An Agricultural Law Research Article

Washington's Family Farm Water Act

by

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WASHINGTON'S FAMILY FARM WATER ACT

I. INTRODUCTION

Washington's water supply is declining as the state experiences substantial nonagricultural and agricultural growth. Nonagriculturally, increased power demand places a greater burden on the state's water supply each year. Agriculturally, irrigation demands increase as once arid landholdings become productive. Competition for the flowing resource, both within and without Washington, has resulted in an effort to assert tighter control over the available water supply.

In order to preserve necessary water for agriculture the voters of Washington, by initiative in 1977, enacted the Family Farm Water Act,[1] mandating that among potential agricultural water users, only the family farm will be given priority status. Thus, while irrigated large-scale landholdings will remain intact, their future expansion is stymied.

This Comment will first examine the development of the water appropriation system and water resource management program as it existed prior to the Family Farm Water Act, and will then analyze the impact of the Act on water resource management as well as on the state's overall agricultural growth.

II. WASHINGTON'S WATER APPROPRIATION SYSTEM

As a matter of national policy, each state has primary responsibility for promulgation and administration of water rights programs within its boundaries.[2] The Washington Legislature has ac-

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1. WASH. REV. CODE ch. 90.66 (1979).

2. Reclamation Act of 1902, 43 U.S.C. § 383 (1976) (originally enacted as Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 380). This section provides that the laws of any state or territory relating to control, appropriation, use, or distribution of water used in irrigation or for other purposes will be controlling. For example, the Columbia Basin Project water is subject to this provision. *See* Port of Seattle v. Oregon & W.R.R., 255 U.S. 56 (1921).

Section 423(e) of the Reclamation Act limits the total irrigable land which may receive project water to 160 acres, with a proviso that land in excess of 160 acres either be sold at the land's market value as fixed by the Secretary of the Interior or retained with no right to

knowledged that responsibility by declaring that "[s]ubject to existing rights all water within the State belongs to the public. . . ."[3] The Department of Ecology is delegated the responsibility for orderly allocation of the state's available water resources.[4] Thus, the department supervises water distribution, issues water use permits, determines water rights, and oversees water quality control.

The allocation of water within the state is governed by a permit system established in the Water Code of 1917,[5] which combines two recognized water allocation doctrines: the riparian doctrine and the prior appropriation doctrine. Under the riparian doctrine,[6] water rights originate from the natural relationship that land bordering a natural watercourse has to the surface water, and the rights of landowners to make beneficial use of such water. The rights to beneficial use carries with it additional rights, including the right to access, to irrigate, and to use the water for recreational purposes.[7] A riparian landowner does not have a right to a specific

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receive project water. The Secretary's determination of market price is dependent on the value of the land if no project had even been constructed. This provision, which withstood due process attack in Israel v. Morton, 549 F.2d 128 (9th Cir. 1977), is designed to prevent windfall profits to landowners who are the benefactors of project waters. Thus, for example, grantees of Columbia Basin Project water are subject to the Reclamation Act's acreage limitation.

Section 431 limits the sale of project water rights requiring the sale not exceed 160 acres and be made to a private landholder. Additionally, such sale may only be made to a bona fide resident of the land. Section 383 does not overrule section 431. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

Ivanhoe also held that once water rights are acquired by the federal government through a reclamation project, the United States is under no duty to distribute water under conditions imposed by the state. This holding was modified by California v. United States, 438 U.S. 645 (1978), which held that a state may impose conditions in a permit which it grants to the United States with respect to irrigation projects, so long as the conditions are not inconsistent with the congressional provisions authorizing the projects. *See also* Comment, *Water District Contracting for Water with the Bureau of Reclamation—Can a State-Created Entity Violate State Law?*, 11 U. CAL. D. L. REV. 473 (1978).

3. WASH. REV. CODE § 90.03.010 (1979).

4. *Id.* § 43.21A.020.

5. *Id.* ch. 90.03 [hereinafter referred to as the 1917 Code].

6. The riparian doctrine was announced by Justice Storey in Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827), in which he set out the rights of riparian proprietors both individually and collectively.

