

Washington Water Rights Based on Actual Use or on Delivery System Capacity? *Department of Ecology v. Theodoratus*

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The Supreme Court of Washington recently held that, for the past forty years, the State has acted illegally when issuing certificates of water right.¹ During these years, Washington State issued certificates of water right to land developers for an amount of water equal to the capacity of the developers' newly constructed water delivery systems.² First, the developers obtained state permits to construct their water delivery systems and to appropriate water from the public domain.³ Then, the developers were guaranteed that, upon completion of the water systems in compliance with the terms of the permits, the state would issue certificates of water right for the capacity of the systems.⁴ The *Theodoratus* court held, however, that the state may issue a certificate of water right, i.e., a vested water right, only for the amount of water that an applicant has actually applied to beneficial use, thereby perfecting an appropriative water right.⁵ Therefore, the state acted illegally for forty years by issuing certificates of water right based on water system capacity.⁶

By what reasoning did the court find that the forty-year-old system capacity basis for granting water rights was unlawful? The *Theodoratus* court based its decision on both common law principles and

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1. See *Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 587, 957 P.2d 1241, 1243 (1998).

2. *Id.* at 587, 601, 957 P.2d at 1243, 1250.

3. *Id.* at 604, 957 P.2d at 1252.

4. *Id.* at 609, 957 P.2d at 1254.

5. *Id.* at 587, 595, 957 P.2d at 1243, 1247.

6. See *id.* at 587, 957 P.2d at 1243. The "system capacity" method of quantifying a water right is also referred to as the "pumps and pipes" method. *Id.* This Note uses only the terminology "system capacity."

state statutory law.⁷ Washington incorporated in its water codes the common law water rights language of prior appropriation for beneficial use.⁸ Therefore, the *Theodoratus* court applied the relevant water codes, but also relied on common law doctrine to support its holding. Thus, an analysis of the court's decision must look to both the text of the water codes and to the history, purpose, and doctrine of common law water rights in Washington. Furthermore, a complete analysis of the court's holding must recognize that the efficient, beneficial use of water has become increasingly important in light of modern population growth and increasing environmental concerns.⁹

This Note argues that the court's holding in *Theodoratus*, that vested water rights must be based on prior appropriation by actual beneficial use, is correct for three reasons. First, it comports with common law water rights, the foundation of Washington's water rights codes.¹⁰ Second, it is consistent with the language and the intent of Washington's water rights codes. Third, prior beneficial use, compared to system capacity, more closely addresses contemporary water management concerns. This Note acknowledges the shortcomings of the prior beneficial use doctrine under common law and as codified, and presents further steps that Washington's courts and legislature should take to refine the doctrine to achieve the goal of a truly efficient use of scarce water resources. Unfortunately, the *Theodoratus* court failed to fully present the modern water rights policy concerns behind its decision. Therefore, the court failed to describe a clear policy foundation for the further development of water rights laws.

7. *See id.*

8. RCW § 90.03.290 provides that a water right permit shall be issued if the Department finds that "there is water available for *appropriation for a beneficial use*. . . ." WASH. REV. CODE § 90.03.290 (1998) (emphasis added). RCW § 90.03.330 provides that upon a satisfactory showing that "any *appropriation* has been perfected . . . it shall be the duty of the department" to issue a water right certificate. WASH. REV. CODE § 90.03.330 (1998) (emphasis added). These are examples in which the codes incorporate the common law terms of appropriation for beneficial use.

9. A discussion of western population growth and its impact on the available water supply is beyond the scope of this Note. However, commentators have observed that the growing population now puts much greater pressure on the western water supply than was the case more than 100 years ago, when the relevant common law doctrines and early water codes were adopted. In those early days, the West was relatively unpopulated. Now, the West is the fastest growing region in the nation. "The population is exploding, while scarce water supplies stay the same." Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 921 (1998) (citing PAMELA CASE & GREGORY ALWORD, WESTERN WATER POL'Y REV. ADVISORY COMM'N, PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES: IMPLICATIONS FOR WATER USE AND MANAGEMENT 30-31 (1997)).

10. The majority of western states, including Washington, adopted the common law concepts of beneficial use, waste, and forfeiture in their water law codes. Neuman, *supra* note 9, at 920-21, 925.

In Part I, this Note discusses the history and purpose of the common law doctrine of obtaining a vested water right by prior appropriation through actual beneficial use. Part II reviews the applicable Washington water rights codes and describes the steps required to obtain a certificate of water right. In Part III, this Note summarizes the relevant facts and procedural history of *Theodoratus*. Part IV presents the court's analysis, reviewing the reasoning and findings of the majority and the argument of the dissent. Part V of this Note analyzes the majority and dissenting arguments in terms of legal doctrine, public policy and implications for the future development of modern water rights laws. Finally, Part VI concludes that the *Theodoratus* court made the correct decision, but unfortunately, avoided setting out a clear policy description for the further development of modern water rights laws.

I. COMMON LAW WATER RIGHTS

The fundamental principles and purposes of the common law of western water rights illuminates the court's reasoning and findings in *Theodoratus*. Under the common law, prior appropriation for beneficial use, without waste, is the basis, measure, and limit of vested water rights in the western states.¹¹

The prior appropriation system developed out of necessity in the 1848 California gold rush mining camps.¹² The doctrine arose because the riparian system of the East was unsuited to the relatively arid West.¹³ Under the riparian system,¹⁴ water rights are appurtenant to the land adjacent to water.¹⁵ Therefore, the location of land appurtenant to water, not the diversion of water to relatively productive land,

11. See *id.* at 920.

12. See DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 77 (2d ed. 1990); Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 ENVTL. L. 1137, 1140 (1998). The preeminent scholar of western water law, Wells A. Hutchins, recognized that gold miners made major contributions to the western doctrine of prior appropriation, but he also postulated additional influences from both the New World and the Old World. See 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 159-75 (1971).

13. See NATIONAL WATER COMM'N, *A SUMMARY-DIGEST OF STATE WATER LAWS* 5 (Richard L. Dewsnup & Dallin W. Jensen eds., 1973); GETCHES, *supra* note 12, at 80-81; Koehl, *supra* note 12, at 1140.

14. "Technically speaking, riparian owners are those whose lands abut upon a river or stream, whereas those whose lands abut upon a lake or pond are termed littoral owners. The reported cases use the terms interchangeably, however." *Clippinger v. Birge*, 14 Wash. App. 976, 984 n.1, 547 P.2d 871 (1976) (citations omitted).

15. See GETCHES, *supra* note 12, at 77; Koehl, *supra* note 12, at 1140 (citing WELLS A. HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 64-65 (1971)).

determines riparian water rights.¹⁶ The prior appropriation system better served the needs of miners, and later the needs of farmers, whose productive or fertile land in arid regions might not enjoy riparian rights.¹⁷ These early miners and farmers in the West obtained water rights for their land by being the first to divert water for their use from streams in the public domain.¹⁸ Western settlements developed local rules and customs based on this diversion.¹⁹

The western courts subsequently incorporated many of these local rules into law, rejecting the riparian rights doctrine.²⁰ The resulting common law of prior appropriation of water rights includes three fundamental principles: (1) water may only be directed for actual beneficial use, (2) the first beneficial user acquires a paramount right to subsequent users, and (3) continued right requires continued beneficial use without waste.²¹

The first common law principle of prior appropriation, diversion for actual beneficial use, includes three limitations on a water right. First, a vested water right is a usufructuary right, a right only to the use of the water.²² Second, the quantity of water put to beneficial use defines the scope of the water right.²³ The holder of the vested right has no right to a quantity of water greater than what he actually puts to beneficial use.²⁴ Therefore, although the capacity of a water delivery system would be equivalent to actual water use if the system were running at full capacity, common law principles vested water rights based on actual use, not system capacity.²⁵ The third limitation originally restricted beneficial use to consumption for diversionary uses

16. See Koehl, *supra* note 12, at 1140.

17. See GETCHES, *supra* note 12, at 74, 78; Koehl, *supra* note 12, at 1140.

18. See GETCHES, *supra* note 12, at 78; NATIONAL WATER COMM'N, *supra* note 13, at 5.

19. See GETCHES, *supra* note 12, at 74, 77; NATIONAL WATER COMM'N, *supra* note 13, at 5. During the settlement of the West, the Federal Government elected not to convey land and riparian water rights together when disposing of land through various public land laws. Rather, the Federal Government allowed local water rights customs to prevail, including the right to divert water across public land for mining and irrigation. Lands were then conveyed separately from water rights and subject to them. GETCHES, *supra* note 12, at 78.

