Whatcom County v. Hirst Decision Requires Counties to Independently Protect Minimum Instream Flows

The Washington Supreme Court's decision in *Whatcom County v. Hirst,*[1] will significantly impact rural water availability by requiring Washington counties to ignore exceptions for permit-exempt wells in many of the state's instream flow protection rules, causing considerable and unwarranted hardship to rural property owners. The decision expands the Court's already extreme protection of regulatory instream flows by requiring counties to make independent "legal water availability" determinations under the Growth Management Act (GMA) before issuing building permits that rely on permit-exempt wells as water supplies. By requiring these water availability determinations to consider impairment of minimum flows and closed streams instead of the intent of minimum flow regulations, the Court has elevated the protective status of minimum flows and closed streams beyond the intent of the regulations establishing them. In *Hirst*, for example, the decision requires Whatcom County to ignore specific exemptions in the Nooksack Rule for in-house domestic uses and to disregard Ecology's advice concerning water availability for permit-exempt wells.

Both GMA planning counties and non-GMA counties throughout the state are facing confusion about how to implement the *Hirst* decision. Several counties have declared moratoriums until it is sorted out, which in turn has led to numerous calls for legislative fixes. Given the plethora of regulatory ironies created by the decision, some of which are described in this article, these calls for reform deserve the Legislature's attention in the upcoming session.

The *Hirst* decision not only affects those seeking building permits outside of public water system service areas, it also casts doubt on the legitimacy of existing exempt-well water supplies for tens or hundreds of thousands of rural and suburban properties built in Washington since the advent of instream flow rules. If water is not "legally available" for a new permit-exempt well because of potential impairment of an instream flow water right created in the 1985 Nooksack Rule, then it isn't legally available for other homes built with exempt wells since the adoption of instream flow regulations with similar exemptions (including the Snohomish, Cedar, Green, White-Puyallup, Nisqually and Deschutes basins). Those homes could also be said to "impair" senior instream flow water rights and closed streams, and the *Hirst* decision gives ammunition to environmental groups or tribes who could seek to enforce the senior priority of minimum flow water rights against junior permit-exempt water rights. The logical extension of the Court's ruling also extends to non-GMA planning counties and basins with administrative stream closures but no minimum flow regulations. Thus, the cloud of uncertainty cast by the decision extends to most of the state outside of public water system service areas.

This article looks at the history of the Court's self-described "instream flow jurisprudence" and asks whether the Court hasn't expanded the scope of instream flow water rights and exceeded its constitutional role as an arbiter of cases with the *Hirst* decision. A companion follow-up article

[1] *Whatcom County v. Eric Hirst, et al.*, Wash. Supreme Ct. Case No. 91475-3 (slip opinion dated Oct. 6, 2016).

will look at potential legislative fixes and provide compliance options for counties and developers of rural properties.

The Hirst Case and GMA's Problematic Link to Legal Water Availability

The *Hirst* case is a local citizens' challenge to Whatcom County's comprehensive land use plan, contending that it failed to adequately protect surface and groundwater resources under the GMA,[2] which requires applicants for building permits necessitating potable water to provide evidence of an adequate water supply. Evidence in the record showed that unregulated permit-exempt wells were contributing to water quality problems and causing further reductions of stream flow in parts of the county where streams were closed to further appropriation or their minimum instream flows were consistently not being met. The Department of Ecology interpreted the Instream Resources Protection Program for the Nooksack River basin (Nooksack Rule), Chapter 173-501 WAC, as not restricting permit-exempt uses of groundwater, including new residential uses in rural areas. Whatcom County relied on the Nooksack Rule, which had not been amended since its adoption, and on Ecology's interpretation of the rule to assume that groundwater was still available for permit-exempt wells. The Growth Management Hearings Board, however, held that Whatcom County's comprehensive plan and development regulations failed to protect surface and groundwater resources contrary to GMA requirements at RCW 36.70A.070(5)(c). Whatcom County appealed, and the Court of Appeals reversed the Hearings Board, holding that the County did not have an independent obligation under GMA to determine whether water was available for permit-exempt water uses and could rely on Ecology's interpretation of the basin rule.[3] The Supreme Court then granted a petition for review and reversed the Court of Appeals.