7. *See, e.g.*, Snively v. Jaber, 48 Wn. 2d 815, 296 P.2d 1015 (1956) (right to prevent swimmers from making a nuisance); *In re* Clinton Water Dist., 36 Wn. 2d 284, 218 P.2d 309 (1950) (riparian owners have right to bathe, fish, boat, and permit drainage from livestock pasturage to enter the water); DeRuwe v. Morrison, 28 Wn. 2d 797, 184 P.2d 273 (1947)

quantity of water,[8] but rather is entitled to make reasonable use of the water bordering his land. This right is held coequally with other riparian landowners, regardless of which landowner first made beneficial use of the water.[9] Water rights of any kind, whether riparian or appropriative, cannot be ascertained apart from an inquiry as to the use made of the water by the claimant, for an individual's water rights can never exceed his needs.[10]

In contrast, the appropriation doctrine allows the owner of nonriparian land, or some other nonriparian user, to obtain exclusive rights to the use of water by diversion for a beneficial purpose. Prior to the 1917 Code,[11] two appropriative measures were used: the customary method, wherein public water was merely diverted and put to beneficial use,[12] and the statutory notice method, which required posting of notice at the point of diversion.[13] Water rights acquired by appropriation can be transferred and, unlike riparian rights, can be the lawful subject of a contract of sale.[14] An appropriative right is definite in quantity,[15] and an action can be maintained to quiet title in appropriated water, as if it were real property.[16] The first appropriator of the water of a stream for irrigation purposes is entitled to the quantity of water appropriated to him, to the exclusion of subsequent riparian and appropriative claimants,[17] and is not, like the riparian landowner, required to submit

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(right to have stream flow past riparian property in natural state and use water without materially interfering with common rights of other riparians); Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900) (right to hold title to the bed of a nonnavigable water course).

8. Wallace v. Weitman, 52 Wn. 2d 585, 328 P.2d 157 (1958).

9. Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41 (1926). *Cf.* Yearsley v. Cater, 149 Wash. 285, 270 P. 804 (1928) (nonriparian land not converted to riparian land by acquisition of land lying between nonriparian land and the water source). *See also* Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960).

10. United States v. Ahtanum Irrigation Dist., 124 F. Supp. 818 (E.D. Wash. 1954).

11. *See* note 5 and accompanying text *supra*.

12. Tenem Ditch Co. v. Thorpe, 1 Wash. 566, 20 P. 588 (1889).

13. Ch. 142, § 2, 1891 Wash. Laws at 327.

14. Thompson Co. v. Pennebaker, 173 F. 849 (9th Cir. 1919).

15. Wallace v. Weitman, 52 Wn. 2d 585, 328 P.2d 157 (1958).

16. Barnes v. Belsaas, 73 Wash. 205, 131 P. 817 (1913). This Comment does not address the rights of the original appropriators, the Indians. *See* Dellwo, *Indian Water Rights—The* Winters *Doctrine Updated*, 6 GONZ. L. REV. 215 (1971). *See also* Dufford, *Water Rights for Non-Indians on the Reservation: Checkerboard Ownership and Checkerboard Jurisdiction*, 15 GONZ. L. REV. 95 (1979).

17. Avery v. Johnson, 59 Wash. 332, 109 P. 1028 (1910). *See also* Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41 (1926) (riparian water user cannot exercise his rights

to apportionment when the water supply is insufficient for all.[18]

A. *How Washington Water Diversion is Determined*

The sole method presently available in Washington for establishing the right to divert and make beneficial use of public surface waters is through the permit system of the 1917 Code.[19] In the last decade, however, permit applications have been considered not only in accordance with the 1917 Code, but also according to policies set forth in the Water Resources Act of 1971.[20] While the 1917 Code provided that water should be used in a manner consistent with the greatest public benefit, it failed to adequately define that term. The 1971 Act was enacted to fill this void, and defined public interest[21] with greater specificity so as to provide direct guidance to the Department of Ecology in carrying out water resource programs. Fundamental guidelines to ensure full utilization and protection of public waters are also set forth in the Act.[22]

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to exhaust water in disregard of other riparian landowners).

