and no creativity on how to fight this problem.
- Marty and Greg oppose adjudication – ag, private, cities, PUDs – have to prove perfected our water rights. In agriculture case, have to prove used water right to its full extent or lose it. They think a negotiated settlement would have a better outcome for water users and conservation efforts.
- GE: Adjudication would be extremely costly to defend.
- GE: Have international borders to deal with – surface water extends into Canada.
- GE: Typical water user – some have spent between \$10k - \$100k defending a water right. We know there are a lot of farms that don't have those resources and will most certainly be lost. Some might be because of conservation efforts.

Possible Follow Up/ Action Items

- Marty and Greg will forward information about the Puyallup and Dungeness negotiated water rights settlements to committee.
- Committee to consider drafting a letter in support of negotiated settlement.
- Committee offer any suggestions on organizations for topic speakers to share this information. Could include AGC, Rotaries, BIAWC, Sustainable Connections, Realtors Assoc, etc.

Presentation Transcript

Greg Ebe – Wish could say excited to present on this. Close to entering an adjudication process on water rights put forth by Dept of Ecology - DOE is the plaintiff and rest are defendant.

- This has been requested by Lummi and Nooksack Tribes - Made request to Federal Government around 8 years ago.
- This type of court case usually occurs in arid climates where water is scarce – which is certainly not the Nooksack basin.

- The DOE is excited to move the process forward.
- Concerned it puts all water users under the microscope – ag, private, cities, PUDs – have to prove perfected our water rights. In agriculture case, have to prove used water right to its full extent or lose it.
- This could date back to 100 years old.
- Very arduous process – can use some crop, power records and aerial photography.
- But in superior court defending something very high stakes. Farmland without water is not farmland.
- Have to hire attorneys, geo-hydrologists, engineers, etc.
- Cited Yakima Valley adjudication – only surface water.
- Nooksack – proposed to adjudicate surface and underground usage.
- Have international borders to deal with – surface water extends into Canada.
- Typical water user – some have spent between \$10k - \$100k defending a water right. We know there are a lot of farms that don't have those resources and will most certainly be lost. Some might be because of conservation efforts.
- Very scary process for us and there is a lot at risk. Marty Mayberry will talk about some of risks to community.

Marty Mayberry – I'm a berry farmer. This is a very complicated issue and difficult to finish up in a short time. This is a legal process where state sues every water-user, and everyone has to defend their right in court. If do not defend, you stand to lose everything.

Two parts:

- 1) Adjudication at state level where all users will have to defend their use.
- 2) Tribal claim

- 1) I believe almost all users will lose water. Agriculture is particularly vulnerable because can go back to at least 1967.
 - a. Mayberry thinks he has to defend 120 water rights alone.
- 2) Tribal claim to a base minimum flow – right now almost all water rights are senior to state minimum flow. If tribes granted and we think they have strong legal ground that they will be granted base minimum flow, all water rights become junior to that. Potentially all water use could be subject to curtailment is Nooksack or tributaries if running beneath base minimum flow.

If agriculture goes away, our land use plan at county level gets torn asunder. This will start an avalanche of legal and court cases that will take a long time. Feel the quality and value of open space that agriculture provides – but not just an agriculture issue. Long term risk is permanent change in county's economic base as well as land use plan. There will be a lot of pressure for down zoning.

Greg -- risks:

- Water rights set up in 1917. Some of oldest water rights are surface. If shut off more current rights, negative impact on habitat projects and could impact fish. In court case, no incentive to do that, open up to more development of current open space and ag lands.
- PUD has a 1965 water right which is relatively young.
- Better solution: Feels there should be a negotiated settlement to work together on solutions. Really a management issue to make sure water available at the right time in the right place.

Marty:

- One of complications of adjudication – in Yakima took 40 years – some people think Whatcom County will take longer. These flows will not be able to be met. If there is a senior flow right without reservoirs to meet the flows, you can shut it all off and it won't meet those flows in low

flow periods. The Nooksack is dominated by snow melt, so the only reservoir we have in the community is ground water.