20. NATIONAL WATER COMM'N *supra* note 13, at 5.

21. Koehl, *supra* note 12, at 1140-41.

22. *Id.* at 1141 (citing 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 440 (1971)). Although a usufructuary right, a vested water right is a property interest protected by the United States Constitution's Takings and Due Process Clauses. See *Sheep Mountain Cattle Co. v. Department of Ecology*, 45 Wash. App. 427, 431, 726 P.2d 55, 57 (1986).

23. Koehl, *supra* note 12, at 1141 (citing HUTCHINS, *supra* note 22, at 440).

24. *Id.*

25. In any event, the difference between actual water use and system capacity would likely have been merely theoretical or at most ephemeral in the mid-nineteenth century West. It is unlikely that these hard working miners and farmers would often have built systems whose full capacity would not be used immediately or shortly.

such as mining, farming, and stock-raising.²⁶ Recently, courts and legislatures have expanded beneficial use to include recreational, environmental, and other nondiversionary instream uses.²⁷

The second common law principle of prior appropriation gives a paramount water right to the first or earlier beneficial user ("first in time, first in right").²⁸ The first or earlier beneficial user of water acquires a vested right to the entire amount of her water right to the exclusion of subsequent users.²⁹ The priority date of this vested right relates back to the date of an individual's first act in creating the diversion.³⁰

The third common law principle of prior appropriation requires that the holder of a water right continue to use the water in order to retain the right ("use it or lose it").³¹ The water right continues only as long as the beneficial use continues.³² Nonuse or wasteful use results in loss of the water right.³³ The "use it or lose it" principle forecloses the risk that the holder of a vested water right who subsequently stops using the water will prevent its beneficial use by subsequent users. Therefore, the principle prevents the holder of a water right from retaining an unused right for the purpose of speculation.

II. WASHINGTON WATER RIGHTS CODES

A. Codification of the Prior Appropriation Doctrine

Prior to codification of water rights law, Washington courts recognized both riparian and appropriative water rights doctrines.³⁴ However, if an individual's riparian rights were not actually used or were not likely to be used within a reasonable time, courts allowed the diversion of water by an appropriator.³⁵ Furthermore, in 1917, the

26. Koehl, *supra* note 12, at 1141 (citing CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 234 (1992)).

27. *Id.* (citing Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483, 488 (1982)).

28. *Id.* (citing WILKINSON, *supra* note 26, at 232-34).

29. NATIONAL WATER COMM'N, *supra* note 13, at 5; Koehl, *supra* note 12, at 1141. The prior appropriation doctrine of "first in time, first in right" contrasts with the riparian doctrine of prorating the entitlement to water among all users during a shortage. GETCHES, *supra* note 12, at 75.

30. *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 565, 250 P. 41 (1926); NATIONAL WATER COMM'N, *supra* note 13, at 5.

31. Koehl, *supra* note 12, at 1141.

32. Neuman, *supra* note 9, at 920.

33. *Id.*; GETCHES, *supra* note 12, at 76.

34. *Benton v. Johncox*, 17 Wash. 277, 49 P. 495 (1897); NATIONAL WATER COMM'N, *supra* note 13, at 759-60.

35. *Brown v. Chase*, 125 Wash. 542, 217 P. 23 (1923).

Surface Water Code, RCW 90.03, made the prior appropriation doctrine the sole means for acquiring the right to use surface waters in Washington.³⁶ In 1945, the Ground Water Code, RCW 90.44, extended the prior appropriation doctrine of the 1917 Surface Water Code to ground water.³⁷ Under the codes, the requirements for ground water rights are linked to the requirements for surface water rights because the codes make provisions for surface water appropriations applicable to groundwater appropriations.³⁸ Recently, the Washington State Supreme Court held that Washington no longer follows the riparian doctrine and follows only the prior appropriation doctrine.³⁹

B. Method to Obtain a Permit and a Certificate of Water Right

Under the water codes, an applicant initiates the acquisition of a water right certificate by filing an application with, and receiving a permit from, the Department of Ecology (DOE).⁴⁰ If the application is for ground water rights, the applicant may include a request for authorization to drill wells and construct a water delivery system of a specified capacity.⁴¹ The DOE will issue the permit only after it makes an investigation and finds that: (1) water is available for use, (2) the use is beneficial, (3) the use will not impair existing rights, and (4) the use is not detrimental to the public interest.⁴² Furthermore, the DOE's issuance of water permits is a discretionary act.⁴³ The code gives DOE further discretion to establish the time-schedule for dili-

36. NATIONAL WATER COMM'N, *supra* note 13, at 760. Courts have held that riparian rights not exercised by diverting water within 15 years of the passage of the 1917 Surface Water Code were extinguished. See *Abbott v. Department of Ecology (In re Matter of Deadman Creek Drainage Basin)*, 103 Wash. 2d 686, 694 P.2d 1071 (1985).

37. See *Abbott*, 103 Wash. 2d at 687-88, 694 P.2d at 1072. Prior to the 1945 Ground Water Code, land ownership formed the basis for a right to groundwater. The landowner had the right to make reasonable use of water under her land. See *Evans v. Seattle*, 182 Wash. 450, 47 P.2d 984 (1935).

38. *Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 590, 593, 957 P.2d 1241, 1245, 1246 (1998).

39. *Abbott*, 103 Wash. 2d at 687, 694 P.2d at 1071.

40. WASH. REV. CODE § 90.03.250 (1998). The Department of Ecology was created in 1970. The act creating this department abolished the Department of Water Resources, the Water Resources Advisory Council, and the Water Pollution Control Commission. Responsibilities of these agencies for water right administration were transferred to the Department of Ecology. Also, the Pollution Control Hearings Board, an independent administrative agency, was created to hear appeals from decisions of the DOE. WASH. REV. CODE §§ 43.21A and 43.21B (1998); NATIONAL WATER COMM'N, *supra* note 13, at 760.

41. WASH. REV. CODE §§ 90.44.050 and 90.44.060 (1998).

42. *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 115, 508 P.2d 166, 170 (1973); WASH. REV. CODE § 90.03.290 (1998).

