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**Our Water, Our Future, Our  
Solutions: Water Supply Symposium**

Legal Decisions Affecting  
Administration of Water Law

Bellingham, WA

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**Adam W. Gravley**

**December 13, 2017**

# Overview

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- Foster v. Department of Ecology
- 2003 Municipal Water Law

# Foster v. Department of Ecology, City of Yelm (2015)

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- Reversed grant of new groundwater right to City of Yelm
- Extensive mitigation plan
  - In-kind: “wet water”
  - Out-of-kind: aquatic habitat
- MIF depletions in “shoulder seasons”
  - Impairment conceded
- Overriding considerations of the public interest (OCPI)

# Foster

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- The majority opinion reasons:
  - OCPI authorizes “withdrawals of water”
  - “Withdrawal” means temporary authorization
  - “Appropriation” means permanent right
  - Compare drought statute (RCW 43.83B)
  - So, OCPI does not allow “permanent impairment of minimum flows.”

# Foster

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- Overriding Considerations of Public Interest
  - “Extraordinary circumstances”
  - Mitigation plan “irrelevant”
  - Ecological value ≠ wet water
  - OCPI effectively closed

# 2003 Municipal Water Law

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- Second Engrossed Second Substitute House Bill 1338
- Title: “An act relating to certainty and flexibility of municipal water rights and efficient use of water...”

# 2003 Municipal Water Law

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- Under Dept. of Health Water Efficiency Rule (WAC 246-290) municipal water suppliers must:
  - Publicly establish water savings goals for their customers.
  - Evaluate or implement specific water saving measures to achieve customer-based goals.
  - Develop a WUE planning program to support the established goals.
  - Install meters on all customer connections by January 22, 2017.
  - Achieve a standard of no more than 10% water loss.
  - Report annually on progress towards achieving these goals.

# 2003 Municipal Water Law

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- System Capacity water right certificates
- “Rights in good standing”
- Ecology cannot revoke or diminish, except
  - Change application
  - Adjudication
  - Misrepresentation

RCW 90.03.330



# 2003 Municipal Water Law

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- Key provisions include:
  - Defined “municipal water supply purposes” and “municipal water supplier”
  - Service area = place of use
  - Duty to Serve

# 2003 Municipal Water Law

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## ■ Appellate Court Cases

- *Crown West Realty, LLC v. Dep't of Ecology*, PCHB No. 16-115 (July 25, 2017); Court of Appeals, Div. III, No. 35610-8 (pending)
- *Cornelius v. WSU and Dep't of Ecology* (2015)
- *Lummi Indian Nation v. Dep't of Ecology* (2010)

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