- A couple of negotiated settlements have been done elsewhere – don't understand why DEO has taken an almost negative view of negotiated settlement.
- At one point, I asked our attorney, what can he tell me that this would not be an absolute disaster. Attorney said, couldn't tell him anything good except it would take so long, he could plan an exit strategy.
- There is no plan to figure out how to get water to people effected.

Q&A:

Sarah: It almost sounds like with the current system and measuring that it is counterproductive because if the farms are using water more efficiently, they are actually punished? Is that true. Second question, we have a lot of customers that involved in public utilities and dams, they are all talking about pressure on removing the dams. Funny I talked to a fellow this morning who said when he is walking into these meetings, he said there's such an agenda to shut down the dams, we are told just to agree and not participate anymore. It seems like we are trying to turn a renewable resource into a nonrenewable resource.

Marty: We don't have experience with dams or reservoirs in community, but you are right – there is a lot of disconnect. It appears DOE is focused on taking back as much water as can. If remove dams in certain areas, the impacts there make this look like nothing.

Rud Browne: One potential bit of hope – the mechanical solution is to do something where mouth of Nooksack meets salt water -- and one I think tribes would be supportive of. But it's expensive -- \$100M to quarter of a billion dollars. Very expensive.

Marty: (Response toe Rud) Have had multiple discussions with tribe – unfortunately when Jerry Freeman passed, those discussions curtailed. Sounds simple but not really. Not talking about pipes, talking about canals. If shut farms and communities off with water – farms don't come back once go out of business.

Pete Dawson: Thanks for time today – complexity of water rights beyond what can comprehend. What are the roadblocks to going to a negotiated settlement? Makes sense on about 100 different levels.

Greg: Everyone needs to come to the table. We feel fish recovery and agriculture really ties together. If going to have salmon recovery, need to have the habitat. If can bring everyone to the table. Rather than spending hundreds of millions of dollars over decades in court, why not spend some of the resources on alternatives.

Right now, as Sarah mentioned, there is a disincentive to conservation. Most of the winter we're dealing with flood fighting and drainage. It's just for a short period of time in the summer, dealing with drainage and irrigation. Using less than 200 CFM so 90% of the flows are there for salmon. It's ridiculous to spend millions of dollars fighting in court with no solutions or creativity to better approach the problem.

Pete: What keeps the process going down in different rout?

Marty: There are some efforts. In that case, county exec and council are leading that charge, but it takes everyone coming to the table and right now seems like ecology locked into adjudication process. Things misrepresented as to what that process is to the tribes. Encourages all of you to spread the word, talk to your legislators that there are better alternatives to adjudication.

Clark: Interested in negotiated settlements.

Greg: Former director of ecology when Dungeness was done – some tough negotiation -- but eventually reached agreement and got some projects funded to assist with the issue.

Clark: If have info on those two settlements or other examples to our group, be interesting to our group, be good model. Was flow part of negotiated settlements. Familiar with another case in Oregon where took an economic model where senior water rights holders could sell and get compensated. Then that senior water right transferred to in stream flow which enabled basin to meet goals and stakeholders who had water rights felt water rights secured and historical water right had some value to it. And farmers conservation efforts seen as positive.

Greg: We have an attorney, Bill Clark, who has done a lot of that research. We will have Brad make that information available. Ecology actually touts the success of Dungeness and how water was set aside for farms and fish. It's interesting they've had that success in other basins, and they are not willing to put that forth in this case?

Ryan: Anyone talking about what's not being used from Nooksack to GP and other industries? Water quality in Lake Whatcom actually has gone down since not as much being taken out.

Greg: City of Bellingham had a diversion primarily for GP facility and that would be diverted to Lake Whatcom – build lake levels up and store over winter. Whatever not used, could release via Whatcom Creek. Talked some with Bellingham about sharing water with fish and farms. A lot of different legal issues (Foster Decision – doesn't allow to move water that easily).