The Supreme Court's decision is based on its interpretation of GMA and its history of liberally protecting minimum instream flows as water rights with no tolerance for exemptions, public interest exceptions, or arguments of "de minimus impairment." Against the background of the Supreme Court's instream flow jurisprudence, discussed in more detail below, the Court interpreted GMA as creating an independent duty for counties to protect minimum flows and closed streams, beyond the protection already provided by Ecology's rules. The majority opinion appeared to regard permit-exempt wells as a loophole allowing impairment of surface waters rather than as an intentional exemption from those rules in order to make water available for domestic uses in rural areas.

The Court criticized the County's reliance on the Nooksack Rule as unreasonable for two reasons: (1) the County knew that the proliferation of exempt wells was creating difficulties for effective water management, and (2) Ecology's understanding about the connection between groundwater withdrawals and surface water has altered since the Nooksack Rule was adopted in

[2] Chapter 36.70A RCW. GMA's water availability requirement for building permits is codified at RCW 19.27.097, which provides: "Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply."

[3] *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wn. App. 32, 344 P.3d 1256 (2015).

1985. Justice Wiggins referred to the Nooksack Rule as an "outdated regulation" where minimum instream flows "are not met an average of 100 days a year." This characterization, however, is based on an utterly false premise that a river failing to meet is regulatory minimum flow is somehow being impaired by junior water rights or permit-exempt wells. In fact, Ecology's minimum flows for the Nooksack River were designed to be met only 50% of the time, because Ecology set those minimums on a 50 percent "exceedance percentage" based on historic flow levels.[4] Thus, the fact they these flows haven't been met an average of 100 days a year is not evidence that later exempt groundwater withdrawals having been impacting those flows. To the contrary, it indicates that the flows have actually been higher than predicted by Ecology by an average of over 80 days per year (a 50% exceedance flow should not be met an average of 182.5 days per year). This reflects a gross misunderstanding by the Hearings Board and the Supreme Court regarding how minimum instream flows are adopted and what it means (or doesn't mean) when they are not being met. It is also ironic that the Court would criticize the County's reliance on the Nooksack Rule as inadequate to protect surface waters in the Nooksack basin, because the Nooksack Rule created the minimum flow water rights that the Court is not protecting.

The majority opinion criticized the County's reliance on Ecology's interpretation of the Nooksack Rule as "an unchecked reduction of minimum flows unless and until Ecology closes a basin to all future appropriations." However, by substituting its own assumption that permit exempt uses necessarily impair minimum flow water rights and closed streams, the Court has stepped out of its judicial role and into the administrative role it believed Ecology was negligent in fulfilling. The Court also failed to recognize that instream flow rules like the Nooksack Rule were intended to allocate waters belonging to the people of state, not only for environmental purposes but also for domestic drinking water and other needs. The Nooksack Rule and many similar rules throughout the Puget Sound Basin intentionally exempted certain small rural groundwater uses that did not require water right permits,[5] thus providing that water would still be available for those uses despite the adopted minimum flows and stream closures. Later instream flow rules, adopted after Ecology realized that more ground water was effectively regulated by minimum instream flows than they previously understood, included reservations for future out-of-stream uses, but the earlier rules continued to have exemptions for small domestic uses and were not amended by Ecology. In *Hirst*, the Supreme Court has altered the scope of instream flow water rights to the detriment of water availability for other uses by using GMA to protect instream flows regardless of the intent of the instream flow rules to allow these small groundwater uses.

