

Meaningful Public Participation and the Nooksack River Adjudication

Alyssa Adams, Bryce Groen, Ben Kassof, Anna Phippen, Jess Struwe and Riley Weeks

College of the Environment, Western Washington University

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Dr. Kate Darby

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Introduction

As of May 2024, over 2 million residents in Washington state live in areas of drought (NOAA & NIDIS, 2024). Lower stream flows and earlier melting snowpack due to climate change, as well as increased pressure on water use due to a growing population and increased agricultural demand, all spell trouble for Washington state's fresh water supply (Yoder & Raymond, 2022). The ability of governments to fairly allocate water resources between their citizens becomes increasingly complicated in the face of climate change. Lower stream flows in the summer and reduced snowpack in the winter all contribute to a strain on freshwater drinking resources (Binder, n.d.). More frequent and prolonged drought due to climate change also puts a strain on water for agricultural use (Yoder & Raymond, 2022). Residents must still rely on their government to enact policies that ensure water is allocated fairly, no matter the climate. The Washington State Department of Ecology (Ecology) has assumed responsibility for water allocation in Washington State through an adjudication process. Adjudication is the process by which the access to fresh water for drinking or farming is legally determined. Ecology has conducted one water basin level adjudication in the Yakima River valley that took 42 years and started with 5,300 water claims (McPherson, 2020). Now, Ecology has begun the process of water adjudication for the Nooksack River valley. They hope to take 12 years and anticipate up to 30,000 water claims (Department of Ecology, 2024; McPherson, 2020).

Meaningful public participation is needed for residents to fairly advocate for themselves and their water claims. Without interference from the government, privileged water users would be able to utilize as much water as their access allows, without considering the needs of water users further downstream. Environmental justice considerations must also play a role in the adjudication process so that water rights are fairly allocated. In this paper, we first situate the

adjudication process through the Yakima River basin and the beginnings of public comment gathered so far for the Nooksack River adjudication process. We then analyze meaningful public participation within the Nooksack River adjudication.

Public Participation

Public comment allows for the public to have a voice in policymaking and provides an opportunity for engagement. Comments provide a chance for individuals and organizations to voice their concerns, perspectives, and expertise on proposed regulations, rules, and policies (Center for Health Law and Policy Innovation, n.d.). By engaging in the public comment process, stakeholders can impact the outcome of regulatory decisions by providing regulators with valuable feedback and insights from different perspectives. Public comments promote transparency and accountability in government decision-making by providing an opportunity for stakeholders to voice their opinions and hold policymakers accountable for their actions. Ultimately, public comment helps to ensure that policies are well-informed, responsive to public needs, and reflective of democratic principles; however, it is not always the case that public comment directly changes proposed policies and regulations (Center for Health Law and Policy Innovation, n.d.).

In the case of Ecology, although they legally required to provide the public with opportunities to voice comments, it is not a legal requirement for public comment to be considered when making changes to proposed rules and policies. Ecology identifies both formal and informal ways to go about the public comment process, including attending public workshops and advisory committees (informal), official public hearings (formal), and the official comment period (formal) (Washington State Department of Ecology, n.d.). Workshops and advisory committees are used to gather input and act as discussion spaces in person while

remaining informal. Official public hearings allow for formal written comments or verbal testimonies regarding rulemaking and become part of official records. The official comment period allows for any comments to be submitted during the process and will also become part of official records (Washington State Department of Ecology, n.d.).

Public Participation and the WA State Department of Ecology

There is a long history of systematically excluding marginalized communities from the environmental decision-making process. For example, the inequitable placement of locally undesirable land uses (LULUs) in marginalized communities affects the environmental and human health of an area, and decision-makers often ignore community members' requests for regulating pollution from those LULUs (Pulido, 2015). It is important to note that communities that are primarily Black, Indigenous, and People of Color (BIPOC) have been historically underrepresented in the environmental movement. As the environmental movement has influenced much governmental change over the past 50 years, this underrepresentation is also present in governmental decision-making. The environmental justice movement has highlighted this disparity and the lack of decision-making power these communities hold to effect change (Cole and Foster, 2023). In light of this injustice, including within procedural processes, there is a need to shift the focus of the current processes towards the needs and social constraints of these communities for them to be able to fully participate and have their questions, opinions, and considerations heard and taken up when environmental decisions that affect their communities are being made.

Currently, most states have laws in place that provide opportunities for the public to engage in the citing and permitting processes of industrial facilities that affect their communities, along with other environmental health projects. Within Washington State, this includes creating

an Environmental Impact Statement (EIS) for environmental projects, providing an avenue and time for public comment, and in some cases facilitating a public hearing, although this is typically at the agency's discretion, (Department of Ecology, 2022.). Yet, there are numerous barriers to engaging in this kinds of processes. These include inaccessible information, lack of education on the topic or decision-making process, lack of time and/or technology to properly engage in public comment and hearings, physical limitations and lack of accessibility accommodations, and other overt or unconscious discrimination (Cole and Foster, 2023).

Due to these common accessibility barriers, it is important to provide environmental justice considerations in the decision-making process for all environmental projects. For instance, when thinking about the information provided for a given topic and the subsequent decision-making process, it's important to deliver this information in digestible language to a non-expert audience, while including translations for community members that speak languages other than English. For public comment, it's important to consider all the various ways people receive information, including through the newspaper, online, via mail, etc., especially when regarding different age groups. Providing all avenues for public comment and adequate time for the community to voice their concerns is important to ensuring an equitable process. Additionally, for public hearings, making them accessible means the agency facilitating them should consider the time of day, location, physical accessibility accommodations, and other resources provided such as food and childcare, so all community members can engage. It is critical that, when received, this feedback and decision-making process is a two-way dialogue between the community and organization managing the work that continues as a project develops (Cole and Foster, 2023). Public comments must be incorporated into decision-making for the process to be equitable.