18. Mally v. Weidensteiner, 88 Wash. 398, 153 P. 342 (1915). *Cf.* United States v. Ahtanum Irrigation Dist., 124 F. Supp. 818 (E.D. Wash. 1954) (water rights will be lost if there is a discontinuance of beneficial use for more than a reasonable time); *In re* Determination of the Rights to the Use of the Waters of Alpowa Creek, 129 Wash. 9, 224 P. 29 (1924) (prescriptive water rights obtainable only where owner of right being affected has notice of invasion); Farwell v. Brisson, 66 Wash. 305, 119 P. 814 (1911) (prescriptive rights to water can be gained by adverse use); Tenem Ditch Co. v. Thorpe, 1 Wash. 556, 20 P. 588 (1889) (nonuser of a water right will not effect an abandonment in absence of intent to abandon).

19. WASH. REV. CODE § 90.03.250 (1979) provides: "Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application . . . ."

Controversy regarding the nature and scope of the 1917 Code has raised the issue whether "existing rights" unaffected by the Code include dormant rights appurtenant to riparian land. Brown v. Chase, 125 Wash. 542, 553, 217 P. 23, 26 (1923), seemed to answer this question in the negative when the court declared that the "waters of non-navigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time . . . are subject to appropriation for use on non-riparian lands." *See also* WASH. REV. CODE ch. 90.44 (1979), which extends the permit system of the 1917 Code to public ground waters.

20. WASH. REV. CODE ch. 90.54 (1979).

21. *Id.* § 90.54.020 contains a general declaration of fundamentals for utilization and management of waters of the state. This section enumerates beneficial uses of water, provides a formula for arriving at maximum net benefit of a proposed use, provides means for protecting and enhancing the natural environment, mandates that adequate supplies of water for domestic use shall be maintained, and generally declares that development of water supply systems and water management programs are deemed to be in the public interest.

22. *Id.* § 90.54.010.

Several grounds exist for departmental refusal to issue a permit. When an application is received, the department must determine whether any water is available for appropriation,[23] and to what beneficial use or uses it can be applied. At all times the Department must keep in mind the highest feasible use of waters which belong to the public. The Department will reject an application if there is insufficient water, a proposed use which may prove detrimental to the public interest, or a conflict with existing rights.[24] If the application is refused, the applicant has two options. The applicant can either acquire existing rights of others by purchase, or through a private eminent domain action.[25] In a private eminent domain action, the court determines which of the conflicting uses, as between the proposed use of the applicant and the current use of the possessor, will be of the greatest benefit to the public and awards the water to the superior use.[26] Importantly, no condemnation under a private action is allowed for irrigation purposes if it deprives another irrigator of water reasonably necessary for presently irrigated land.[27]

When the permit applicant has satisfactorily shown the Department that an appropriation is justified, it issues a water rights certificate.[28] This certificate relates back to the filing date of the

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23. *Id.* § 90.14.041 facilitates water availability determinations. Under this section all persons using or claiming the right to withdraw or divert or make beneficial use of state public or surface ground waters were required to file a statement of claim for each water right asserted prior to June 30, 1974. This section is inapplicable to any water rights based on the authority of a permit or certificate issued by the Department of Water Resources or any of its predecessors. The filing procedure affected rights to divert and withdraw water, excepting riparian rights which did not diminish the water supply, such as recreation and aesthetic uses, which are not subject to the beneficial use requirement. *Id.* § 90.14.020(5). The effect of *id.* ch. 90.14 is to extinguish all water rights not on record as of the filing deadline.

24. *Id.* § 90.03.290 provides that preliminary permits may be issued for a period not exceeding three years, during which time the permit holder must make such studies as the department may find necessary in determining if water is available and if appropriation will impair existing rights.

25. *Id.* § 90.03.040.

26. *See* State *ex rel.* Kennewick Irrigation Dist. v. Superior Court, 118 Wash. 517, 204 P. 1 (1922) (between irrigation district and municipality each seeking to condemn water for power generation purposes, irrigation district had superior use and granted full amount sought, even though effect was to reduce to zero amount available to municipality during low water level months).