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[4] There are many possible methods for creating and quantifying minimum flows, but the primary method used by Ecology was to select a percentage of exceedance flows, historical flow numbers that represent a likelihood that future flows would be met on any given day. These exceedance flows generally ranged from 50 to 80% of historical flows, meaning that on any given day there was a 50 to 20% chance that the minimum flow would not be met. The Nooksack Rule minimum flows generally mimicked 50% exceedance flows, meaning that they were predicted not to be met 50% of the time. Nooksack Instream Resources Protection Program, Appendix A – Hydrographs, WA State Dept. of Ecology (November 1985).

[5] See WAC 173-501-070, 173-507-050, 173-508-080, 173-509-070, 173-510-070, 173-511-070, 173-513-070, 173-514-060, and 173-515-070.

Ecology's instream flow rules are imperfect and many like the Nooksack Rule are outdated, but they incorporate allocations of water that GMA was never intended to override. There is no clear legislative intent that GMA, including its water availability provisions, was intended to override Ecology's allocations of water to exemptions in its minimum flow rules for domestic uses. The authority to amend those rules or to close groundwater due to lack of availability was delegated by the Legislature to Ecology through administrative rules with public notice and hearing requirements under the Administrative Procedure Act.[6] The GMA obligations relating to water availability determinations, while adopted later, did not amend these rule-making requirements or delegations of authority. The Supreme Court's decision that counties have an independent duty under GMA to determine the legal availability of water, regardless of exemptions in the rules, has the effect of denying to the public the protections of the APA for changes to instream flow rules and their allocations of water to permit-exempt uses in rural areas. The Court's action in *Hirst* is tantamount to overriding Ecology's rule-making authority by expanding the scope of one type of water right at the expense of water availability for others. This disconnect between instream flow protection and water allocation for people is discussed further below.

Are GMA's Rural and Environmental Goals Mutually Inconsistent?

GMA doesn't define how counties must protect water resources, but does require comprehensive plans to include a rural element that permits development at a variety of rural densities and that protects rural character by, among other things, protecting surface water and groundwater resources. RCW 36.70A.070(5). These requirements may be mutually inconsistent, which implies the need for discretion at the county level for resolving those inconsistencies, and a process or policy for doing so. In *Kittitas County v. E. Wash. Growth Mgmt. H'gs Bd.*, 172 Wn.2d 144, 169, 256 P.3d 1193 (2011)(*Kittitas*), the Court held that RCW 36.70A.070(5) requires GMA plans to "include something to assure the provision of a variety of rural densities." In *Hirst*, the Court held that GMA plans must also protect surface and groundwater resources from the cumulative effects of permit-exempt wells. It may not be possible to permit rural development of varying densities and economic circumstances without access to groundwater as a primary drinking water supply in rural areas. It is also problematic to protect minimum flows and closed streams from the cumulative impact of numerous permit-exempt wells by continuing to issue building permits without understanding the resulting impacts to surface water and providing meaningful mitigation. (In fact, the whole subject of impairment and mitigation relating to minimum flows and closed streams is fraught with policy issues relating to Ecology missteps, inflexible Supreme Court holdings, and legislative inaction, which are discussed further below.) Instead of determining who is responsible for resolving these mutually conflicting GMA goals and under what legal authority and procedure (and then deciding whether that procedure had been properly followed), the 6-3 majority decision by Justice Wiggins strained to resolve the conflict itself in favor of one goal and against another. That directed resolution in favor of protecting minimum flows at the expense of building permits for rural

[6] The adoption or amendment of minimum instream flows and the closure of groundwater must comply with rule-making requirements of the APA at chapter 34.05 RCW.

homes under existing regulatory exemptions is not the Court's role. Our complicated statutory scheme of managing water resources and development under multiple statutes delegates some of these responsibilities to Ecology with rule-making requirements and others to counties with GMA planning requirements.

