Water Availability, Land Use, and the *Hirst* Decision

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Mission

Department of Ecology's Water Resources Program

We manage water resources to meet the needs of people and the natural environment, in partnership with Washington's communities.
Previous case law

- Early instream flow rules regulated surface water permitting and groundwater in direct (or significant) hydraulic continuity
- Under Postema (2000), the Supreme Court ruled that even de minimus impairment could not be permitted
- There is some degree of connection between most all surface and groundwater

Previous case law (2)

- Since Postema, to address lack of water availability for domestic uses, Ecology began setting aside “reservations” or developing water banks
- Swinomish (2013) decision invalidated Ecology’s reservation in Skagit Basin
**Hirst v. Whatcom County**

- No reservation for domestic uses of water in WRIA 1 (Nooksack) instream flow rule
- The Nooksack instream flow rule
  - Only regulates uses of water that require Ecology permits
  - Does not apply closures or instream flow restrictions to permit exempt uses
- The Supreme Court ruled Whatcom County cannot issue permits for uses that impair minimum flows – saying the GMA obligations exceed the instream flow rule exemptions

**Implications in Whatcom County**

- The “no impairment” standard precludes people from building a home on their property in most areas where there is no service from an existing public water system
  - Rainwater collection from rooftop is allowed
- Mitigation banking structures are not in place
- Skagit basin has been under a similar standard for four years with limited success in obtaining water for water banking purposes
Implications in Spokane County

- Spokane County adopted an interim ordinance in response to the Hirst decision
- In Little Spokane River watershed, applying a “no impairment standard” to instream flows
- Where there are no instream flow rules, no impairment to existing wells is assumed for any well that is at least 500 feet from all other wells

Implications in Pierce, Okanogan counties

- Pierce County adopted a policy
  - Requires hydrogeological analysis for projects in certain WRIAs
  - County will determine whether legal water is available based on the findings
- Okanogan County adopted an emergency ordinance
  - Requires public hearings by the Hearing Examiner for all land-use decisions that require water
  - Burden of proof on applicant
Implications for the rest of the state

Pre-1990 rules do not have reservations of water for future domestic use*

* Note: Methow Basin (WRIA 48) was amended to add a reservation for domestic uses

Impact to landowners in other counties

- Each county is evaluating the decision
- Key questions:
  - When do counties need to make changes to land use regulations?
  - Will counties face appeals on permitting and land use decisions?
  - Property owners face either restrictions or uncertainty
  - How does the ruling apply in basins where there are no adopted instream flow rules?
Ecology’s response

- Providing technical assistance
  - Maps/information about instream flow and closure status
  - Procedures to determine continuity with streams
- Answering landowner questions
  - Getting dozens of landowner visits/calls per day
  - Many do not understand they may not be able to build a home because of water limits
- Will significantly affect our staff resources available to make water right decisions elsewhere
What is the impact to streams?

- Domestic well use is about one percent of total consumptive water use in Washington
  - Very little consumptive use from indoor water use
- Roughly 85 percent of state’s homes are served by public water systems

Path forward

- Ecology will continue to support counties as they work toward implementing Hirst
  - Water banking or other creative solutions
- Water unavailability will be common throughout regulated areas; places with water available will be the exception
  - Evaluating data
  - Providing info to counties
Path forward (2)

- Rural water supply solutions workgroup and report
  - Two years of discussion
  - Variety of water resource interests provided many ideas and feedback on others’ ideas
  - Continued split between interests on how to provide flexibility for rural water supply
- Legislative engagement is needed to reconcile and balance competing interests for limited resource; Ecology will continue to participate in the dialog

Some considerations and questions

- We have seen success in Kittitas and Dungeness basins with water banking solutions; it’s been much more difficult in Skagit
  - How broadly will water banks provide solutions?
  - Under the Foster decision, water banking success will now be more challenging
  - What conditions are necessary for success?
  - How portable and sustainable are different models?
  - What is the level of impact vs. level of effort?
Thank you

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