The Healthy Environmental for All Act (HEAL) was enacted in Washington State in 2021 after four iterations over several years. Also known as Washington State Senate Bill 5141, this law incorporates environmental justice work through governmental agencies across the state. This happens by incorporating and standardizing environmental justice terminology in state agency work, updating data on the environmental injustices of marginalized communities, and conducting Environmental Justice Assessments to understand and lower the negative impacts of state agency work within these communities (Department of Ecology, 2022.). Although much more action is needed to address the disproportionate impacts of environmental health hazards and degradation on marginalized communities in the state, the process is in beginning stages through state agency work and is closely advised by the environmental justice council additionally set forth by the law (Department of Ecology, 2022). Ecology is one of the state agencies charged with environmental justice work in the HEAL Act. Although they have not yet started the public facing work that the HEAL Act charges them with, the agency currently has a strategic plan, community engagement plan, and implementation plan drafted that outlines future plans, including reducing barriers to public involvement in Ecology projects (Geraghty et al, 2023). Ecology's environmental and resource management decision-making within the adjudication process have a complex history of public involvement.

Adjudication

Water rights are a complicated resource management issue that, by nature, involve extensive interactions between state government and members of the public. In general, water in Washington State does not belong to any individual. Instead, the state itself owns the water and creates a system of rights and permits for water use (Ottem, 2006). In Washington, water rights date back to the territorial era before statehood, when the federal government mostly allowed the

territorial government to determine its own rules for establishing water rights (Horowitz, 1932). Multiple regulatory regimes for water in Washington have created confusion for water users. Water rights adjudications are an important tool used by the state to clarify who has water rights and in what order.

Initially, a standard of “beneficial use” was applied to determine which landowners in Washington had legitimate water rights (Ottem, 2006). Under this system, consistent use of water for almost any “non-frivolous” (Ottem, 2006, pg. 3) purpose (i.e., not purposefully wasting water) is required for the maintenance of the water right. The date of intent for beneficial use determines when the water right began. The prior appropriation system used in Washington can be summarized as “first in time, first in right” (McPherson, 2020), meaning that the oldest water users have the most seniority. It was not until 1917 that the Water Code was enacted by the legislature to create a system for formally applying for a water right (Geller, 2002). A new law passed in 1945 established a similar process for groundwater, which was still being managed through the prior appropriation system until then (Ottem, 2006). The gradual adoption of water rights laws in Washington has created multiple subsets of rights based on the policy regime used to establish them. As water rights become a more salient issue, their complexity has become a more pressing problem.

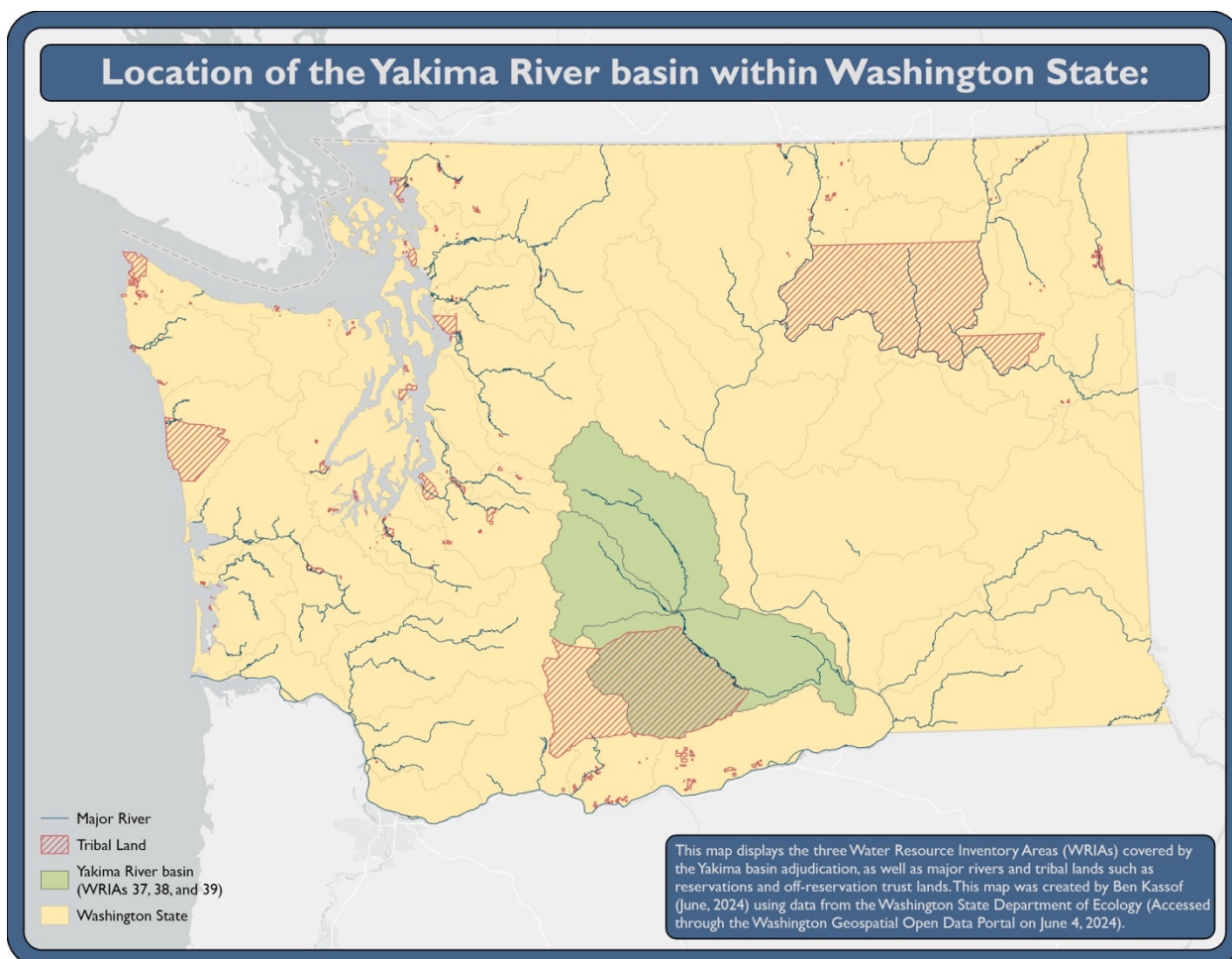
Climate change has already begun to impact water rights in Washington. Washington has a quickly growing population, and the demand issues already caused by more water users are being exacerbated by drier summers, wetter winters, and shrinking glaciers and snowpacks (Binder, n.d.). Climate change means lower stream levels in summer when water is in highest demand. Water is a finite resource, and in-stream flow is very vulnerable to over-exploitation. Water levels in above ground streams and rivers respond readily to changing weather and