GMA includes thirteen planning goals, but the *Hirst* decision cites only the environment goal, "protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10). This goal supports the "availability of water" but not only for the purpose of protecting the environment. It also supports the state's high quality of life, which necessarily includes access to drinking water, especially in rural areas not served by public water systems. Throughout the *Hirst* decision, however, the concept of protecting "water availability" is interpreted as protecting water resources for minimum instream flows and closed streams – not as "water availability for people." In the author's opinion, if water availability decisions under GMA are required to be distinct from water allocations in instream flow rules, as the *Hirst* decision suggests, then Whatcom County should have been given more discretion to balance the availability of water for both environmental and drinking water purposes. The Supreme Court, as it has been prone to do since *Postema*, defaulted to protecting instream flows rather than water for people.

Whatcom County argued that its comprehensive plan was consistent with GMA requirements because it was consistent with the Nooksack Rule, which is the state government's authorized determination regarding the nature and level of protection of surface and groundwater resources in the watershed. The Nooksack Rule is also Ecology's determination that groundwater remained available for uses exempt from permitting under RCW 90.44.050, and that those uses were exempt from the minimum flows and stream closures adopted in the Nooksack Rule. WAC 173-501-070(2).[7] Previous GMA decisions by the Supreme Court recognized the dual roles of counties and Ecology relating to water resource management, in particular Ecology's roles relating to the administration of the Water Code and assisting counties in their land use planning relating to water availability. In *Kittitas*, the Court stated:

> "While Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use in a manner that is consistent with the laws regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources. We note that the record demonstrates that Ecology in fact communicated with the County

[7] The Nooksack Rule exemption provides: "Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available."

about concerns regarding the availability of water during its planning process." 172 Wn.2d at 180. (Emphasis added.)

In *Hirst*, however, the Supreme Court disregarded Ecology's interpretation that the Nooksack Rule continued to allow permit-exempt wells. Instead the Court presumed that additional permit-exempt wells would impair the minimum instream flows, and held that Whatcom County could not rely on Ecology's interpretation but had an independent duty under GMA to protect the minimum flows. This is another step in the Court's "instream flow jurisprudence" to divorce minimum flow water rights from the rules that create them, with resulting impacts to water availability for people and future domestic, municipal and other beneficial uses of water.

Ultimately, whether the *Hirst* decision was an appropriate exercise of judicial power depends on how permit-exempt wells, stream closures, minimum instream flows, and the regulations that created them are interpreted and applied to water availability decisions by counties. The majority and dissenting opinions in *Hirst* demonstrate a schism on this question that needs to be resolved by the Legislature because of its deep policy implications and complexity. Otherwise, it appears that the state is ripe for a multiplicity of different and inconsistent approaches to the water/GMA conflict from county to county, resulting litigation in multiple forums and with inconsistent results, and growing frustration (if not anger) from rural property owners and counties with the state's inability or unwillingness to resolve the conflict.

The Supreme Court's Flawed Instream Flow Jurisprudence Has Derailed the Water Rights Permitting Program and Now Preys on Rural Water Availability

The *Hirst* decision continues a line of cases beginning with the *Postema* decision[8] involving Ecology's instream flow rules that have left the State in a virtual moratorium with respect to water rights permitting and exempt well development. In *Postema*, the Court declared that minimum instream flows created by rule are water rights with priority dates that cannot be impaired by subsequent groundwater withdrawals, 142 Wn.2d at 81, and that there is no such thing as *de minimus* impairment. *Id*. at 92. With respect to streams closed to further appropriation in the instream flow rules, the Supreme Court held that "a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have <u>any effect</u> on the flow or level of the surface water." Id. at 95 (emphasis added.) "Any effect" taken literally could mean a computer model demonstration that continuous pumping of a well would result in one less molecule of water reaching any part of a stream that is closed, at any time in the future, which is an impossible standard to disprove.