43. *Peterson v. Department of Ecology*, 92 Wash. 2d 306, 314, 596 P.2d 285, 290 (1979).

gent commencement of work, completion of construction, and application of the water to beneficial use.⁴⁴ If a permit holder fails to meet the schedule, the DOE may grant extensions to the permit for "good cause shown."⁴⁵ Ultimately, if the permit holder fails to meet either the schedule or extensions, the DOE may cancel the permit.⁴⁶ If the holder meets the conditions of the permit, however, he has perfected the appropriation, and the DOE will issue a certificate of water right.⁴⁷ The priority date for the certificate of water right relates back to the date of the application for the original water permit.⁴⁸ With some statutory exceptions, the holder loses all or part of the water right if it is not used for five consecutive years.⁴⁹

For at least forty years prior to *Theodoratus*, Washington based perfection of water appropriation for beneficial use under the codes upon the permit holder's timely completion of construction of the permitted water delivery system.⁵⁰ On that basis, the state would issue a certificate of water right to the permit holder.⁵¹ Consistent with forty years of practice, the DOE based *Theodoratus*' original water permit on system capacity.⁵² However, under the decision in *Theodoratus*, perfection of appropriation and issuance of a certificate of water right must be based on actual beneficial use of water, not on the capacity of the permit holder's completed delivery system.⁵³

III. FACTS AND PROCEDURAL HISTORY

A. *Facts in Theodoratus*

In 1973, George *Theodoratus* applied to the DOE for a water right permit to serve a private residential development in Skagit County.⁵⁴ Pursuant to a Report of Examination, the DOE approved the

44. WASH. REV. CODE § 90.03.320 (1998).

45. *Id.*

46. *Id.*

47. WASH. REV. CODE § 90.03.330 (1998). The water right is appurtenant to the land on which it is used and may not be used on other land without obtaining authorization from the state to transfer the right. WASH. REV. CODE § 90.03.380 (1998).

48. *See* WASH. REV. CODE § 90.03.340 (1998).

49. *See* WASH. REV. CODE § 90.14.140 (1998); WASH. REV. CODE § 90.14.150 (1998); WASH. REV. CODE § 90.14.160 (1981); WASH. REV. CODE § 90.14.170 (1998); WASH. REV. CODE § 90.14.180 (1998). Although five consecutive years without use seems to be a rather generous criterion for the loss of a water right, this rule for retaining a water right is clearly a codification of the common law "use it or lose it" principle.

50. *See Theodoratus*, 135 Wash. 2d at 587, 957 P.2d at 1243.

51. *Id.*

52. *Id.*

53. *See id.* at 587, 595, 957 P.2d at 1243, 1247.

54. *Id.* at 587, 957 P.2d at 1243.

permit to withdraw groundwater.⁵⁵ Language in the permit purported to create a vested water right, entitling Theodoratus to a certificate of water right under RCW 90.03.330 once the water supply system was capable of delivering water.⁵⁶ The state would then issue Theodoratus a certificate of water right for a quantity of water based upon system capacity, not upon the amount of water actually used.⁵⁷ This original permit called for completion of the development by 1980.⁵⁸

Theodoratus began construction of the water system in 1973 with one well; at the time, water lines were available to 93 of the 253 lots platted in the development.⁵⁹ The DOE granted several extensions to the permit because the development was delayed due to litigation, as well as a recession in the area.⁶⁰ From 1985 to 1992, the DOE's file on the permit was inactive.⁶¹ In 1992, Theodoratus requested an extension to 2001.⁶² The DOE first denied the extension, but after Theodoratus appealed, the DOE granted an extension to January 1, 2001.⁶³ However, in the permit extension, the DOE included a condition that the certificate of water right would be issued for a quantity of water based upon actual application of water to beneficial use, not on system capacity.⁶⁴ This condition in the permit extension clearly changed the basis for issuance of a certificate of water right.⁶⁵

55. *Id.*

56. *Id.*

57. *Id.* Under the system capacity method, the DOE would issue Theodoratus' certificate of water right for the quantity his pump could supply in gallons per minute, converted to acre-feet based on the total number of lots to be served. *Id.* at 608, 957 P.2d at 1253. An acre-foot of water is the amount of water covering one acre to a depth of one foot, equal to 43,560 cubic feet. RANDOM HOUSE UNABRIDGED DICTIONARY 18 (2d ed. 1987).

58. *Theodoratus*, 135 Wash. 2d at 587, 957 P.2d at 1244.

59. *Id.* Theodoratus planned his water system to serve a 253-lot development plus an additional thirty homes outside the development under a plan approved by the State Department of Health. *Id.* Theodoratus would draw water for the system from wells. *Id.* at 590, 957 P.2d at 1245. At the time of this case, Theodoratus had constructed twenty-eight homes. *Id.* at 608, 957 P.2d at 1254.

60. *Id.* at 587, 957 P.2d at 1244.

61. *Id.*

62. *Id.* at 587-88, 957 P.2d at 1244.

63. *Id.* at 588, 957 P.2d at 1244.

64. *Id.* Because the quantity of Theodoratus' water right would be based on the amount of water actually used, his certificate of water right would not vest a right to a quantity of water for any lots not yet served at the time the certificate was issued. If use later increased as additional lots were served, Theodoratus could, of course, apply for water rights for the quantity of water serving the additional lots. However, Theodoratus could not be certain that the DOE would later be willing to issue such rights, that unclaimed water would later be available, or if unclaimed water were not available later, that someone else's water rights could then be acquired.

65. *Id.*

B. Procedural History

Theodoratus appealed the actual beneficial use condition to the Pollution Control Hearings Board (PCHB), which struck the beneficial use condition from his extended permit.⁶⁶ The PCHB concluded that in this case, the system capacity method constituted the application of water to beneficial use for the purposes of the certificate of water right.⁶⁷ The PCHB held that Theodoratus could appropriate an amount of water equal to the capacity of his completed water delivery system.⁶⁸

The DOE appealed to the superior court.⁶⁹ The superior court reversed, holding that the DOE had the discretion to condition Theodoratus' permit extension on a final certificate of water right to be issued in the amount of water actually put to beneficial use.⁷⁰ However, the court suggested the possibility that the DOE must issue a certificate of water right before any actual beneficial use of water occurred.⁷¹ The court held that the certificate of water right would be for a quantity based on "reasonable beneficial use" determined at the time a final certificate of water right would be at issue.⁷² However, the superior court noted that reasonable use might include recognition of variable conditions, including the capacity of a completed public water delivery system, to the extent the water would be beneficially used within a reasonable time.⁷³

In an attempt to get the Washington State Supreme Court to affirm the PCHB ruling that his completed system capacity constituted the requisite beneficial use, Theodoratus appealed the superior court's decision.⁷⁴ The DOE cross-appealed, contending that the superior court's definition of beneficial use was in error because it took into account system capacity and future use.⁷⁵

The primary issue before the supreme court was whether the DOE could issue a certificate of water right for a public water system based upon the capacity of the completed system, or whether the DOE could only issue a certificate for the amount of water actually put to prior beneficial use.⁷⁶ The court held that the DOE could only

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 588-89, 957 P.2d at 1244.

72. *Id.* at 588, 957 P.2d at 1244.

73. *Id.* at 589, 957 P.2d at 1244.

74. *Id.*

75. *Id.*

76. *Id.* at 586, 957 P.2d at 1243.

issue a certificate of water right after an appropriation of water is perfected by the actual application of water to beneficial use.⁷⁷ The supreme court reasoned that neither common law nor statutory law allowed the DOE to issue a certificate of water right based upon delivery system capacity.⁷⁸

IV. THE WASHINGTON STATE SUPREME COURT'S ANALYSIS

A. *The Majority's Reasoning and Findings*

In holding that a vested water right requires actual beneficial use, the majority's reasoning relied on elements of common law, statutory law, and case law. The majority also found support for its holding in the legislative intent behind Washington's water rights statutes.