climate, and in-stream water is easily accessible to anyone, regardless of whether they have an established water right. Unpermitted diversion of water on already stressed systems that are experiencing smaller snowpacks in winter and less meltwater in spring and summer can easily overextend the available in-stream flow of a river. Agriculture is vulnerable to issues of water supply for irrigation. Crops need reliable water at regular points throughout summer, but if the total water rights on a river exceeds the level of in-stream flow, someone will not be able to get as much as they need. Planning for water use at the watershed level has been underway in Washington since 1998, when the passage of the Comprehensive Watershed Planning Act established 62 Water Resource Inventory Areas (WRIAs) (Spelleccacy, 2009). WRIAs are used to coordinate water policy and response to local water issues on a local scale. There is a more formal mechanism for addressing system-wide water issues and clarifying water rights stemming from multiple regulatory frameworks: a water rights adjudication.

A general water rights adjudication is the only legal process in Washington state for clarifying and appropriating water rights in a resource area, and the process typically plays out in Superior Court (Eggerth, 2022; Geller, 2002). Ecology is the state agency that initiates an adjudication based on its own finding or a petition from the public or a WRIA planning unit. Ecology files a statement of fact with the superior court, listing all known entities claiming a water right on the WRIA in question, and then files suit against those who wish to assert their water right (Geller, 2002). Claimants to water rights must submit statements and evidence to the court supporting their claimed water right. After hearings have been held and evidence has been collected, Ecology creates “reports of findings”, which delineate the clarified water rights based on collected evidence. Claimants may object to these reports, and the superior court will rule on Ecology’s findings, eventually producing “Conditional Final Orders” and a “Final Decree”

(Weber et al., 2024). This ruling determines all the valid water rights in the adjudicated watershed and their seniority. In Washington, older water rights take priority over newer rights in the event of water scarcity (Weber et al., 2024). Importantly, an adjudication cannot modify, reduce, or enlarge water rights. A general water rights adjudication clarifies the existing water rights of a system (Geller, 2002). Clear, confirmed water rights make planning within a watershed easier – and allows for rights to be bought and sold in a water market – which could help improve the efficiency of water use in the face of a changing climate.

Yakima Adjudication



Although Ecology completed hundreds of stream-level adjudications between the 1920s and 1970s, the Yakima River basin remains the only watershed level adjudication to have

occurred under the case name *Ecology v. Acquavella* (McPherson, 2020). The Yakima River basin is the most irrigated region in the state and a major fruit producing area at the national level, with annual agricultural production valued at over one billion USD (Molenaar, 1985; Ottem, 2008). The basin is primarily snow-fed, although this is limited somewhat by a network of dams and reservoirs (Molenaar, 1985). The use of diversion canals for agricultural irrigation was first recorded in 1867, with larger projects beginning in the 1980s and 1990s (Flaherty, 1976; Molenaar, 1985). Additional canals and reservoirs were constructed following the establishment of the federal Bureau of Reclamation in 1902 and Yakima Federal Reclamation Project in 1905, particularly during the New Deal era (Flaherty, 1976). Reservoirs were necessary, as by this point the low water flow of the Yakima River and its tributaries had already been appropriated, with the state urging the federal government to store and release unallocated water (Ottem, 2008).

The Yakima basin adjudication was filed in October 1977, with a final decision issued in 2019 and appeals being settled as late as 2021. 1977 was the worst drought on record, exacerbating pre-existing issues such as undefined rights for the Yakama Nation and little existing documentation on rights predating adoption of the statewide water code in 1917 (Ecology, 2002; Ottem, 2006). Holders of claims established following the Bureau of Reclamation's appropriation in 1905 were expected to receive 15% (originally 6%) of their normal allocation, while rights established prior to 1905 would receive their full amount (Ottem, 2008). In an area so economically dependent on irrigation, this presented a serious challenge (Flaherty, 1976; Molenaar, 1985). It is within this context that Ecology began the process of adjudicating all 5,300 known claims in the basin (Ottem, 2008).