Marty: Worked on stream flow augmentation to ground water. Two parts: Minor tributaries and then the main stem of the Nooksack. A lot of work can be done in the tributaries and has been done which has much more of an impact. Augmentation could be second major phase by speeding up process of groundwater moving to those tributaries. Regarding the Nooksack - Rud you said potentially getting to tidal influence area – but adjudication will look at Bellingham's right. There is a reason why Bellingham initially opposed adjudication. They have to keep Lake Whatcom at a certain level. Whatcom Creek is a salmon habitat. Some talk Whatcom Creek will be part of the conversation. One of concerns have is community not very aware of process. How many people will say not going to enter the process? If don't enter, you've lost what you have. Very fearful that will happen a lot in the rural community regarding individual use.

Paul Burrell: Clark you spoke about what's happened in Oregon. I've been through a few of these in Alaska – good in the beginning but creates a barrier to entry that is too high for anyone else. Consolidation of the industry

Point of clarification – was the water right Marty has to defend, was \$10 to \$100k figure the price per piece of land or total for one business or individual? What is the impact to agriculture in this county?

Greg: Cost to defend each water right is significant. Marty and I have multiple water rights. Could potentially cost \$1M. DEO says only effecting large farms which is not true. Can't imagine farmers at Farmer's Market able to defend their water rights, so small 2-to-5-acre farms will be some of the first to lose. Also have landowners that I rent from – a retired widow who lives off rent check that I pay her. Elderly and retired people really being put into a financial hardship. Impact of ag – been told one of the largest industries/employers in county – been told valued at \$2B.

Brad: The sales are around \$300 million, but when you multiply input, you are close. That all flows to the economic viability of the county.

Marty: Adjudication doesn't address quality of life – open space and the changes would most certainly occur. Keep reiterating not just agricultural issue – it's a community issue.

Ryan: Second that – my dad has done nothing but fight water rights over the years on Lake Whatcom. Bunch of people. This group has spent 1.5 years trying to get housing sorted out. Water rights and housing go directly together. Only going to make things more difficult. Will directly impact future housing in the county. Have you talked with housing community to help with this? City could lose their rights.

Marty: They have on the Nooksack river. They have a storage right. You look at the future? What does the future look like? Uncertainty about the end of the process.

Ryan: We have spent a year and a half spinning our wheels on housing. Housing and water rights go hand in hand, in good areas, not on farmland. This will directly impact housing abilities. Troy will have nothing to sell.

Marty: We can take control of the resource out of the hands of the state.

Ryan: Have you talked to construction, housing community, about partnering up to cover some costs? Partnering up might help.

Greg: Real Estate Association supported adjudication process – probably bought into Ecology's misrepresentation about what it would do.

Marty: Been a bit perplexing why not more resistance to the process. Could easily see no more domestic wells put in.

Clark: Question on where stand. Understand that it's a state issue – state administers water rights. Understand adjudication passed in this year's state budget and some funding in the budget passed for the county for water rights adjudication to get the process started. Want to get a sense for where things stand. Its happening. The deciding body is moving on it. Is it set to start this calendar year? Next calendar year? If so, is there anything the county can do – county advisory body can do?

Greg: Maybe \$1M budgeted to begin pre-adjudication – can't file until 2023. Pre-adjudication work is staffing up. This will occur in Whatcom County Superior Court – would need more judges and support staff and space. Council got \$250k to get negotiated process underway – trying to get everyone to the table to get off the ground hopefully.

Marty: So far tribes adamant that adjudication will happen, and DOE hasn't been helpful in trying to push a process of negotiated settlement along side that. The \$1M is pre-adjudication. The legislature will have to fund the adjudication. Thinks DOE has downplayed consequences – time and money that it will take. They can't possibly even know because will probably be a lot of lawsuits that go in before adjudication starts. When look at Spokane – decided against adjudication because had issues with Idaho. Whatcom County has issues with Canada. Have creeks that go into Canada.

Clark: Quick Administrative update. Councilmember Browne not on the call – had allocated 15 minutes regarding childcare funding proposal. Not sure going to get to that. Propose keep going on water rights discussion until 12:25p – unless anyone disagrees.