1. The Majority's Common Law Analysis

The majority began its analysis by referring to common law water rights.⁷⁹ According to the majority, both the application of water to beneficial use and the perfection of an appropriative right are terms of art, the meanings of which are established by western water law.⁸⁰ Therefore, "in requiring actual application of water to beneficial use in order to perfect an appropriative right before a final certificate of water right may be issued, the statutes codify fundamental western water law."⁸¹ The majority found that under common law, water must actually be put to a beneficial use before a water right vests;⁸² beneficial use refers to both the type of use and the measure and limit of the water right.⁸³ The majority noted that it was the measure, not the type, of beneficial use that was disputed in this case.⁸⁴

2. The Majority's Statutory Analysis

The majority then analyzed the case under statutory law in terms of beneficial use and perfection of appropriative rights as codified in

77. *Id.* at 590, 957 P.2d at 1245.

78. *Id.* at 587, 957 P.2d at 1243.

79. *Id.* at 589, 957 P.2d at 1245.

80. *Id.*

81. *Id.* at 592, 957 P.2d at 1246.

82. *Id.* at 596, 957 P.2d at 1248.

83. *Id.* at 589, 957 P.2d at 1245 (citing *Department of Ecology v. Acquavella*, 131 Wash. 2d 746, 755, 935 P.2d 595, 600 (1997)); see also *Department of Ecology v. Grimes*, 121 Wash. 2d 459, 468, 852 P.2d 1044, 1049 (1993); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wash. 2d 232, 237, 814 P.2d 199, 201-02 (1991).

84. *Theodoratus*, 135 Wash. 2d at 590, 957 P.2d at 1245.

RCW 90.03 and 90.44.⁸⁵ Theodoratus' water system used wells, which means that he would be appropriating groundwater.⁸⁶ RCW 90.44 governs appropriation of ground water, including wells.⁸⁷ However, the majority held the surface water provisions of RCW 90.03 also applied because statutes concerning surface water appropriations also apply to ground water appropriations, including issuance of ground water permits and certificates of right to ground water.⁸⁸

The majority found that, taken together, RCW 90.03 and 90.44 require more than the construction of a water delivery system to perfect appropriation by beneficial use.⁸⁹ An applicant for a permit must estimate both the time needed to construct the delivery system and the time required to actually apply appropriated water to beneficial use.⁹⁰ Furthermore, the majority held that the DOE must establish a time period in which water shall actually be applied to beneficial use.⁹¹ Pursuant to the above codes, the majority found that perfection of appropriation requires actual application of water to beneficial use; the court also found that the DOE may only issue a certificate of water right upon a showing that the applicant perfected the appropriation.⁹²

Although the Ground Water Code, RCW 90.44.080, provides only that completion of construction of the delivery system is necessary for issuance of a certificate of water right, the court held that the requirements of the Surface Water Code, RCW 90.03.250 through 90.03.340, are also specifically made applicable to ground water by the Ground Water Code.⁹³ Thus, while construction must be complete as required by the Ground Water Code, perfection of the appropriative water right must occur by actual beneficial use as required by the Surface Water Code.⁹⁴

The majority also reasoned that the existence of a statute mandating relinquishment of unused water rights weighed against Theodoratus' contention that system capacity determines a water right.⁹⁵ By statute, failure to beneficially use all or part of a water right for five

85. *See id.* at 590-96, 957 P.2d at 1245-47.

86. *Id.* at 590, 957 P.2d at 1245.

87. *Id.*

88. "Surface water provisions must also be examined because RCW 90.44.060 provides that statutes concerning surface water appropriations, RCW 90.03.250 through RCW 90.03.340, apply to groundwater appropriations, including issuance of groundwater permits and groundwater right certificates." *Id.*

89. *Id.* at 590-91, 957 P.2d at 1245-46.

90. *Id.* at 590, 957 P.2d at 1245 (citing WASH. REV. CODE § 90.03.260 (1998)).

91. *Id.* at 591, 957 P.2d at 1245 (citing WASH. REV. CODE § 90.03.320 (1998)).

92. *Id.* at 591-92, 957 P.2d at 1245-46.

93. *Id.* at 592-93, 957 P.2d at 1246.

94. *Id.*

95. *Id.* at 595-96, 957 P.2d at 1247.

consecutive years can result in loss of the unused water right.⁹⁶ If system capacity determined the scope of Theodoratus' water right, the statutory provisions for relinquishment would be meaningless "because system capacity would not change no matter how long water was not actually used. . . ."⁹⁷ Therefore, the court held that the use of system capacity as a measure of water right would contradict the code, allow speculation in water rights, and lead to uncertainty in water management.⁹⁸ The majority concluded that the code requires actual beneficial use before a certificate of water right can be issued.⁹⁹

The majority also found that the legislative intent of the water codes supports a requirement of actual beneficial use.¹⁰⁰ When determining the legislative intent of a statute, a court considers the intent of the Governor when he vetoes a section.¹⁰¹ In 1997, the Governor vetoed a portion of legislation that would have allowed for a system capacity measure of water right for public water supplies fulfilling municipal water supply purposes.¹⁰² The majority reasoned that the "Governor's veto message is strong evidence of intent that system capacity is not the measure of a water right under current statutes."¹⁰³ This inchoate right supported Theodoratus' financial reliance.

3. The Majority's Case Law Analysis

The majority reasoned that Washington case law supports the statutory requirement that a vested water right must be based on actual application of water to beneficial use rather than system capacity.¹⁰⁴ The majority quoted *Department of Ecology v. Grimes*: "an appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon land."¹⁰⁵ Also, in *Department of Ecology v. Acquavella*, the Washington State Supreme Court recently held that, as a basis for determining an irrigation water right, system capacity is inconsistent with beneficial use requirements, and thus appropriation for irrigation

96. *Id.* (citing WASH. REV. CODE § 90.14.160; WASH. REV. CODE 90.14.170; WASH. REV. CODE § 90.14.180).

97. *Id.* at 595, 957 P.2d at 1247.

98. *Id.*

99. *Id.* at 592-93, 957 P.2d at 1246.

100. *Id.* at 594, 957 P.2d at 1247.

101. *See id.*

102. *Id.*

103. *Id.*

104. *Id.* at 592, 957 P.2d at 1246.

105. *Id.* (quoting *Department of Ecology v. Grimes*, 121 Wash. 2d 459, 468, 852 P.2d 1044, 1094 (1993)).

must be calculated based upon diversion and actual use under Washington law.¹⁰⁶

In *Theodoratus*, the majority declined to distinguish between beneficial use of water for irrigation and beneficial use of water for a development.¹⁰⁷ The statutes do not distinguish between water for irrigation and water for other purposes.¹⁰⁸ Furthermore, a competing need for water exists whether irrigators or public water systems hold vested rights.¹⁰⁹

Finally, the majority noted that conditions in an original permit do not necessarily create a vested right as to those conditions upon discretionary renewal of the permit if the law changes during the interim.¹¹⁰ Although the majority did not specify what law had changed in *Theodoratus*, the majority declared that *Theodoratus'* original permit gave him no vested right to obtain a water right certificate based on system capacity under his permit extension because system capacity is an illegal condition.¹¹¹

4. The Majority's Financial Reliance Analysis

The majority was not persuaded by *Theodoratus'* argument regarding his financial reliance on the original permit conditions. *Theodoratus'* permit extension, granting time in which to perfect his vested right by actual use, granted an inchoate right to water that he had not yet applied to beneficial use.¹¹² Inchoate rights are protected under the water code as long as the future application of water is prosecuted with reasonable diligence.¹¹³

The majority acknowledged concerns that future developers might have difficulty obtaining financing for water systems if system capacity were not used to determine vested water rights.¹¹⁴ However, the majority declined to abandon the common law definition of "beneficial use" and redefine the term using system capacity in order to address this possible difficulty.¹¹⁵ After all, "whether financing con-

106. See *id.* at 593, 957 P.2d at 1246 (citing *Acquavella*, 131 Wash. 2d at 756, 935 P.2d 595).

107. See *id.* at 593, 957 P.2d at 1246-47.

108. *Id.* at 594, 957 P.2d at 1247.