27. WASH. REV. CODE § 90.03.040 (1979).

28. *Id.* § 90.03.330. The permit states the amount of water appropriated and the beneficial use or uses to which the water may be applied.

original application.[29] Such water rights then take on the characteristics of an appropriative right at common law, becoming a vested proprietary interest which may be transferred without loss of priority, provided such transfer is not deleterious to existing rights.[30]

Water availability will, of course, depend largely upon the area within which application is made.[31] The Water Resources Management Program policy for the Little Spokane River Basin,[32] for example, establishes priorities for beneficial uses within that area. Emphasis is placed on maintenance of existing rights, maintenance of base flows, and domestic use.[33] Large irrigation projects are encouraged to develop ground water resources. The John Day and McNary Pools-Columbia River water resources policy,[34] in contrast, provides that domestic use, municipal supply, and irrigation should enjoy the highest priority.[35] Industrial growth, municipal development, power generation, and energy facilities requiring cooling waters will, naturally, affect future priority policies.

Although the Washington Legislature had taken affirmative steps to protect and regulate the State's water, the proponents of the Family Farm Water Act were convinced that the maximum beneficial use test, as employed by the Department of Ecology, was inadequate. Important considerations as to the nature of the water user had been overlooked.

The permit system allowed use of water inconsistent with the

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29. *Id.* § 90.03.340.

30. *Id.* § 90.03.380 sets forth procedural aspects of transfer.

31. To facilitate orderly water allocation pursuant to the 1971 Act, WASH. AD. CODE § 173-500-040 (1977) divides the State into 62 Water Resource Inventory Areas, as authorized by WASH. REV. CODE § 90.54.040(1) (1979). Focused attention to given "psyioeconomic" regions can thus be achieved. In accordance with *id.* § 90.54.030, water use and availability studies in each of the inventory areas are conducted by the department, which publishes study results and recommendations for water allocation in each region. These recommendations serve to aid in the decision-making process on individual water permit applications.

32. Wash. Dep't of Ecology, Water Resources Management Program, Little Spokane River Basin (Aug. 1978).

33. *Id.* at 8-9.

34. Wash. Dep't of Ecology, Water Resources Management Program, John Day & McNary Pools—Columbia River (Nov. 1977) (review draft).

35. *Id.* at 7-14. *Compare id. with* ARIZ. REV. STAT. ANN. § 45-147 (Supp. 1979), which establishes statewide water use priorities. The order of priorities is: 1) domestic and municipal uses, 2) irrigation and stock watering, 3) power and mining uses, and 4) recreation and wildlife, including fish.

most beneficial social atmosphere. Large scale irrigation by corporate agricultural concerns was possible because the permit system contained no specific criteria for permit consideration in terms of maximum social benefit. Proponents of the new Act saw a need to eliminate department discretion to grant water permits to large-scale concerns. They believed that the smaller farm should have priority.

III. THE FAMILY FARM WATER ACT

The Family Farm Water Act[36] governs future development of irrigated farmland in Washington. The Act is designed to grant priority of available irrigation water to farms of 2,000 acres or less. The Department of Ecology is directed to issue water use permits for agricultural purposes only if the permit falls into one of four categories.[37] The first, a family farm permit, limits the use of water withdrawn for irrigation to land qualifying as a family farm, which is a unit consisting of not more than 2,000 acres controlled[38] by the same person.[39] Second, a family farm development permit may be issued to a person without any limit on the number of irrigated acres, provided that the person develops the land into family farms and transfers his interests within ten years to one qualifying for a family farm permit.[40] Third, publicly owned land permits are issued only to governmental entities which allow the irrigation of publicly owned lands. The fourth, public water entity permits, require public water districts to deliver water for irrigation only under the same provisions as enumerated in the first three catego-

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36. WASH. REV. CODE ch. 90.66 (1979).

37. *Id.* § 90.66.050.