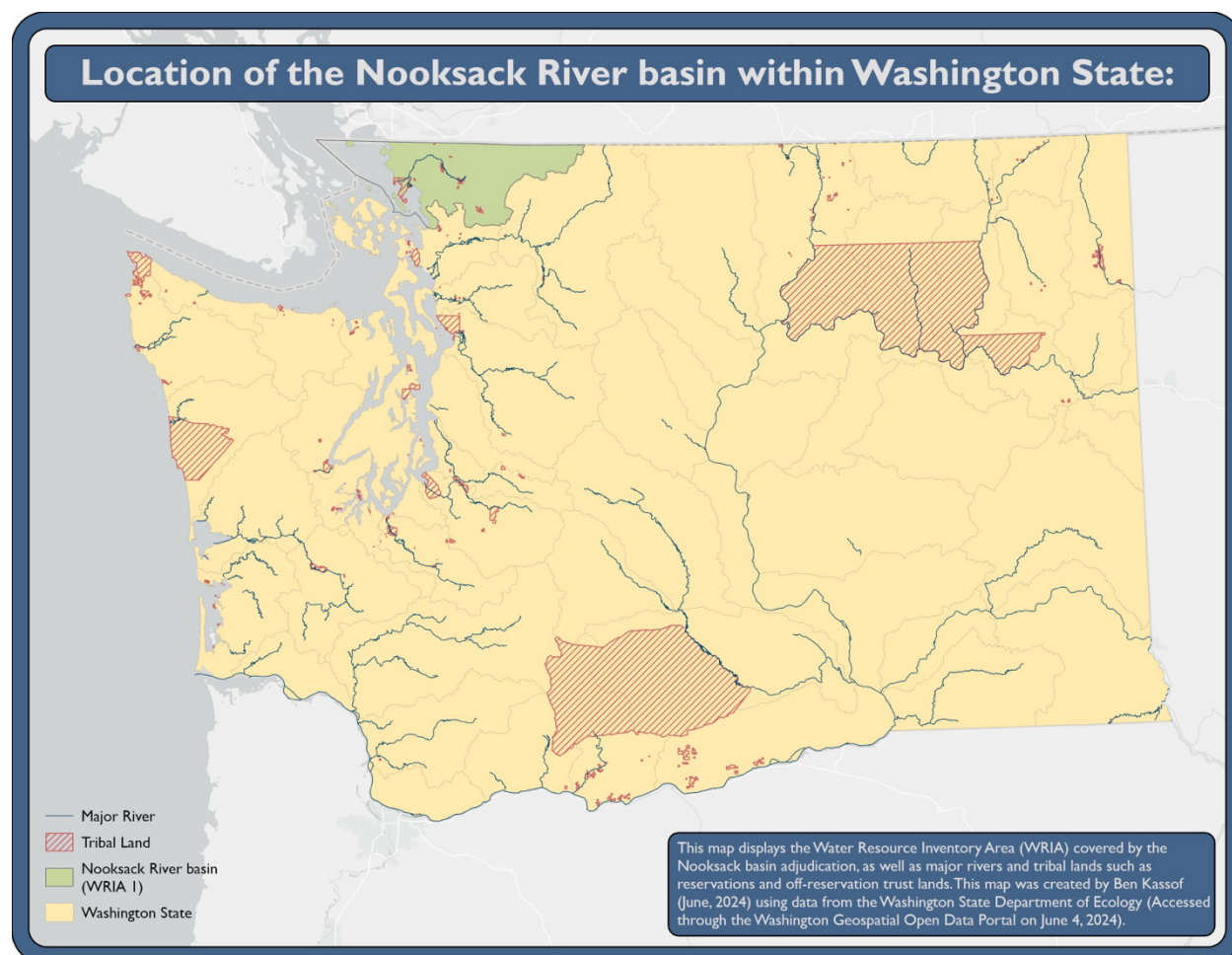
While generally treated as an issue for state courts, the involvement of the federal government due to Indigenous rights and Bureau of Reclamation complicated the matter. Debates over water rights jurisdiction kicked the case from state to federal court and back again, finally establishing a deadline for filing water rights claims of September 1, 1981, four years after the process began (Ottem, 2008). However, hearings did not start until 1987 due to further challenges over jurisdiction and summons (Geller, 2002). Four “pathways” were established for adjudicating claims – sub-basin, major claimant, Indigenous, and federal (non-Indigenous) – with a referee appointed by Ecology recommending water rights on sub-basin rights and all other claims handled by the courts (Ottem, 2008). Following the referee’s 2004 retirement, the courts handled sub-basin claims (Ottem, 2008).

Previously represented by the U.S. Department of Justice, the Yakama Nation joined the adjudication process in 1992, demanding not only irrigation rights, but also water rights to support their 1855 treaty-established fishing rights (Ottem, 2008). Although initially limited to 120,000 acres, the tribe appealed under the argument that only federal law could limit their irrigation (*State of Washington, Department of Ecology, v. James J. Acquavella et al.*, 2021). The only party to file a legal brief in response was Ecology, who “explicitly agree[d]” with the tribe’s interpretation (*State of Washington, Department of Ecology, v. James J. Acquavella et al.*, 2021, p. 7). In addition to asserting tribal and federal sovereignty, this decision also had practical effects. The 120,000-acre limit reflected a historical survey that determined irrigable land, but this estimate was raised to 136,000 acres in 1962 (*State of Washington, Department of Ecology, v. James J. Acquavella et al.*, 2021). The Bureau of Indian Affairs-operated irrigation project could not legally irrigate the additional land while the restriction was in place, although the limit was lifted following a second decision in 2021 (*State of Washington, Department of Ecology, v.*

James J. Acquavella et al., 2021). Two irrigation-district related appeals were also decided along with the Yakama Nation's appeal, marking the end of the 44-year adjudication process (Ferolito, 2021; *State of Washington, Department of Ecology, v. James J. Acquavella et al.*, 2021).