109. *Id.* at 593, 957 P.2d at 1247.

110. *Id.* at 597, 957 P.2d at 1248 (citing *Eastlake Community Council v. Roanoke Ass'n, Inc.*, 82 Wash. 2d 475, 491-93, 513 P.2d 36, 46-47 (1973) (involving an issue of vested rights in a building permit)).

111. *Id.* at 597-98, 957 P.2d at 1248-49.

112. *Id.* at 595-96, 957 P.2d at 1248.

113. *Id.* at 596, 957 P.2d at 1248 (citing WASH. REV. CODE § 90.03.460).

114. *Id.* at 595, 957 P.2d at 1247.

115. *Id.*, 957 P.2d at 1247-48.

cerns should be taken into account in determining beneficial use is a matter for the legislature."¹¹⁶

5. The Majority's Conclusion

The majority concluded that the DOE did not violate common law, statutory law, or case law by conditioning Theodoratus' permit extension on actual beneficial use. The vested water right for Theodoratus' development depended upon appropriation by the actual application of water to a beneficial use, and the DOE could not legally issue a certificate of water right for a quantity of water not actually put to beneficial use.¹¹⁷ The court concluded that the system capacity basis for water right in Theodoratus' original permit did not entitle him to a vested right, because system capacity is an illegal basis for issuing a water right certificate.¹¹⁸ If the inchoate, rather than vested, right to water created by a permit based on actual beneficial use causes financial problems for developers, the majority determined that that issue should be addressed by the legislature, not by the courts.¹¹⁹

B. *The Dissent's Argument*

In *Theodoratus*, the dissent incorporated elements of common law and statutory law to argue that Theodoratus' vested water right should be based on system capacity.¹²⁰ The dissent declined to apply the common law definitions of appropriation and beneficial use to the water law statutes,¹²¹ arguing that the statutory language allows vested water rights based on system capacity.¹²² The dissent also gave weight to Theodoratus' reasonable investment reliance on water rights based on delivery system capacity and to the financial concerns of other developers who benefit by receiving water rights based on system capacity.¹²³

116. *Id.*, 957 P.2d at 1248.

117. *Id.* at 597, 957 P.2d at 1248.

118. *Id.* at 597-98, 957 P.2d at 1248-49.

119. *Id.* at 595, 957 P.2d at 1247-48. In a brief portion of the opinion, beyond the scope of this Note, the court further held that the DOE acted within its proper discretion and did not act arbitrarily and capriciously when it switched to an actual beneficial use standard for the extension of Theodoratus' permit because the DOE acted *ultra vires* in utilizing an unlawful system capacity standard of a water right in the original permit. *Id.* at 598, 957 P.2d at 1249.

120. *Id.* at 610-17, 957 P.2d at 1255-58.

121. *Id.* at 601-03, 957 P.2d at 1250-51.

122. *Id.* at 600-10, 957 P.2d at 1250-55.

123. *Id.* at 609-10, 957 P.2d at 1254-55.

1. The Dissent's Common Law Argument

The dissent purported to find support for perfecting a vested water right based upon future intended use under two western common law doctrines. One doctrine, the progressive growth doctrine, recognizes that appropriated water for irrigation need not be immediately used to the full extent possible, provided there is a bona fide intent to use the water and the appropriator proceeds with due diligence.¹²⁴ The dissent urged that this doctrine is not limited to granting agricultural water rights for intended future growth and should extend to *Theodoratus*, who manifested an intent of future use by constructing a water delivery system.¹²⁵

A second doctrine, the growing communities doctrine, supports granting a water right based on future intended use.¹²⁶ The dissent stated that under this doctrine, a community may perfect a water right in the amount of water it reasonably anticipates it will need for future growth.¹²⁷ The dissent relied primarily on *City and County of Denver v. Sheriff*¹²⁸ for authority.¹²⁹ The dissent argued that the doctrine should be applied to *Theodoratus* because "often the best indicator of the community's future intended water need is the capacity of the water distribution system it has constructed."¹³⁰ *Theodoratus* anticipated his developing community would have a growing need for water as each new home was constructed; therefore, the dissent believed *Theodoratus* should be granted a certificate of water right based on intended future use.¹³¹

2. The Dissent's Statutory Argument

In addition to arguing that common law doctrines support vested water rights based on system capacity, the dissent asserted that actual use is required only for those water rights that arose before Washington enacted its water rights statutes.¹³² The dissent maintained that for water rights arising after Washington enacted its water rights statutes, such as the rights at issue in *Theodoratus*, the statutory language governs without regard to common law.¹³³

124. *Id.* at 611-14, 957 P.2d at 1255-57.

125. *Id.* at 613-14, 957 P.2d at 1256-57.

126. *Id.* at 614-17, 957 P.2d at 1257-58.

127. *Id.* at 614, 957 P.2d at 1257.

128. *City and County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1938).

129. *Theodoratus*, 135 Wash. 2d at 614-15, 957 P.2d at 1257.

130. *Id.* at 614, 957 P.2d at 1257.

131. *Id.* at 617, 957 P.2d at 1258.

132. *Id.* at 603, 957 P.2d at 1251.

133. *Id.*

Having dismissed the common law definitions of perfection of appropriation and beneficial use as inapplicable under the code, the dissent noted that the "statute does not define either 'appropriation' or 'beneficial use'."¹³⁴ Furthermore, the construction of the statutes makes the prospective nature of the water rights process apparent.¹³⁵ The application for a permit is for a future intended use of water, not for a past actual use.¹³⁶ Also, RCW 90.03.250 provides for appropriation through the construction of a water delivery system, and "it makes perfect sense . . . that perfection occurs when . . . a water delivery system is constructed."¹³⁷ RCW 90.44.080 provides that, upon a showing that a permit holder has completed construction, the DOE shall issue a certificate of ground water right stating that appropriation has been perfected under the permit.¹³⁸ The dissent concluded, therefore, that perfection of an appropriative water right occurs when construction of the water delivery system is complete, and Theodoratus was entitled to a certificate of water right at that time.¹³⁹

3. The Dissent's Financial Reliance Argument

The dissent also made a reliance argument: "the majority denies Theodoratus a certificate even though he justifiably relied on Ecology's directive by making a substantial investment of private funds."¹⁴⁰ Furthermore, the dissent asserted that the majority's prior beneficial use rule would defeat other future planned developments because of financial uncertainty.¹⁴¹ Vesting a water right based upon completion of the water delivery system allows a developer to invest in a costly system because the system itself will guarantee the water right.¹⁴² A developer would not invest without such a guarantee because her valuable water right might never materialize.¹⁴³

134. *Id.* at 604, 957 P.2d at 1252.

135. *Id.*

136. *Id.* at 605, 957 P.2d at 1252.

137. *Id.* at 606-07, 957 P.2d at 1253.

138. *Id.* at 607, 957 P.2d at 1253.

Upon a showing to the department that construction has been completed in compliance with the terms of any permit issued under the provisions of this chapter, it shall be the duty of the department to issue the permittee a certificate of ground water right stating that the appropriation has been perfected under such permit.

WASH. REV. CODE § 90.44.080 (1998).

139. *Theodoratus*, 135 Wash. 2d at 607, 957 P.2d at 1253.

140. *Id.* at 602, 957 P.2d at 1251.

141. *Id.* at 609-10, 957 P.2d at 1254.

142. *Id.* at 609, 957 P.2d at 1254.