Sarah: Two things. Mr. Mayberry – thank you – I think your family was my first employer. I don't know if I was your best employer, but I really enjoyed it. It was a great experience.

Marty: That would have been my dad or my uncle.

Sarah: Moving on to the next topic. It was a great experience, thank you. One thing I was going to ask, as a group, is there an action item we wanted to formulate? Or is that jumping the gun? Do we want to review, maybe pulling together recommendations to County Council? It would take a lot of time, but would you be interested in presenting to a rotary forum, the AGC forum.

Marty: Yeah – have multiple people that can do the presentation on why not to do adjudication. Have presented to a lot of groups. Yes, always willing to do that.

Sarah: Would like to put a recommendation on the table. What a powerful move for our community if everyone aligned and went to federal government to help today and multiple generations on not fighting the battle but working together instead of fighting. It would be more powerful, classy, and mature. Maybe we can be the community that does that.

Clark: For follow up, getting detail of other examples of negotiated settlement and then a recommendation from the sector of what alternative might look like if want to go down that path. Would need to come with some level of specificity.

Marty: We can get you other examples, thinking of your comments about recommendations. Basically, our deal has been instead of adjudication, lets get to the table and do a negotiated settlement. Executive Satpal been helpful to push that process. Key is tribal acceptance. What ended the Yakima fight wasn't adjudication. Everyone gets sick of suing each other.

Paul: What is the problem? What is broken? Why are we going down this road? Why are we even starting this process? I know it is salmon. You have a lot of habitats. It doesn't matter how much water there is, if there is no salmon, the fish won't go up. Fish have access, fish have water, I do not think the problem is there. Maybe the problem is elsewhere? Why are no fish getting up the river to the area you guys are improving?

Greg: Very complicated. Is it really about habitat or control of water? Can chip away on salmon habitat needs.

Brad: Will work on getting follow up on the Dungeness. Just thinking out loud – there is a lot of discussion about collaboration. Maybe a letter can be drafted and signed by cities and tribes as a recommendation. Understand needs to be some work and comfort level before that.

Marty: Both processes can happen at the same time. We are opposed to adjudication. Tribes want adjudication. Brad you owe us both dinner for doing this for you.

Brad: Bring you some berries, Marty you want some? Thank you all for taking the time to listen, you are all in positions where you've led businesses and you achieved that by thinking logical and not being wasteful, being productive, hopefully to you this is terribly wasteful and unproductive. Some reason the momentum has been built to head that way, hopefully speaking out, being problem solvers, being creative, we can stop the train and get to some problem solving.

Marty: It is nice to give a shot to explaining the complexity of this issue. You are businesspeople, you know what uncertainty can do – uncertainty can do to a business, financial relationships with banks, very concerned that the rug could get pulled out from underneath before this process gets going. Bank loans pulled. Reevaluation of collateral of real estate. When we first started talking about this with Ecology, they said adjudication provides certainty. I said so does the death penalty and people fight like crazy to get out of that. Thanks for listening to us.

Clark: Thanks for coming.

Debbie – probably understand the least of the conversation. In Whatcom County, both fishermen and farmers – traditional economic elements want to support equally. Understand have different water capacities. Understand from watching union and other negotiations, when people get dug in, so hard to get them undug. Only way is look at “what are the outcomes want” – healthy thriving salmon and ag communities. Need to go back, start over, get right people with right emotional capacity. To tribes, yes want to respect what need for salmon fisheries. Suggest that if feels like digging in and trying to control things – kind of have to look at the history. They (tribes) haven’t had a lot of control. So many conversations that do need to look at the history and where people are coming from.

Marty: We have a good relationship with the tribes, and they say don’t want to destroy ag. Have had those discussions about the past – just think there is a better way.

Other Business

Reviewed Port of Bellingham protocols for in person meetings held at the Mount Baker Room following CDC guidelines.

Meeting adjourned at 12:34pm

Next Meeting: July 19, 2021, via Zoom or in person at POB Mt. Baker Room

Potential Topics: Water Rights Discussion Follow Up, GMA, Annexations, Housing