UNDERSTANDING THE HIRST AND FOSTER DECISIONS – WHY DO THEY NEED TO BE FIXED?

The Supreme Court's *Hirst* decision, the subject of legislative reform efforts and an impasse over the capital budget, is a very controversial barrier to water availability in rural areas. The Court's 2015 decision in *Foster v. Yelm* is another controversial ruling that eliminated water right flexibility for mitigation banking and water availability for growing urban areas. Both of the Court's decisions changed water availability in Washington in a legislative manner, ignoring existing water allocation policy, which deserves review and revision by the Legislature.

Legislators and the press need and deserve to be properly informed about the *Hirst* and *Foster* decisions and the interrelated history of instream flow rules and "legal availability" of groundwater. This paper provides an objective look at how about instream flow rules have impacted water availability in the State of Washington, and why reform is necessary.

1. Instream flow rules were adopted without public interest evaluations and did not allocate water for future municipal or domestic needs. This violated legislative policy at RCW 90.54.020. In 1971, when the Legislature authorized rules setting minimum instream flows, it directed the Department of Ecology to allocate water according to the maximum net benefits for the public, including both instream and out of stream water needs. Ecology never made these public interest evaluations and decided to protect streams flows without allocating water for future domestic or municipal purposes.

2. Older instream flow rules did not intend to regulate most groundwater or limit water availability for permit-exempt wells. These rules (including the Nooksack, Snohomish, Cedar, Green, Puyallup, and most other Puget Sound watersheds) did not close groundwater and were not challenged when adopted decades ago because groundwater was still available and mitigation techniques were flexible and achievable. Now, after *Foster* and *Hirst*, adequate "legal" mitigation is no longer available and water allocation for people has hit a wall, without any public notice, rulemaking, or legislation to close groundwater or change the permit exemption.

3. Minimum flows are not immutable "legal rights" that are "injured" by any impact whatsoever, no matter how small, remote, or speculative, but that is how the Supreme Court inappropriately interpreted them in *Foster*. The purpose of protecting minimum flows is to preserve instream functions and values, including fish habitat, water quality, aesthetics and recreation. Because minimum flow water rights allocate public waters for public purposes they properly "belong" to the people of the state and can be changed or altered in the public interest. They are therefore "regulatory" water rights not legal property rights, and any "injury" to such rights should rightly be offset by measures relating to instream resources and values, and in the public interest. Mitigation flexibility is consistent with the nature of instream flow water rights and can be used effectively to achieve the public interest.

4. The Supreme Court has no authority to close groundwater. Only Ecology, through rule-making, has the authority to close groundwater to new uses including permit-exempt wells. RCW 90.54.040, .050. In *Hirst,* the Supreme Court closed groundwater to permit-exempt wells through a back door, by requiring counties to protect minimum flows under the Growth Management Act (GMA), even though Ecology interpreted the Nooksack Rule as not regulating permit-exempt groundwater uses.

5. Closing groundwater to new uses is not necessary to protect instream flows. It is a false premise that permit-exempt groundwater withdrawals necessarily impair instream flows. Physically, the effects on streams of small groundwater withdrawals are immeasurable and have no effect on instream functions and values for fish, water quality, aesthetics, and recreation, even when measured cumulatively throughout an entire basin. It is more practical and sensible to regionally manage the cumulative effects of multiple exempt wells by implementing projects that restore and enhance instream functions and values, rather than denying people access to water or forcing restrictive and unavailable mitigation solutions.

6. Relying only on existing water rights as mitigation violates public policy, is a waste of public resources, and is usually impossible. Existing water rights cannot be moved around freely to wherever water is needed because the Water Code prohibits any transfers that "impair" instream flow water rights or that affect closed streams in any way. It is also virtually impossible to find and acquire existing year-round water rights to mitigate for every *de minimus* and remote "legal impact" to instream flows. Even if they existed, acquiring them for mitigation would require closing businesses or cutting off wells to existing homes. It also creates an artificial market for water rights that inflates values, thereby wasting government resources that could accomplish more benefit to instream functions and values using site-specific habitat enhancement projects.

WHY IS A HIRST FIX NEEDED?

- The rural areas of some counties are already in moratorium due to *Hirst* because County governments don't know how to make "legal water availability" decisions under RCW 19.27.097 for exempt well systems. In particular, they lack guidance and experience on how to determine impairment and mitigation adequacy. They also lack resources to handle litigation over the denial of access to water, on one hand, and regarding minute impacts to instream flow water rights, on the other.
- Rural constituencies are impacted and angry because there is no process leading to reasonable and feasible solutions.
- Even existing exempt-well water supplies developed after the adoption of instream flow rules in the 1970s and 1980s may not be legally adequate under *Hirst*.

- Banks may not lend money for the purchase or refinancing of rural homes with exempt wells until legal availability issues are resolved. Well over 100,000 homes are potentially affected statewide and rural development is at a standstill.
- Challenges to GMA plans and LUPA appeals on building permit decisions could clog the courts, lead to inconsistent decisions, and waste resources better spent on water and habitat investments.

WHY IS A FOSTER FIX NEEDED?

- The Supreme Court's "legal" mitigation standard in *Foster* prevents new water rights and water right changes that are needed to authorize mitigation banks and new municipal wells, because year-round water-for-water mitigation is unavailable in most cases.
- Ecology needs flexibility to approve water right changes with some out-of-kind or out-of-season mitigation, or to adopt an impairment standard for instream flows and closed streams that allows de minimum impacts if otherwise in the public interest. Flexible mitigation standards and priorities has been approved by the Legislature for other aquatic resources (*see* chapter 90.74 RCW), and can be implemented effectively to prevent detrimental impacts to instream resources and values.
- Some tribes and environmental groups may be defending the *Foster* mitigation standard to control growth and land use, which should be left to state and local government through Growth Management Act planning and development regulations.