A final notable feature of the Yakima Basin adjudication process was the Yakima Basin Integrated Plan (YBIP). Following 30 years of adjudication, the Yakima Tribe and Roza Irrigation District began work on the YBIP in 2008 with the goals of restoring fisheries, ensuring reliable irrigation, and increasing climate resilience (Vickers and Eberhart, 2023). As the two had been adversaries throughout the adjudication process, this represented a shift in strategy towards solving the challenges of the basin through an integrated approach (Vickers and Eberhart, 2023). Although the YBIP has been generally considered a success, decades of attempted negotiation in the Nooksack basin have failed to produce similar results, suggesting that the adjudication process may have had a larger role in the YBIP's success than previously acknowledged (Meacham, 2021; McPherson, 2020; Vickers and Eberhart, 2023).

Nooksack Adjudication



Although the adjudication process is just beginning, the Nooksack River had been identified as a priority for adjudication prior to the conclusion of the Yakima Basin adjudication. Like the Yakima adjudication, unresolved tribal rights will play a large role in this process, particularly those of the Lummi Nation and Nooksack Tribe (McPherson, 2020). As signatories to the 1855 Treaty of Point Elliot, both claim senior water rights as well as instream water for the fishing grounds promised within the treaty (McPherson, 2020). Another similarity to the Yakima basin is the prevalence of water rights claims predating the surface water code of 1917, often with poor documentation (McPherson, 2020). Even where water rights have been established, estimated actual water use can be thousands of acre-feet (the amount of water required to cover

an acre of land to a depth of one foot) higher than authorized, suggesting a culture of “widespread noncompliance” in the region (McPherson, 2020, p. 21). Agricultural irrigation continues to grow in the region, an “extensive” amount of which is non-permitted (McPherson, 2020, p. 21). Even when enforcement is attempted, it is often bogged down in a time and resource-expensive appeals process (McPherson, 2020). The irrigation used within the basin has allowed it to become the most productive farming region in western Washington (Ryan, 2021).

Unclear and sometimes unpermitted water use is not the only challenge facing the Nooksack basin, as it faces multiple threats from climate change. Salmon populations are declining, particularly in the South Fork, which is warming faster than other branches, as it receives the least glacial meltwater (Gluzman, 2022; Ryan, 2021). Thousands of Chinook salmon died in the South Fork due to a heatwave in 2021, while in 2013 only ten arrived to spawn in the South Fork (Gluzman, 2022; Ryan, 2021). Considered threatened under the Endangered Species Act since 1999, Chinook salmon are important cultural and spiritual symbols to the Lummi Nation and Nooksack Tribe and are also important sources of food for endangered orca populations in the Salish Sea (Gluzman, 2022; McPherson, 2020; Ryan, 2021).

As the climate warms further, winters are predicted to get warmer and wetter, leading to decreased snowpack as more precipitation falls as rain (Ryan, 2021; Yoder and Raymond, 2022). As the Nooksack River is primarily fed by snowmelt during the summer, this is predicted to lead to higher maximum streamflow during the winter and lower minimum streamflow during the summer, when water needs are the highest and predicted to continue this pattern as temperatures increase (Gluzman, 2022; Yoder and Raymond, 2022). Higher winter streamflow will also lead to larger and more frequent floods, such as the one that occurred during November 2021,

affecting thousands and causing over \$150 million in damage (Gluzman, 2022; Lerner, 2022; McPherson, 2020; Yoder and Raymond, 2022).

Following years of failed negotiations including a lawsuit that ran from 2001 to 2007, the Nooksack Tribe formally petitioned Ecology for adjudication in 2019, joined in 2020 by the Lummi Nation (McPherson, 2020). Also, Ecology has been mapping all water rights in the basin since 2006 to simplify the eventual adjudication process (McPherson, 2020). While Ecology (2024) expects anywhere between 5,000 and 30,000 claims as opposed to the Yakima's approximately 2,500, the Nooksack adjudication is predicted to only take 10-20 years (McPherson, 2020; Ryan, 2021). This is primarily thanks to the jurisdictional issues cleared up by the Yakima adjudication, as well as expanded negotiation options implemented following the lessons learned from the Yakima adjudications (McPherson, 2020) The Nooksack adjudication will also cover both surface and ground water claims, unlike the Yakima which exclusively focused on surface water rights. Ecology filed in Whatcom Superior Court to formally begin the adjudication process on May 1, 2024 (Department of Ecology, 2024b).

Measuring Public Participation: our Approach

As with all legal processes that involve the public, including adjudication, it is important to consider how and when public input is considered. In our analysis, we determined that using frameworks that ranked mechanisms of public participation that were already in place would be most beneficial. We used Fiorino's *Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms* (Fiorino, 1990) and Arnstein's *A Ladder Of Citizen Participation* (Arnstein, 1969) to qualitatively determine which mechanisms were being used in Ecology's Nooksack adjudication process. Fiorino uses the argument that citizens [sic], not scientists and experts, should have the ability to decide what's best for society (Fiorino, 1990). Fiorino

identifies five institutional mechanisms that can be used to increase public participation in policy shaping, making, and changing: public hearings, initiatives, public surveys, negotiated rulemaking, and citizens review panels (Fiorino, 1990). *Figure 1* simplifies these findings. In our analysis, we determined that of the five mechanisms, Ecology utilized only public hearings as a part of the Nooksack River adjudication process. We decided to incorporate public comments received during the initial phase of the adjudication process as under the umbrella of public hearings.

Table 1. Summary of Mechanisms Under the Participation Criteria

<i>Mechanism</i>	<i>Direct/ Amateurs?</i>	<i>Share Authority?</i>	<i>Discussion?</i>	<i>Basis of Equality?</i>
Public Hearings	Yes	No	Limited	No
Initiatives	Yes	Yes	Potential	Some
Public Surveys	Yes	Limited	Unlikely	No
Negotiated Rule Making	Unlikely	Yes	Yes	Yes
Citizen Review Panels	Yes	Limited	Yes	Some

Figure 1. A table that summarizes Fiorino’s mechanisms of public participation and criteria for each (Source: Fiorino, 1990, p. 236).