143. *Id.*

4. The Dissent's Conclusion

The dissent concluded that the DOE was required to condition Theodoratus' vested water rights on delivery system capacity under common law progressive growth and growing communities doctrines. Furthermore, the dissent also argued that the language of the water codes provides for vested water rights based on system capacity. Theodoratus had also justifiably relied on the system capacity basis specified in his original permit. Finally, the dissent concluded that employing actual use, rather than system capacity, as a basis for vesting water rights would create financial uncertainty for other developers, stifling planned development.

V. ANALYSIS OF THE MAJORITY AND THE DISSENTING OPINIONS

A. Analysis of Common Law Arguments

1. Analysis of Majority's Common Law Arguments

In *Theodoratus*, the majority grounded its opinion on the water code but supported its opinion with common law doctrine, largely codified by the water rights codes.¹⁴⁴ Therefore, to examine the majority's opinion, it is useful to begin with the common law. The majority's finding, that actual prior application of water to beneficial use is required to perfect a water right, harmonizes with the common law of water rights. Under common law, prior appropriation for beneficial use provides the basis and measure of a water right.¹⁴⁵ Perfection of appropriation under common law requires the actual diversion of water and its application to a beneficial use.¹⁴⁶ Thus, the majority correctly found that the requirement of actual beneficial use for issuing a certificate of water right under the Washington code comports with the common law requirement for perfecting an appropriative vested water right.

The majority's holding also supports the intent behind the common law of water rights. The overall intent of the common law doctrine was to promote the fullest, most efficient use of a finite supply of water.¹⁴⁷ In order to provide early beneficial users certainty of a water

144. The majority explicitly tied the common law of water rights to the water codes: "In requiring actual application of water to beneficial use in order to perfect an appropriative right before a final certificate of water right may be issued, the statutes codify fundamental western water law." *Id.* at 592, 957 P.2d at 1246.

145. See Neuman, *supra* note 9, at 920.

146. See Koehl, *supra* note 12, at 1141.

147. See *id.* at 1143.

supply, an actual user's water rights were paramount to any subsequent user.¹⁴⁸ Common law thereby tied efficiency of use and certainty of supply to the earliest beneficial use. Similarly, the state promotes efficiency of use and certainty of supply by issuing a certificate of water right only after the application of water to beneficial use, making earliest actual users' water rights paramount.

The common law also sought to provide certainty of supply and to avoid speculation in water rights by not allowing appropriators to hold unused or future vested water rights.¹⁴⁹ Here again, the majority's holding in *Theodoratus* supports this common law purpose by preventing the DOE from issuing a water right certificate that would vest rights to future amounts of water beyond an amount already being used. Thus, by finding that a perfected appropriation requires actual use, the majority affirmed that the Washington water rights codes are consistent with common law doctrine.

Furthermore, the majority persuasively argued that the system capacity measurement of a water right contradicts common law doctrine. A certificate of water right based upon the capacity of a completed water delivery system would grant a vested water right without any prior beneficial use and would allow the appropriator to hold water rights indefinitely without use. Both of these concepts oppose common law water rights principles. System capacity based water rights would prevent the fullest actual use of water because subsequent users could not obtain vested rights to unused water already vested based on the capacity of prior users' systems.

A system capacity measurement of water right would also contravene the common law intent to avoid speculation in water. The common law requirements of prior actual use to obtain a vested water right and continued use to retain a vested water right avoid speculation in water rights. The issuance of a certificate of water right based on system capacity allows the holder to speculate in water rights by holding a vested right with respect to the unused capacity of a water delivery system.

Additionally, the majority properly noted that a system capacity measurement of a water right violates the common law intent to provide certainty of water availability to holders of vested water rights. A system capacity based water right would endow the holder with vested rights in water to be used at an undetermined time in the future. Because total capacity is independent of unused capacity, even if a vested holder never used a part of her system's capacity, it would not

148. See *id.* at 1141.

149. See *id.* at 1141-43.

reduce her vested right. This introduces an uncertainty of availability to other users that the common law doctrine sought to avoid.

Although the majority persuasively argued that a system capacity measurement of water right would violate common law principles, the majority failed to argue that the common law historically distinguished between system capacity and actual use. Perhaps the courts never faced the need to make this distinction. One would not expect a hard working miner or early settler in the West to undertake the unnecessary work and expense of building a water delivery system larger than actually needed. Therefore, system capacity and actual beneficial use would have generally been equivalent at the time common law water rights doctrines were developed.

It is likely that, because of policy considerations discussed *infra*, the majority was determined to make a distinction between system capacity and actual use regardless of whether such a distinction existed in common law. However, rather than forthrightly rejecting system capacity based upon clearly described policy considerations, the majority chose to cloak its policy concerns in common law principles that fortuitously support modern policy considerations.

2. Analysis of Dissent's Common Law Arguments

The dissent argued that the common law did not apply to water rights issued under the codes.¹⁵⁰ Even if the common law did apply, the dissent believed that two doctrines allowed Theodoratus to establish a water right based on future intended use.¹⁵¹ The dissent first cited the progressive growth doctrine and contended it should apply to this case.¹⁵² Insofar as it has vitality, this doctrine allows an agricultural landowner to establish vested rights when he manifests a future intent to use water and proceeds with reasonable diligence to apply the water to his land.¹⁵³

The dissent's argument that the progressive growth doctrine should apply in this case is not persuasive. The doctrine clearly conflicts with the basic common law tenet of prior beneficial use and can only be viewed as an exception. Even if one accepts the dissent's argument that the doctrine should be extended from agriculture users to land developers, and even if we assume that Theodoratus' *twenty-plus year* development project complied with the reasonable diligence requirement, the dissent failed to establish that the progressive growth

150. *Theodoratus*, 135 Wash. 2d at 601-03, 957 P.2d at 1250-51.

151. *Id.* at 610-17, 957 P.2d at 1255-58.

152. *Id.* at 611-14, 957 P.2d at 1255-57.

153. *Id.* at 612-13, 957 P.2d at 1255-56.

doctrine has vitality in Washington. The dissent cited a 1924 case to establish that Washington recognizes the doctrine,¹⁵⁴ but the dissent overlooked *Acquavella*, decided in 1997. In *Acquavella*, the Supreme Court of Washington held that the right to use irrigation water could not be based on the capacity of the district's delivery system without requiring proof of past beneficial use of that amount of water.¹⁵⁵ Thus, even assuming the progressive growth doctrine could rightfully be extended to nonagricultural water uses, the doctrine lacks vitality in Washington after *Acquavella*.

The dissent also argued that a second common law doctrine, the growing communities doctrine, allowed Theodoratus to obtain a vested water right for an amount of water reasonably anticipated for future community growth within his development.¹⁵⁶ Here, the dissent did not overlook recent Washington case law, as it did with the progressive growth doctrine; instead, the dissent failed to cite any Washington cases recognizing this doctrine.

Furthermore, the dissent misconstrued *City and County of Denver v. Sheriff*, which it identified as the leading case applying the growing communities doctrine and on which it primarily relied for support of its application of the doctrine.¹⁵⁷ The dissent stated that the *Sheriff* court held that a community's vested water right may be based on system capacity rather than on actual use.¹⁵⁸ Actually, the *Sheriff* court clearly held that a vested water right requires prior actual use: "[the fact] that such water must first be applied to a beneficial use by the city before it has any property right . . . is not disputed."¹⁵⁹ Furthermore, the *Sheriff* court found the quantity of water that Denver put to beneficial use was 335 cubic feet per second (cfs) actually used, not the system capacity of 600 cfs.¹⁶⁰ The *Sheriff* court made clear that "construction of [the delivery system] with due diligence, and even the actual diversion of water . . . unaccompanied by the beneficial use of the water constitute but an inchoate right or interest."¹⁶¹ Beneficial use must follow within a "reasonable time" for the inchoate right to "ripen into an appropriation."¹⁶²

154. *Id.* at 613, 957 P.2d at 1256 (citing *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 13-15, 224 P. 29, 31-32 (1924)).