38. Under *id.* § 90.66.040(3) a "controlling" interest is a transferable property interest sufficient to effect a change in the landlord's rights and benefits. This provision does not specifically address leasehold interests; thus, it appears to allow unlimited leasing of landholdings which qualify for family farm water permits. Arguably, such leases would not effect a change in the control of the landlord's benefits as regards the land to which the water use permit is appurtenant. Conversely, argument might be made that *id.* § 90.66.900, which calls for liberal construction of the Act, might effectively bar such leases, since the purpose of the Act is to limit the extent to which one entity may irrigate.

39. Under *id.* § 90.66.040(2) a "person" is an individual, corporation, or any entity whatsoever, public or private. Holding companies also qualify as a person to the extent that they have a common ownership of more than one-half the assets of each of any number of entities.

40. *Id.* § 90.66.050(2) allows extension for up to ten years upon a showing of need for additional time for orderly development and transfer to qualified persons.

ries. This fourth category of permits does not apply to water deliveries of federal reclamation projects, such as the Columbia Basin Project, if the federal project provides for acreage limitations in its own water delivery contracts.[41]

A. *The Intent of the Act*

The underlying philosophy of the Act is that big is bad. The Voters Pamphlet[42] explaining the Family Farm Water Initiative stated:

> Washington has almost 1 ½ million acres of irrigated land . . . . In recent years, large corporations have been withdrawing public water to irrigate thousands of acres of land. Three to 4 million acres are still available for irrigation development. . . . Will these acres be developed in family-size farms for the public good, or in large corporate farms?[43]

The overall aim of the Act is to ensure that waters available for irrigation are used by the maximum number of beneficiaries. The Act attacks corporate dominance as it stops the flow of a resource essential to expansion of large scale agriculturally based concerns.

The Family Farm Water Act is not the first evidence of a movement toward tighter control of the water supply. The Water Resources Act of 1971[44] recognized a need for stricter management than provided in the earlier Water Code. Reference was made in the 1971 Act to interests which sought to deprive the state of its valuable flowing resource, and the need to prevent those interests from usurping Washington's waters. Specifically, the Act provided that

> [t]he legislature . . . finds that the availability of waters of the state is being evaluated by interests who desire to remove portions thereof from the state in a manner inconsistent with the public interest of people of the state. It is the purpose of this chapter . . . to provide direction to the

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41. *Id.* § 90.66.050(4) is, in effect, a codification of California v. United States, 438 U.S. 645, 670-75 (1978), which was not decided until after the enactment of the Family Farm Water Act. While federal reclamation projects currently limit acreage holdings which may receive project water to 160 acres, the provision exempting these projects indicates that if a federal project were allowed to distribute water to large scale developments, the provisions of the Act would not prohibit delivery, so long as a specified acreage limit is provided.

42. OFFICE OF THE SECRETARY OF STATE, STATE OF WASHINGTON, VOTERS PAMPHLET (1977).

43. *Id.* at 14.

44. WASH. REV. CODE ch. 90.54 (1979).

department of ecology and other state agencies and officials, in carrying out water and related resources programs.[45]

B. *The Act's Effect On the Washington Administrative Code*

WAC chapter 173-596[46] establishes procedures and policies governing appropriation of significant amounts of water for agricultural irrigation use. The chapter sets out specific guidelines which the Department of Ecology must follow in ruling on applications for water rights permits which contain proposals to irrigate vast tracts of land with public surface waters. The Family Farm Water Act will have its greatest impact upon these administrative guidelines since they do not apply to applications for permits to irrigate less than 2,000 acres.[47]

Under WAC chapter 173-596 certain characteristics of large developments are encouraged.[48] In addition to the primary considerations of availability and existing rights, the department is directed, when it receives an application for a significant withdrawal, to determine whether the proposed use may be better served through a regional supply system or a multipurpose water project. Further, the department must determine if there is a presently existing public entity with the interest and the capability to construct and operate such a project, or if it appears that such an entity will be established within the foreseeable future.

If a regional project is not feasible, and a public entity neither existent nor imminent, public hearings are held to determine

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45. *Id.* § 90.54.010.

46. WASH. AD. CODE ch. 173-596 (1977). *See* Andersen & Rogers, *Time-Limited Water Permits: Legal and Economic Considerations*, 12 GONZ. L. REV. 193, 220 n.184 (1977), which indicates that U & I Sugar Co. had a direct interest in the proposed WASH. AD. CODE ch. 173-596 (1977).