In our analysis of public participation in the adjudication process, we also used Arnstein’s *A Ladder Of Citizen Participation* (Arnstein, 1969). Arnstein argues that citizen [sic] participation is citizen [sic] power (Arnstein, 1969). She further writes that citizen participation in government processes is a cornerstone of democracy, but that this participation has been lacking in BIPOC communities. She writes “It is the redistribution of power that enables the have-not citizens [BIPOC communities], presently excluded from the political and economic processes, to be deliberately included in the future” (Arnstein, 1969, p. 216). She further describes a ladder of public participation, on which the higher you go, the more power citizens have in governmental decision making. She creates eight rungs, listed here from the bottom to

top: manipulation, therapy, informing, consultation, placation, partnership, delegated power, and citizen control (Arnstein, 1969). She further sections the ladders into three categories:

nonparticipation, degrees of tokenism and degrees of citizen power (Arnstein, 1969, p. 216).

Figure 2 simplifies this model.

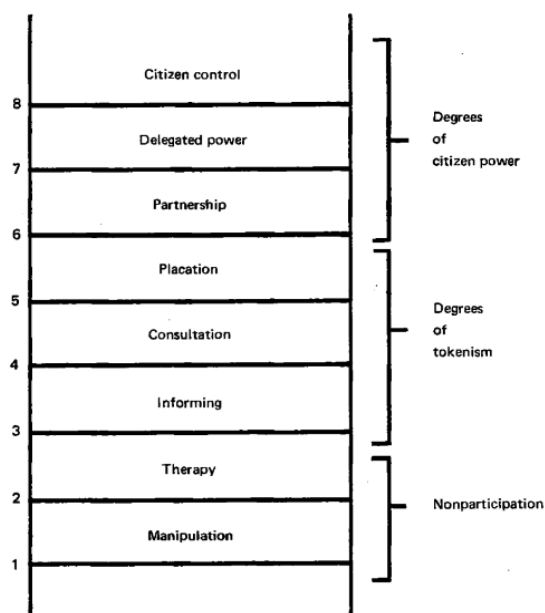


FIGURE 2 *Eight Rungs on a Ladder of Citizen Participation*

Figure 2. A table that summarizes Arnstein's Ladder of Citizen Participation (Source: Arnstein, 1969, p. 217).

Whereas the Fiorino paper addresses the ways in which citizens [sic] can be involved in government through meetings or comments, the Arnstein paper defines our analysis more broadly to define meaningful participation. Combining these papers allows us to first identify particular mechanisms of participation, and then place overall participation on a scale of most to least meaningful. We decided to base our analysis on both the Fiorino and Arnstein papers to ensure our analysis consisted of both specific and broader definitions of meaningful public

participation. The Fiorino and Arnstein models we used do not explicitly mention environmental justice considerations. In our analysis section, we explicitly mention what considerations Ecology did or did not meet regarding environmental justice.

Our group created an Excel spreadsheet and tables for each of Fiorino's mechanisms of public participation as well as a table for Arnstein's Ladder of Public Participation. We then went to the Department of Ecology website and gathered all public comments provided. In our analysis we determined, for each mechanism of public participation, included EJ considerations, if they were met, how and anything else that felt important to note. After this analysis we then decided which rung of the Arnstein ladder the Nooksack adjudication fell onto.

Analysis

In the section below we analyze the public participation efforts of Ecology during the WRIA 1, or Nooksack, adjudication process. The forms of public participation that Ecology used were public hearings consisting of public comments and outreach. The main environmental justice considerations that we found to be relevant for analyzing the meaningfulness of the participation are the time of hearings/comment collection period, language considerations, publicity/advertising, accessibility of the physical space, and accessibility of the online materials. Through these considerations, we were able to determine which rung of the Arnstein ladder Ecology's attempts at including public participation fall on.

The adjudication process does not require Ecology to hold hearings or collect comments, but they are required to inform all people who hold water rights that a legal claim is being filed (Ottem, 2006; Geller, 2002). To inform claimants, Ecology sends a form to those they believe are water rights holders. Those who receive the forms will then report their water usage and return the form to the courts within one year (Department of Ecology, 2024-c). Those who are

direct water users are claimants in the case, but not everyone who uses the water is a claimant (Department of Ecology, 2024-a). For example, most Bellingham residents get their water from a public water system, so the City of Bellingham is the claimant in the case rather than the individual residents. This can result in some people who will be affected by the adjudication being unaware of the process, but all those who hold water rights should be represented. Ecology has made attempts to inform more residents in the watershed by providing FAQs and an email list on their website (Department of Ecology, 2024-c). Since Ecology isn't required to hold hearings or collect comments, there is more public participation included in the Nooksack adjudication than legally obligated. The adjudication process is also procedural since it is a legal proceeding which will take place in court. So, in analyzing how meaningful participation in this process is, it is important to acknowledge that more is being done than legally necessary.

The public comments accepted by Ecology have been the main form of public participation in the adjudication process so far. Ecology put out a request for comments on their website, which were collected online from January 2 to March 2, 2024. There was no requirement to be in person, which would allow people with mobility issues to still easily submit comments. Even so, they were still inaccessible for some people, specifically non-English speakers. Nowhere on the website could my group find instructions for submitting comments in another language and there was no mention that comments could be accepted in different languages. This fails to meet our EJ requirement of language considerations. Ecology also did not advertise the Nooksack adjudication comment period as widely as it did other comment requests. For example, they did not post the comment period for the Nooksack adjudication on Facebook but have posted about other comment periods in the past. This could have resulted in fewer people knowing about the comment period being open. If there are further comment

periods, it would be important to make sure it is widely advertised and there are resources provided for non-English speakers.