In *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), the Supreme Court invalidated Ecology's amended Skagit basin rule, in which Ecology used the "overriding considerations of public interest" (OCPI) exception at RCW 90.54.020(3)(a) to establish twenty-seven reservations of water for specified future uses, including exempt wells in rural areas and various municipal, domestic, irrigation, and stock watering uses. The Court held

[8] *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000).

that once water had been allocated to minimum flows, it could not be reallocated to those out-of-stream uses, even if Ecology determined that it was in the overriding consideration of public interest to do so. By declaring the amended Skagit Rule invalid, over 475 groundwater uses (primarily rural homes built since 2001 with exempt wells) established after adoption of the amended rule were instantly subject to uncertainty about the legal status of their water supplies, and hundreds more properties were devalued by as much as 90% by the Skagit County Assessor. Over three years later, Ecology is still unable to provide mitigation to "legalize" all of those 475 homes. Its ability to establish mitigation banks to solve the Skagit problem was then dealt a major blow by the Supreme Court's next instream flow case.

In *Sara Foster v. Dep't of Ecology, City of Yelm and PCHB,* 184 Wn.2d 465, 362 P.3d 959 (2015), the Supreme Court virtually eliminated the OCPI exception, holding that it cannot be used by Ecology to approve permanent water rights that would impair minimum instream flow water rights, even to the minutest degree. The Court also held that out-of-kind mitigation could not be used to offset the "legal injury" caused to minimum flow water rights from any reduction in flow. Coupled with the *Swinomish* decision, *Foster* elevated instream flow protection to unprecedented levels, making "legal water availability" a growth limiting factor in the most populated and fastest growing areas of the state. Then, as explained above, the Court's *Hirst* decision extended this legal water availability problem to permit-exempt wells by imposing new duties on counties under GMA.

One by one, these decisions have effectively eliminated the availability of the people's groundwater and run Ecology's water rights permitting program off the rails.[9] The Supreme Court's instream flow jurisprudence is at odds with legislative policy and impacts water availability for people and the state's growing economy and population. It leaves Ecology helpless to fix these problems by amending instream flow rules or making water predictably available where and when needed through mitigation banking or water rights changes. It also prohibits Ecology from creating new reservations of groundwater to meet the peoples' needs for drinking water in basins with existing minimum instream flows.

The Court has defined inflexible and unrealistic impairment and mitigation standards to protect minimum flows and closed streams, standards that defy the environmental nature and purpose of minimum flows and stream closures. Put simply, minimum flows are not legal rights, they are environmental rights. They are created to protect the public's interest in instream values, such as fish habitat, water quality, aesthetics and recreation.[10] As a form of property right they represent a fundamentally different bundle of sticks than water rights diverted or withdrawn from a source and used for a specific beneficial purpose by the owner of a water right. There is no constitutionally protectable legal right to a flow level that exists only 10 to 50% of the time. Another significant difference is that out-of-stream water rights require findings under the 4-part test of RCW 90.03.290, including that water is available and its appropriation would not be

[9] See Thomas Pors' article, "Supreme Court Bruises Department of Ecology in Foster Opinion," on the author's website at http://www.porslaw.com/wp-content/uploads/2015/12/Supreme-Court-Bruises-Department-of-Ecology-in-Foster-Opinion-Tom-Pors-12-7-15.pdf

[10] See RCW 90.54.020(3)(a) and the purpose section of minimum flow rules, such as WAC 173-501-020.

detrimental to the public welfare. In creating minimum flow water rights by rule, Ecology allocated water that was not available a large percentage of time, and did not make findings consistent with the public interest, *i.e.*, with the maximum net benefits for the people of the state.

Minimum flows are therefore established in a manner very different from out-of-stream water rights under the Water Code. Because of their fundamental differences from other water rights, the Legislature should recognize that minimum flows and closed streams have unique values-based impairment and mitigation standards related to the functions and values of minimum flows rather than the legal fiction that they are injured by a missing molecule of water.[11] This would fix the unavailable mitigation problem resulting from the *Foster* decision, and enable Ecology and counties to predictably establish mitigation banks for future groundwater uses.