155. *See* Department of Ecology v. *Acquavella*, 131 Wash. 2d 746, 935 P.2d 595 (1997).

156. *Theodoratus*, 135 Wash. 2d at 614-17, 957 P.2d at 1257-58.

157. *See id.* at 614-15, 957 P.2d at 1257-58.

158. *Id.* at 615, 957 P.2d at 1257.

159. *City & County of Denver v. Sheriff*, 105 Colo. 193, 204, 96 P.2d 836, 842 (1939).

160. *See id.* at 197-98, 208, 96 P.2d at 839, 843.

161. *Id.* at 199, 96 P.2d at 839.

162. *Id.*

The growing communities doctrine described in *Sheriff* comports with the majority's, not the dissent's, opinion in *Theodoratus*. The majority's opinion leaves intact inchoate water rights based on unused system capacity, stating that they can ripen into a vested right if "prosecuted with reasonable diligence."¹⁶³ The dissent's position, that system capacity provides a basis for a vested rather than inchoate rights, contradicts the growing communities doctrine of inchoate rights described in *Sheriff*. Thus, the dissent not only fails to establish that Washington recognizes the growing communities doctrine; it also does not demonstrate that, even if the doctrine were applied in this case, it would vest a water right in *Theodoratus* based upon system capacity.

B. Analysis of Statutory Arguments

1. Analysis of Majority's Statutory Arguments

Under a statutory analysis, the majority's position is again more compelling than the dissent's position. The code's language includes terms of art from the common law; for example, beneficial use and perfection. By reasonable inference, the code's common law terms of art retain common law meanings because they are not otherwise defined in the statutes.

Given these definitions, substantial language in the statutes supports the conclusion that perfection of a water right requires actual beneficial use. For example, RCW 90.03.260 requires that an application for a permit include "the time for the complete application of the water to the proposed use."¹⁶⁴ Thus, this code provision seems to anticipate that permit compliance, which is prerequisite to issuance of a certificate of water right, requires actual application of water to the proposed beneficial use. RCW 90.03.320 requires that, in issuing a permit, the DOE must fix the time for the "application of the water to the beneficial use prescribed in the permit."¹⁶⁵ Here again, the code plainly anticipates that a permit holder must ultimately apply water to a beneficial use before a certificate of water right will be issued. RCW 90.03.330 provides that a certificate of water right shall be issued upon a satisfactory showing that "any appropriation has been perfected in accordance with the provisions of this chapter. . . ."¹⁶⁶ The language

163. See *Theodoratus*, 135 Wash. 2d at 595-96, 957 P.2d at 1248.

164. WASH. REV. CODE § 90.03.260 (1998).

165. WASH. REV. CODE § 90.03.320 (1998).

166. WASH. REV. CODE § 90.03.330 (1998).

of these statutes clearly conveys the intent that perfection of a water right under the code requires actual beneficial use.

The majority's reliance on legislative intent is also well founded, assuming the premise that a governor's veto reflects legislative intent. In 1997, the Governor vetoed legislation that would have provided a system capacity measure for municipal water supplies.¹⁶⁷ In explaining the veto, the Governor expressed concerns about allowing system capacity to determine water rights.¹⁶⁸ These concerns parallel certain concerns of the *Theodoratus* court: creating uncertainty in determining water availability and increasing the difficulty of managing the State's waters.¹⁶⁹ Such concerns are justified, because unused but vested system capacity water rights create uncertainty as to their future use. Such uncertainty adds difficulty to managing water rights. The requirement of actual beneficial use avoids this uncertainty.

The majority's argument that a vested water right requires actual beneficial use is persuasive. However, the majority's attempt to justify the application of its change in water rights law with respect to *Theodoratus* is less compelling. *Theodoratus* had an especially strong reason to rely on his system capacity for a vested water right. The DOE issued his original permit based on delivery system capacity.¹⁷⁰ Furthermore, the DOE granted several subsequent extensions to his permit based on system capacity as the measurement of his water right.¹⁷¹ Under these circumstances, the majority could have found that *Theodoratus*' original permit and its extensions endowed him with a vested right to complete his project based on system capacity. This would be analogous to the established rule in Washington that a building permit holder acquires vested rights to the applicable zoning ordinances and building codes in force at the time of application for the permit, regardless of subsequent changes to the ordinances and codes.¹⁷²

The majority summarily discounted the issue of whether it was appropriate to deny *Theodoratus*' vested water rights in light of the rules for other vested property rights such as zoning ordinances and building codes. Referring to permits in general, the majority declared that "the conditions of [an] original permit do not necessarily create a vested right to proceed under those conditions where renewal is discretionary. . . ." ¹⁷³ The majority then noted that the following circum-

167. *Theodoratus*, 135 Wash. 2d at 594, 957 P.2d at 1247.

168. *See id.*

169. *Id.*

170. *Id.* at 587, 957 P.2d at 1243.

171. *Id.*, 957 P.2d at 1244.

172. *See, e.g.,* *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

173. *Theodoratus*, 135 Wash. 2d at 597, 957 P.2d at 1248.

stances might justify a change of conditions for vested rights under a permit extension: changes in the law, consideration of information not considered for the original permit, a lack of good faith on the part of the appropriator, and public interest concerns.¹⁷⁴ However, after declaring the above rule, the majority failed to explain how any of these circumstances applied to Theodoratus. The applicable codes did not change, no new information was presented for consideration, Theodoratus' "good faith" was not an issue, and the public's interest had not changed. Nevertheless, the majority applied this rule to Theodoratus and declared that (1) the basis for vested water right in the original permit was unlawful, (2) the DOE may condition any extension to correct an unlawful permit, and (3) the DOE validly conditioned Theodoratus' permit extension.¹⁷⁵ It seems likely that the majority was determined to change the law, even if doing so required correctly stating a general rule and then drawing a non sequitur conclusion in this specific case.

2. Analysis of Dissent's Statutory Arguments

The dissent falls short in its argument that the language of the codes requires that appropriation of a water right is perfected if a delivery system is complete.¹⁷⁶ The dissent relies primarily on RCW 90.44.080, which includes language that "upon a showing . . . that construction has been completed . . . it shall be the duty of the [DOE] to issue . . . a certificate of ground water right stating that the appropriation has been perfected under such permit."¹⁷⁷ A ground water permit, however, must also comply with the surface water code. Therefore, although RCW 90.44.080 makes completion of construction of the water system a prerequisite, such completion is not sufficient to perfect the appropriation. The applicant must also perfect the appropriation under RCW 90.03, requiring actual beneficial use.

C. Analysis of Financial Reliance Arguments

The dissent's argument that a beneficial use basis for water rights does not allow Theodoratus to realize his reliance-based investment and does not allow other developers to invest in water systems is unpersuasive. Inchoate rights are recognized under the water code.¹⁷⁸

174. *Id.*

175. *Id.* at 597-98, 957 P.2d at 1248-49.

176. *See id.* at 601, 957 P.2d at 1250.

177. WASH. REV. CODE § 90.44.080 (1998).

178. *Theodoratus*, 135 Wash. 2d at 596, 957 P.2d at 1248.