The first public comment period was mainly focused on the draft instructions for filing a claim that Ecology will send to all those with water rights. At first, the forms Ecology was requesting comments on were unavailable. On January 3, 2024, a member of the public, William Little, said they could not access any documents. “I don't see how this evaluation and comment process can be of any value, if the forms and instructions we are asked to comment on are not available. When I click on the review documents button, nothing happens” (Little, Public Comment, Jan 03, 2024). By January 9, Ecology had fixed the problem with the document links, and William Little submitted another comment stating that they could now review the documents (Little, Public Comment, Jan 09, 2024). Ecology has started to respond to comments, but it will be important to see if they address all concerns brought about during this comment period.

While most of the comments were correction suggestions to the draft of the instructions sheet Ecology will send out on how to file a claim, there were some common concerns. Multiple commenters were confused by whether they should fill out a form stating they were a small or large water user. This is determined by the amount of water used each day. But that is not an intuitive estimate so there were requests for more information on how to determine which form to fill out. There was also concern about having different forms. Whatcom Family Farmers, Save Family Farming, Western Washington Agricultural Association, Washington Farm Bureau, Washington Ag Water Board, Washington Potato and Onion Association, and the Washington State Dairy Federation all submitted comments stating that they do not believe Ecology has the legal authority to change how small water users file a claim. The Washington State Dairy Federation stated:

One consideration should be whether it is appropriate for thousands of small users to get an easy pathway forward given that these ‘small users’ may collectively equal more use than ‘large’ water users and/or that these small users may be junior [users]. These small uses could impact our farmers, who have been here for generations and must file the long form and wait in suspense for years to learn if and how their water rights are shaped by this adjudication process (Washington State Dairy Federation, Public Comment, March 2, 2024).

These farmers believe that this change in the process could undermine their livelihoods and negatively impact a specific group: farmers.

Even if Ecology does have the legal authority to change the way small users file a claim, they should address the concerns raised by farmers as the process continues. Without addressing the comments, farmers in WRIA 1 may not trust the adjudication process or outcome. James Smith, a rural property owner in Whatcom County, expressed concern with the current interactions between Ecology and the public. They stated:

Ecology's failure to give widespread notice of the draft claim forms and foster widespread public participation is a form of unhelpful provocation in an era in which many people (not myself) have feelings of anger and hostility toward government agencies. It will have the effect of magnifying bad feelings and interfere with the smoothness of the adjudication process, and may increase divisiveness in our County (Smith, Public Comment, Feb. 28, 2024).

The Yakima adjudication showed how long and complicated this process can be, and the process will only be longer if there is mistrust between Ecology and the public. The comments from farmers, James Smith, and others reflect the need for transparency, education, and clear instructions from Ecology during the Nooksack adjudication process.

Ecology has been doing public outreach and public education forums as well, which help the public have more meaningful participation. On the evening of September 13, 2023, Ecology and water rights consultants put on an adjudication event for Whatcom Water Week to inform the public about the Nooksack adjudication. The main topics covered were “what is adjudication?”, “what are water rights?”, a discussion on the geological aspects of the watershed,

and administrative tools to transfer or change water rights. This was supposed to help address possible issues that would come up early to make the adjudication process more efficient. Over 300 people attended the event and a recording of the presentations at the event was posted on the WRIA 1 Watershed Management Project channel on YouTube (Youtube, 2023). Ecology then did an additional adjudication workshop for farmers with small farms which they posted unlisted on their own YouTube channel. This was a smaller meeting and took place in February 2024 in Ferndale, Washington. Robin McPherson, the adjudications manager at Ecology, gave a short presentation outlining the adjudication process, answered frequently asked questions from small farmers, and then concluded the evening with a Q&A with those in attendance (YouTube, 2024).

The meetings helped to inform the public which should help them have more meaningful participation. Those who attended the events could learn more about the adjudication process and ask questions to address any remaining concerns. We believe that these meetings met most of our EJ considerations. Both events were in the evening from around 5pm-7pm after normal business hours. This meant attendees could come after work, allowing this workshop to meet our “timing” EJ consideration. While we were unable to find the ways the events were advertised, there were over 300 people in attendance at the first outreach event and presenters mentioned people standing during the meeting. This suggests that Ecology did a thorough job of advertising the event and met the EJ consideration of proper publicity and advertising. The attendance for the second meeting and the accessibility of both spaces are unknown since we cannot see the room from the posted recordings. The final EJ consideration we highlight is language considerations. For both events, the verbal presentations and accompanying PowerPoint slides were in English. While that is a common language spoken in the WRIA 1 area, it is not the only language. Ecology could meet this final EJ consideration by having workshops in alternative languages for

those affected by the adjudication who do not speak English. Overall, we believe these meetings met most of our EJ considerations.

We believe that Ecology's public participation falls on the 4th rung of the ladder of participation: consultation. As shown in Figure 3 below, this rung goes a step further than just informing the public and invites community members' opinions to be heard (Arnstein, 1969). This is typically done through surveys, neighborhood meetings, and public hearings (Arnstein, 1969). Ecology has been incorporating the public mainly through public comments or public hearings, which is typical of this level of participation. The consultation rung has a level of tokenism in its participation because there is no guarantee that the opinions heard during consultation will be incorporated into new policies or rules (Arnstein, 1969). Ecology is listening to citizens with water claims, but there is no guarantee that any change will happen based on the comments heard. Farmers have already expressed concerns about the process. Adjudication is a very procedural process which can result in limited ways to engage the public since there aren't many public engagement requirements (Ottem, 2006; Geller, 2002). After seeing successful collaboration following the Yakima adjudication, we hope the Nooksack adjudication will pave the way for collaboration in WRIA 1 too. To have meaningful participation, the comments and opinions collected by Ecology should be addressed as the adjudication process continues.