The Hirst Decision Expands a Major Disconnect Between Minimum Flows and the Peoples' Right to Water, Which the Legislature Must Resolve

The waters of the state belong to the people, RCW 90.03.010, and the allocation of those waters was directed by the Legislature to secure "the maximum net benefits for the people of the state." RCW 90.54.020(2); 90.03.005. The maximum net benefits for the people cannot logically be met by rules or court decisions that allocate all the remaining waters to instream flow protection and leave no water available to meet human domestic needs, yet Ecology has steadfastly refused to make maximum net benefit findings before adopted minimum instream flow rules.[12] Strangely enough, none of the instream flow cases decided by the Supreme Court have considered the maximum net benefits requirement or other public interest finding as a necessary foundation to closing groundwater or making it otherwise unavailable for domestic uses in order to provide maximum protection for instream flows.[13] To the contrary, in *Postema* the Supreme Court stated that once minimum flows are set, "no statute … requires any further weighing of interests … and none requiring that economic considerations influence permitting decisions …." 142 Wn.2d at 19-20. In *Swinomish,* the Court interpreted minimum flow water rights as undiminished by maximum net benefits or OCPI. 178 Wn.2d at 595. Thus, minimum flows have been adopted by Ecology and expanded by the Supreme Court to deny water availability to the people without any consideration of the maximum net benefits for the people – a sure sign that the current state of water rights law in Washington State is unbalanced and skewed from its foundational principles.

Ecology has adopted minimum flow regulations for 27 of the state's 60 designated water resource inventory areas, known as WRIAs. The earliest regulations were adopted in the 1970s and approximately half of them predate the advent of hydraulic continuity determinations and the

[11] The differences between minimum flows and other water rights and case for a values-based impairment and mitigation standard is made in Thomas Pors' article, "Potential Legislative and Regulatory Solutions to the Water Availability Train Wreck," on the author's website at http://www.porslaw.com/wp-content/uploads/2016/01/Potential-Solutions-PORS.pdf

[12] See POL-2025, "Water Resources Program Policy/Interpretive Statement on When to Perform a Maximum Net Benefits Analysis" Ecology, Jan. 31, 2005.

[13] This argument has not effectively been presented to the Supreme Court in any of the reported instream flow cases, but could come up for consideration in *Bassett, et al., v. Ecology*, an APA challenge to the validity of the Dungeness Rule, if appealed from a December 2, 2016 decision by the Thurston County Superior Court.

Postema decision. These early rules were intended to protect instream flows and lake levels without allocating all available water in the watersheds or closing the ground water to future uses. They were based on the understanding, communicated to the public, that most groundwater in the affected WRIAs would remain available for appropriation through the issuance of groundwater permits or via permit-exempt wells.[14] As stated above, the Supreme Court's interpretations of instream flow water rights has altered these water allocations by Ecology, effectively closing the groundwater in each of these 27 basins without any additional public notice, hearings, or other protections provided by the APA. This is troubling because closing all the groundwater of a basin in order to protect surface waters, without any attention to future out-of-stream water needs of the people, is clearly contrary to the legislative scheme for allocating and protecting the peoples' water resources. Simply put, the people have not been consulted in this backdoor appropriation of the peoples' groundwater.

While Ecology's minimum flow rules were not perfect and failed to allocate water according to the maximum net benefit for the people, the Supreme Court's interpretation of minimum flow water rights has stymied Ecology's efforts and those of local watershed planning groups to make the rules work for both people and fish. The *Swinomish* decision denying Ecology the right to adopt reservations based on OCPI threatened to topple not only the Skagit reservations but those in similar rules that followed lengthy watershed planning processes. The 2016 Legislature stepped in to preserve the OCPI-based reservations in the Wenatchee and Dungeness rules by adopting ESSB 6513, after Ecology derailed a lengthy process to allocate a 5 cfs reservation in the Wenatchee Basin as a result of the *Swinomish* decision. Other legislative actions may be necessary to preserve water allocations for out-of-stream uses affected by the *Hirst* decision, including the permit-exempt domestic exemptions in instream flow rules cited in footnote 5.

To summarize, property owners, developers, builders, and county governments have inherited a growing disconnect between instream flow protection and state policy to preserve potable water for domestic needs, with little to no guidance from the Court as to what they can or should do. Legislators have been alerted to the confusion and injustice caused by the *Hirst* decision, and will likely be considering numerous approaches to fixing these problems in the upcoming session.