47. WASH. AD. CODE § 173-596-015 (1977) provides that chapter 173-596 is designed to integrate the policies of the Water Code and the Water Resources Act as they pertain to proposed significant withdrawals of surface waters for irrigation. *Id.* § 173-596-020(9) defines significant as a withdrawal of 40 cubic feet per second or greater, or for use on 2,000 acres or greater. Chapter 173-596 does not apply to permit applications for less than significant amounts.

48. *Id.* § 173-596-045 provides that a permit pertaining to a significant withdrawal shall include conditions relating to the promotion of the public interest, among which are conditions which promote natural resources, protect against soil losses, and which provide for adequate drainage.

whether the permit should issue,[49] and if such permit should have a time limit.[50] A permit with a time limitation runs for fifty years, and the holder of the permit possesses the first right to additional fifty-year extensions.[51] Termination will occur if the department finds that permit waters are needed for a more beneficial use.[52] Even though proposals for significant withdrawals of water have the potential to modify the economic and social structure of vast areas of the state, and use of the water is limited to a few persons or nongovernmental entities,[53] the chapter does not restrict the size of the irrigated acreage, the ownership, or the controlling interest in the irrigated land. Permits are issued based on water availability and overall impact on future water use.

The effect of the categorical permit system of the Family Farm Water Act is to undermine the provisions of WAC chapter 173-596. Under the Administrative Code, a significant withdrawal permit holder could expect to have use of water for a minimum of fifty years. Under the Act the significant withdrawal permit is replaced by the family farm development permit; only under this permit can an irrigator of 2,000 acres or more appropriate water. Fifty-year permits, although not rising to the level of an absolute water right, arguably have more appeal to the land developer than do water use permits which have a ten-year limit. Emphasis is shifted from long-range capital investment and development to short-range development for resale, as long as such development can be accomplished within a decade. The overall economic import of this change in emphasis is yet to be seen.[54]

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49. *Id.* § 173-596-035.

50. Id. § 173-596-040.

51. *Id.* Failure by the department to notify a permit holder of intention to terminate a permit by the 45th year of a 50-year permit results in automatic permit extension for an additional 50 years.

52. *See* Andersen & Rogers, *supra* note 46, at 220-22, n.52 in which the authors recognize and lay to rest the fear of critics of the term permit system that such permits will allow out-of-state interests to acquire prior valid claims to Washington water by establishing in perpetuity water rights superior to Washington term rights.

53. WASH. AD. CODE § 173-596-010(2) (1977).

54. *See* Andersen & Rogers, *supra* note 46, at 194, which indicates that the massive amounts of capital necessary to finance private development may very easily be beyond the reach of most "family" farmers. Large scale developers must be relied upon to convert Washington's remaining irrigable land into productive assets. The increased value of the developed land must be great enough to recoup development costs, plus return an amount at least equal to the profit which might have been made had the developer's dollar been

C. *Problems With the Family Farm Water Act*

If the 1917 Code, the 1971 Act, and WAC chapter 173-596 are deficient in failing to address the issue of family versus corporate farming, the Family Farm Water Act is equally deficient in its inadequate treatment of underlying economic considerations. The effect of the new Act's restrictions on large-scale development may lead to a decrease in the pace of agricultural development, with a resultant decrease in growth rate of property tax revenues, agricultural support businesses, and agriculturally based employment opportunities.

A major issue not faced by the Act is the granting of in perpetuity water permits. Under the Act the water use permit has no time limit provided the land under irrigation conforms to the definition of a family farm.[55] This conditional perpetual right to withdraw water could create significant clouds over appropriative claims of right. The Act makes no provision for issuance of water rights certificates, nor does it confer the right to withdraw water in specific amounts. Reference to water use is made only in relation to specific landholdings,[56] a throwback to the riparian rights doc-

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invested elsewhere over a ten-year period. Large scale speculators would be wise to commit buyers who qualify for family farm permits prior to entering a land development venture. Should the Family Farm Water Act be interpreted to allow unlimited leasing of land which qualifies for these permits, the potential exists for a sale of developed farmland to qualified buyers, with a lease-back of the developed land to the original developer.