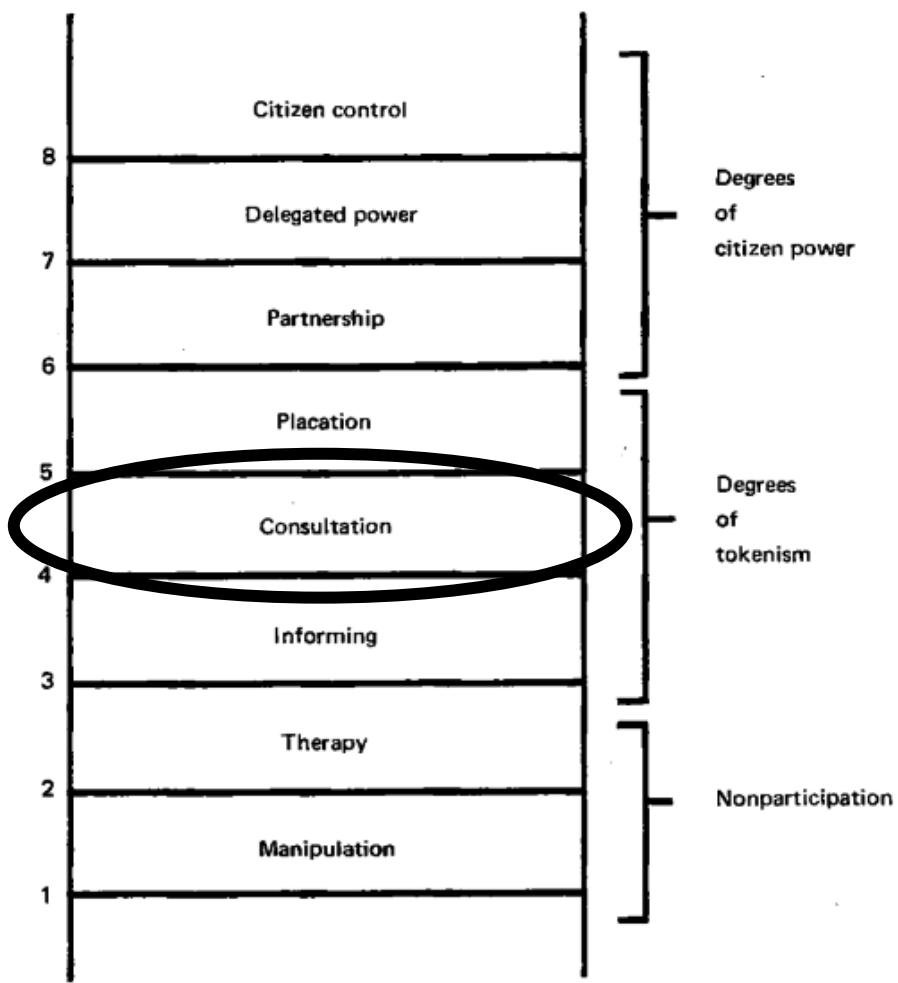


FIGURE 2 *Eight Rungs on a Ladder of Citizen Participation*

Figure 3. A table that summarizes Arnstein’s Ladder of Citizen Participation marked to show the Rung of Participation the Department of Ecology falls on in the Nooksack Adjudication (Source: Arnstein, 1969, p. 217)

Modified by Alyssa Adams, 2024.

Conclusion

In light of the HEAL Act legally requiring environmental justice considerations within public participation, now is the time to evaluate where our state agencies, like Ecology, can have more meaningful public participation. Ecology has filed a general water rights adjudication

which will clarify water rights of the Nooksack River basin. There has been some public consultation already, but this process will require much more interaction between Ecology and the public in the upcoming years. It is important that any public participation during this process is meaningful and cognizant of the environmental justice considerations we have highlighted throughout this paper. Ecology should hold meetings outside of normal business hours to allow more people to attend, widely advertise the comment periods and meetings in multiple languages, hold meetings and give information in multiple languages, and ensure both the physical space and online materials are accessible for a wide range of abilities. The current public participation in the Nooksack adjudication only climbs up to the fourth rung on Arnstein's ladder of public participation.

While not entirely the fault of Ecology due to the procedural nature of water rights adjudications, it is important to recognize this shortcoming and strive for more meaningful public participation moving forward. The legal adjudication process constrains the ability of even well-executed public participation to influence the outcome for water users. "First in time, first in right" is still the prevailing model for water right priority in Washington, so the oldest proven water rights will be given more seniority. Under conditions of water scarcity on the Nooksack, these senior right holders would be able to continue to use water, while newer water users would have to suspend their consumption. The system is inflexible and is based in resource doctrine from the territorial era of Washington, so the efforts of Ecology to engage the public and upcoming HEAL Act requirements will likely not impact the outcome of the Nooksack adjudication. Public participation is important, but Ecology also must navigate its own relationship to the legal adjudication proceedings. It would be disingenuous for Ecology to enter into public partnerships or delegate power to water users when the actual decision-making

authority for water rights is out of the agency's hands. It is incumbent upon Ecology to make the adjudication process as just and accessible as possible and help prepare water users for filing their claims. This support would make the Superior Court deliberations, and therefore the adjudication, better for the public and more responsive to underserved communities.

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