Nothing in this chapter contained shall operate to effect an impairment of any inchoate right to divert and use water while the application of the water in question to a

Thus, *Theodoratus* and others with water permits establishing a time for future beneficial use of water have "an inchoate right to water which has not yet been applied to beneficial use."¹⁷⁹ The inchoate right matures into a vested appropriative right on actual application of the water to beneficial use.¹⁸⁰ The dissent overlooks the possibility that this inchoate right to water not yet put to use represents an adequate guarantee to support financial investment in the construction of water systems.¹⁸¹

D. Analysis of Majority's Stealth Policy Considerations

This Note previously concluded that a requirement of prior application of water to beneficial use to perfect a water right conforms to common law, statutory language, legislative intent, and investor concerns. Therefore, the *Theodoratus* court stands on firm statutory and common law ground in rejecting the system capacity basis for a vested water right. However, analogous rules for other vested property rights do not clearly support the court's denial of *Theodoratus*' vested right to proceed under a system capacity basis. For example, a building permit holder acquires a vested right to proceed under zoning ordinances and building codes in place at the time he applies for his permit.¹⁸² Therefore, a skeptic would certainly wonder why it took forty years to challenge the system capacity standard, discover the

beneficial use is being prosecuted with reasonable diligence, having due regard to the circumstances surrounding the enterprise, including the magnitude of the project for putting the water to beneficial use and the market for the resulting water right for irrigation or power or other beneficial use, in the locality in question.

WASH. REV. CODE § 90.03.460 (1998).

179. *Theodoratus*, 135 Wash. 2d at 593, 957 P.2d at 1248.

180. *See id.* An inchoate right to water that has not yet been put to beneficial use is "an incomplete appropriative right in good standing, that comes into being at the taking of the first step provided by law for acquisition of an appropriative right. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law." HUTCHINS, *supra* note 12, at 226.

181. The dissent also expressed concern that the majority's rule would "destabilize" certificates already issued using the illegal system capacity approach. *Theodoratus*, 135 Wash. 2d at 602, 957 P.2d at 1251. However, the majority made clear that its finding left intact inchoate water rights under statutory and common law. *Id.* at 596, 957 P.2d at 1248. Therefore, although the holder of a system capacity based certificate of water right may not have a vested right in unused water, the certificate holder's inchoate right to the quantity of water in her certificate might not be affected by the decision in *Theodoratus*. Of course, such an inchoate right is dependent upon the "reasonable diligence" requirement for perfecting inchoate water rights. Presumably, a certificate holder with "unused capacity" could preserve that inchoate right by applying for a permit or extension and pursuing the actual beneficial use of the water with reasonable diligence.

182. *See, e.g.,* Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

truth, and deny that a permit holder such as *Theodoratus* has a vested right to proceed under a system capacity standard.

The likely reason for the court's holding is that vesting water rights based on prior appropriation for beneficial use, rather than system capacity, comports with contemporary water management policy. The majority noted that "using system capacity as a measure of a water right would . . . lead to uncertainty in management of this fixed resource at a time when availability of water is a significant concern and management of limited water resources is of utmost importance."¹⁸³ On the other hand, the majority observed that "the requirement of beneficial use of water addresses concerns about the availability of water resources given ever increasing demands."¹⁸⁴ Other than this cursory acknowledgment that the actual beneficial use requirement better supports modern conservation concerns,¹⁸⁵ the court hid its modern water policy considerations behind its common law and statutory arguments.

Clearly, the actual beneficial use doctrine's attempt to avoid water waste and speculation does support modern water conservation goals. However, commentators have observed that the doctrine has not achieved many of its goals, and it contains internal inconsistencies.¹⁸⁶ For example, "use it or lose it" likely motivates unnecessary use by the appropriator to avoid loss of a water right. Furthermore, although "waste" is prohibited, it is so loosely defined and so seldom enforced that its prohibition has little effect.¹⁸⁷

Nevertheless, the court's affirmation of prior appropriation by beneficial use in *Theodoratus* provides a small step in the right direction for water policy. The modern goal of water use and conservation must be the same as the goals of use and conservation for other natural resources: to accomplish beneficial use with the minimum amount of resources necessary. Clearly, the courts alone cannot direct this policy. Legislative and agency action must be directed toward several aspects of water rights. Water development plans should be required to include a conservation component. This could be achieved both by enforcing mandatory conservation standards and by providing incentives, or at least removing disincentives, for water conservation. A component of such a conservation standard should include a provision

183. *Theodoratus*, 135 Wash. 2d at 595, 597 P.2d at 1247.

184. *Id.* at 593, 957 P.2d at 1247 (citing *Department of Ecology v. Grimes*, 121 Wash. 2d 459, 468, 852 P.2d 1044 (1993)).

185. For a proposed comprehensive agenda for improving efficiency in western water use under the beneficial use doctrine see Neuman, *supra* note 9, at 921.

186. *See id.*

187. *Id.* at 933-46.

that the "beneficial use" be achieved in a reasonable manner conforming to modern practices. For example, inefficient irrigation practices based on outdated methods should no longer be tolerated for the purposes of establishing or retaining a vested water right.

Furthermore, enforcement of the prohibition against "waste" should be truly incorporated in a modern beneficial use doctrine. The common law concept of defining waste based on customary practices must give way. Where customary practices are wasteful or where modern, efficient water use practices or technology are being ignored, regulations and enforcement must be instituted to ensure that users adopt the newer practices and technology.

The state should also continue to develop and refine a policy that considers the retention of water in its source in support of environmental concerns, including the preservation of aquatic habitat. The majority in *Theodoratus* noted with approval that, in 1997, the Governor vetoed system capacity water right legislation in part because such legislation would "creat[e] . . . uncertainty in the protection of instream resources. . . ."¹⁸⁸ Washington expressly recognized the environmental importance of water management in its 1971 Water Resources Act, RCW 90.54.¹⁸⁹ This statute asserts certain fundamental aspects of water management, including protecting the environment by establishing stream flow levels and defining beneficial use to include instream uses for fish, wildlife, recreation, and aesthetics.¹⁹⁰ In 1979, RCW 90.03.005¹⁹¹ reinforced this policy with language stating that "it is the policy of the state to promote the use of the public waters for obtaining maximum net benefits arising from both diversionary uses . . . and the retention of waters . . . to protect instream and natural values and rights. . . ."¹⁹²

Regrettably, the *Theodoratus* court failed to state fully and expressly the contemporary water policy considerations behind its decision. The court cloaked these policy considerations by applying century-old common law doctrine and many-decades old statutory law to support its decision. By using such stealth tactics, the court may have hoped to avoid the appearance of "legislating." However, the court also has forgone the opportunity to describe a clear policy foun-

188. See *Theodoratus*, 135 Wash. 2d at 594, 957 P.2d at 1247.

189. WASH. REV. CODE § 90.54 (1998).

190. The 1971 Water Resources Act acknowledges that there is a public interest in the retention of water in streams as "necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values." Diversion that conflicts these policies will be authorized only when "it is clear that overriding considerations of the public interest would be served." WASH. REV. CODE § 90.54.020 (1998).

191. WASH. REV. CODE § 90.03.005 (1998).

192. *Id.*

dation on which subsequent courts, and possibly the legislature, could have further advanced water rights law.

VI. CONCLUSION

In sum, by discarding the water delivery system capacity measurement for perfecting a vested water right, the *Theodoratus* court properly recognized that the concerns of economic development should no longer take priority over other water management concerns, such as in-place use of water and water conservation. Unlike the system capacity measurement, the prior appropriation for beneficial use measurement of water rights conforms to common law, statutory law, and contemporary water policy concerns. Unfortunately, the *Theodoratus* court failed to fully describe the modern water policy arguments that would better establish a foundation from which a more effective system of water rights could be developed to achieve conservation, reduce waste, and address environmental concerns.