

**AWRA Washington Section  
2018 Annual State Conference  
October 16, 2018**

**The Supreme Court's Decision in  
*Hirst* – and the 2018 Streamflow  
Restoration Act**

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**General's Office**

- Futurewise and several area citizens filed appeal in GMHB to contest Whatcom County ordinance that updated its Comprehensive Plan and Zoning Code.
- Futurewise contended that Plan's Rural Element violates GMA because it does not protect surface and groundwater resources, and water quality.

- The GMA provides that: “The rural element shall include measures that apply to rural development and protect the rural character of the area . . . by (iv) protecting . . . surface water and groundwater resources . . .” RCW 36.70A.070(5)(c).
- GMHB ruled that the ordinance does not adequately protect groundwater and surface water in rural areas of the County.

- GMHB found that water resources are not adequately protected because under the Nooksack Basin Rule, WAC 173-501, water is no longer available for new permit-exempt uses (without mitigation).
- The appeal of the GMHB's decision went directly to Court of Appeals.

# *Whatcom County v. Hirst,* Supreme Court

- In earlier *Kittitas County* decision, Supreme Court held that counties must consider legal and physical water availability in permitting.
- Under RCW 58.17.110 and 19.27.097, counties must find that water is *legally* available, and not just *physically or factually* available before subdivision and building permit applications can be approved.

- Court of Appeals reversed GMHB and held that Plan did not violate GMA requirement to protect water resources.
- Court of Appeals ruled that the Plan complied with GMA because it includes a provision to prevent “daisy-chaining” of permit-exempt wells, and a provision that land use applications cannot be approved in areas where Ecology water management rules disallow water use.

- Court of Appeals held that GMHB misinterpreted Nooksack Rule, which does not govern permit-exempt groundwater use.
- In basins with Ecology water rules, land use plans and regulations must be consistent with Ecology's rules, but they don't have to be more restrictive of water use.

- The Supreme Court reversed the Court of Appeals and held that Whatcom County violated the GMA by not adequately protecting water resources.
- While the Nooksack Rule does not govern permit-exempt wells, the GMA requires the County to go beyond the Rule and ensure that instream flows and closed streams are not impaired by land use decisions.



- “The GMA requires counties to ensure an adequate water supply before granting a building permit or subdivision application. The County merely follows the Department of Ecology’s ‘Nooksack Rule’ . . . .

- “This results in the County’s granting building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a watercourse below the minimum instream flow. We therefore hold that the County’s [Plan] does not satisfy the GMA requirement to protect water availability. . . .”

- In evaluating land use applications, counties are required to apply the same standards that Ecology applies under *Postema* in processing water permit applications to ensure that permit-exempt water use in hydraulic continuity with closed streams or water bodies with instream flows that are not being met is not allowed.

- “We hold that the same [*Postema*] standard applies to counties when issuing building permits and subdivision approvals. We have been protective of minimum instream flow rules and have rejected appropriations that interfere with senior instream flows [citing *Swinomish* and *Foster*].”

- The Washington Legislature responded to the *Hirst* decision by enacting ESSB 6091, the Streamflow Restoration Act.
- Amended RCW 19.27.097, a provision of the State Building Code governing issuance of building permits, and RCW 58.17.110, governing approval of subdivisions.

- Adds new sections to the Growth Management Act, RCW 36.70, relating to land use planning.
- Includes sections comprising a new chapter, codified as RCW 90.94.

- Revised requirements to demonstrate adequate water supply for approval of building permits.
- In basins with post-2001 rules that expressly regulate permit-exempt use, compliance with those rules is required.
- In basins with pre-2001 rules that do not regulate permit-exempt use, and where watershed plans were adopted, a \$500 fee must be paid, and other requirements must be met.

- In basins with pre-2001 rules that do not regulate permit-exempt use, and where watershed plans were not adopted, a \$500 fee must be paid, and other requirements must be met.
- Additional requirements for WRIAs in the Yakima River Basin, and in the Skagit River Basin.



- Only submission of a well water report is required in basins without instream flow rules.
- Any permit-exempt groundwater withdrawal associated with a well constructed prior to January 19, 2018 is deemed to be evidence of an adequate water supply (without paying fee, etc.).

- RCW 90.94.020. Planning process in WRIAs with pre-2001 rules with watershed plans. Committee includes earlier planning unit, and must include certain entities.
- Must project new permit-exempt use over next 20 years, and identify projects to offset impacts on instream flows. Ecology must determine that plan will result in “net ecological benefit to instream resources within the [WRIA]” before it can be adopted.

- RCW 90.94.030. Planning process in WRIAs with pre-2001 rules without watershed plans. Committee lead by Ecology and specific entities must be invited to participate.
- Project new permit-exempt use over next 20 years, and identify projects to offset impacts on instream flows. Ecology must determine that plan will result in NEB before plan can be adopted.

- In plans, highest priority projects must offset potential impacts to flows caused by permit-exempt use “in time and in place.”
- Lower priority projects include ones “not in the same basin or tributary and projects that replace consumptive water supply impacts only during critical periods.”
- “Out of kind” mitigation projects can be included in addition to projects necessary to offset impacts to instream flows.

- Three accounts are established for watershed restoration and enhancement funds. One of them is a “taxable bond account” and another is a tax-exempt “bond account.”
- The Legislature intends to appropriate \$300 million over 15 years for projects to achieve the goals of the new law.

- Ecology “is directed to implement a program to restore and enhance streamflows by fulfilling obligations under this act to develop and implement a program to restore and enhance streamflows by fulfilling obligations under this act to develop and implement plans to restore streamflows to levels necessary to support robust, healthy, and sustainable salmon populations.”

- This statute requires a county to determine there are “appropriate provisions” for “potable water supplies” before a subdivision can be approved.
- Amendment states that if water supply is to be provided by permit-exempt groundwater, compliance with RCW 90.44.050 (i.e. no “daisy-chaining”), and with Ecology instream flow rules “is sufficient in determining appropriate provisions for water supply for a subdivision. . . .”

- RCW 36.70A.590. “For the purpose of complying with the requirements of [the GMA] relating to surface and groundwater resources, a county or city may rely on or refer to applicable minimum instream rules adopted by [Ecology]. . . . Development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable [Ecology instream flow rules] when making decisions under RCW 19.27.097 and 58.17.110.”