55. WASH. REV. CODE § 90.66.060 (1979). If land irrigated by permit waters loses its character as a family farm by gift, devise, bequest, or satisfaction of a debt, the permit grantee has five years to divest himself of enough acreage to conform to the definition of a family farm. If for some other reason the land does not conform to the definition, the landowner will be given two years, with a possible extension to a maximum of five years, to attain conformity or face cancellation of all withdrawal rights.

56. *Id.* § 90.66.080 empowers the Department of Ecology to promulgate rules necessary to carry out the provisions of the Act. As part of each water permit application, the Department includes a questionnaire designed to ascertain whether the applicant can comply with the Act and into which of the four categories the permit applicant and permit must fall. The questionnaire asks:

> Does the total number of acres in which you have controlling interest in the State of Washington exceed 2,000 acres for the following three categories?
>
> 1. Lands that are being irrigated under water rights acquired after December 8, 1977.
>
> 2. Lands that may be irrigated under application now on file with the Department of Ecology.
>
> 3. Lands that may be irrigated under this application.

Applicants must answer Yes, or No, to all questions collectively. Only the signature of the landowner is required. Failure to answer any of the questions in the negative results in

trine. Such a policy could result in the assertion of superior water use rights by a water rights certificate holder during times of short water supply. The certificate holder would assert that his absolute right rises to a level superior to that of the Family Farm Water Act conditional right.[57]

Along with the potential legal issues confronting future water users, two additional areas deserve mention. First, the cost of administering the water rights program will increase as the administration of the state's water policies becomes more complex, and the costs to acquire, analyze, and store information relative to the availability of, and need for, water increase. There is currently no fee exacted by the state for waters utilized under water use permits. As the demand for water and administration costs increase, this policy may have to be reexamined.[58]

In the past, water management policy has been based solely upon the maximum beneficial use of the water. The Family Farm Water Act shifts the policy emphasis from maximum beneficial use to a consideration of preferred social and economic benefits. Under both the 1917 Code and 1971 Act the Department of Ecology was not required to consider current social and economic policy when approving applications for water use permits. Thus, the department could grant a permit to a large corporate farm rather than a series of family farms if it believed it to be for the better use. The Act, however, takes away the department's discretion in deciding what the most beneficial uses of water are for the entire state. Instead, the department is required to grant water use permits to family farms rather than corporate farms without consideration of the best water use.

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disqualification of the application from consideration for a family farm water permit, although the applicant may qualify for one of the alternate permits. A copy of the questionnaire is on file with the Gonzaga Law Review.

57. *See* Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41 (1926) which held that the purchase of water rights relates back to the date of establishment of the seller's right. As such, large-scale developers may find it possible to purchase water rights in existence prior to the Family Farm Water Act, establishing superior rights against those using water under the Act's in perpetuity water permits.

58. A use tax may be a possible vehicle for the collection of revenue to finance water resource program administration expense.

IV. CONCLUSION

The Family Farm Water Act dictates water use policy based on size of the landholding alone, without considering the total water available, or the long range impact on the agricultural economy of the state.[59] Capital expenditures required to finance irrigation are much greater than the average farmer can afford, and the Act eliminates any large corporation from tackling the arid areas. While a statewide network of family farms has great populist appeal, there remains the reality that the state has much acreage destined to remain unproductive for a far greater period of time than would have been witnessed with unfettered growth. Agricultural development in some areas could be stopped as the available water supply is exhausted by nonagricultural interests.

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59. As illustrations of the approach other states have taken to the regulation of corporate farming, *compare* CAL. WATER CODE § 5901, art. III C.1. (West 1971), which provides that appropriation of water from the Klamath River for domestic or irrigation purposes within the Upper Klamath River Basin shall be superior to all other purposes within the Basin, but limits the superior right for irrigation to the water necessary to irrigate 100,000 acres in California, and 200,000 acres in Oregon *with* N.D. CENT. CODE § 10-06-01 (1976), which provides that: "All corporations, both domestic and foreign except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."