More Unresolved Issues Stemming from the Hirst Decision

Another irony of the *Hirst* decision is that groundwater is not available for human consumption or commercial farming in rural areas but remains available for animals and non-commercial

[14] The Puyallup River Basin IRPP, adopted in March 1980, states: "it is believed that there are adequate groundwater resources to support future growth forecasts" and "future growth in demands for municipal and industrial water will fall upon groundwater supplies." In the Snohomish River Basin IRPP, adopted in August 1979, alternative sources of groundwater were described as mitigation for any adverse effects of regulating MIFs. The Chambers-Clover Basin IRPP, adopted in November 1979, states that "deeper aquifers appear to contain large quantities of water and do not readily affect surface waters." The Green-Duwamish IRPP, adopted in April 1980, states: "Groundwater remains open for future appropriation in all the Green-Duwamish River Basin. It is anticipated that groundwater will be relied upon in many instances where surface water rights will not be available due to this program or because of water quality considerations." There are many other such statements in many instream flow rules.

irrigation of lawns and gardens. According to Dave Christensen, the Department of Ecology's Water Resources Program Development and Operations Support Manager, the decision doesn't restrict the ability to drill wells, and doesn't apply to permit-exempt uses that don't require a building permit. For example, someone could drill a separate well for lawn and garden use and since they aren't required to get a building permit and they don't have to go to the county for approval, that well would be allowed.[15] "Unless there is a county action required, such as a building permit, the *Hirst* decision does not directly affect other permit-exempt uses. … [A] well for stockwater would not be precluded by the *Hirst* decision."[16] In other words, because the *Hirst* decision relates to the issuance of building permits, its impact is restricted to denying people in rural areas what may be their only reliable and affordable drinking water supply, and prohibiting the construction of homes and businesses without an alternative source of water.

The Stevens County Commissioners recently wrote to the Legislature that there is nothing to stop a homeowner from parking an RV on their rural property and connecting it to a permit-exempt well, because no building permit is required. The lot owner could establish beneficial use for an exempt well water right that a county would then have to accept as a legal water supply for a building permit for that property, on the premise that, as between junior and senior water rights, only the superior courts can adjudicate priorities and impairment claims. This is the sort of legal absurdity that may proliferate if the Legislature doesn't take action to fix the problems outlined in this article.

The Supreme Court may have assumed that other alternative water supplies exist for rural areas, such as cisterns and mitigation banks, but such an assumption is premature and in most areas unrealistic. The Court's own "legal injury" mitigation standard in *Foster* is preventing Ecology from approving new mitigation banks due to the unavailability of year-round mitigation sources. Representatives of the Department of Health Drinking Water Program have stated that cisterns and trucked water have not been adequately studied as replacement sources of drinking water and may create a host of unresolved public health issues.

Justice Stephens' dissenting opinion in *Hirst* warns that "[t]he effect of the majority's holding is to require individual building permit applicants to commission a hydrogeological study to show that their very small withdrawal does not impair senior water rights [including minimum flows], and then have the local building department evaluate the adequacy of that scientific data. The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells." This warning is well-founded, because several counties have already declared moratoriums until they can find a way to evaluate impairment determinations and determine what constitutes an adequate hydrogeological study. Even if they eventually accept such studies as a basis for making legal water availability determinations, county decisions can be appealed either by applicants or those seeking to protect instream flows like the plaintiffs in *Hirst* and *Foster*, filling the superior courts with litigation over the smallest impacts to instream flows and further taxing limited financial resources to manage water for both fish and people.

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[15] The Water Report, "*Interview with Dave Christensen, Washington State Department of Ecology*," Issue #153, Nov. 15, 2016, at p. 10.
[16] *Id.*

Hopefully, the Legislature can find a better bipartisan resolution to the instream flow/water for people disconnect.

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