Recent legal cases involving water resource issues important to water utilities

1. Whatcom County v. Hirst

The state Supreme Court issued its decision on October 6 in a major ruling involving rural water supply and the state's Growth Management Act (GMA). The long-awaited decision in the case, which the court heard last October, could lead to sharply curtailed use of permit-exempt wells as the water supply for new homes in rural areas of counties required to prepare land-use plans under the GMA.

In *Whatcom County v. Eric Hirst, et al.,* the court ruled 6 to 3 in favor of the state's Growth Management Hearings Board, which concluded in a June 2013 decision that the county's planning efforts did not comply with the GMA.

The growth board ordered the county to put stricter limits on the drilling of permit-exempt wells—which can withdraw up to 5,000 gallons of water per day for residential use without a state-issued water right—as the water source for new rural homes. The board's "final decision and order," after analyzing arguments by the county and petitioners contesting the county's rural development plan, concluded that "In essence, the County's Rural Element...does not include measures needed to protect rural character in the County's Rural Area by ensuring patterns of land use and development consistent with water supply protection."

The county's practice was to allow the drilling of permit-exempt wells in "closed watersheds" where the state Department of Ecology has determined that insufficient water is available for granting new water rights. The growth board's decision challenged this well-drilling policy and required the county to adopt tighter water supply standards in rural areas, to protect groundwater and streams from depletion by new wells.

In its ruling yesterday, the Supreme Court agreed with the growth board's decision and declared that the county must make its own determination of whether water is legally available for new permit-exempt wells in rural areas, taking into account whether nearby streams are meeting the flow targets set for them by state-adopted rules.

Before the case went to the Supreme Court, the state Court of Appeals had ruled in February 2015 against the growth board, holding that it was "proper" for the county to comply with the GMA by adopting regulations consistent with Ecology's 1985 instream flow rule for the Nooksack River, which does not preclude the drilling of exempt wells in the Nooksack basin.

The Supreme Court firmly rejected the appeals court's decision that the county could rely on Ecology's Nooksack rule as the basis for allowing more permit-exempt wells in the Nooksack basin. Repeatedly in its 44-page decision, the court cites evidence of low stream flows in rural Whatcom County exacerbated by the proliferation of exempt wells, concluding that the growth board properly determined that the county failed to protect surface-water and groundwater resources as required by the GMA.

In her dissent to the court's majority opinion, Justice Debra Stephens said, "The 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, 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....it potentially puts counties at odds with the Department of Ecology and imposes impossible burdens on landowners."

The court's ruling is the final word in this case, though it likely will spawn efforts in the Legislature next session to weaken its impact on rural development.

2. Fox v. Skagit County

The state appeals court issued a decision earlier this year that could become known for the principle that instream flow rules apply to permit-exempt wells, and that low flows can restrict exempt-well use, making such wells an unreliable water source for proposed new homes in certain rural areas.

The legal case that led to this decision is *Fox v. Skagit County*, a building-permit dispute between the Fox family and Skagit County building permit authorities. In its April 11 decision, the Washington Court of Appeals, Division One (based in Seattle) upheld the county's denial of a building permit for the Fox's new home that would draw its water from an exempt well (so-called because it would withdraw no more than 5,000 gallons per day and wouldn't need a state-issued water right).

The Foxes argued that an exempt well is exempt from all water rights permitting requirements and from minimum instream flow regulation, in this case the instream flow of the Skagit River, which was adopted as a state rule in 2001.

Following principles set in the state Supreme Court's 2013 *Swinomish* ruling (which overturned a state "reservation" of water for future exempt wells in the Skagit basin), the appeals court disagreed with the Foxes and held that an exempt well is subject to the prior appropriation doctrine and to the Skagit River's instream flow regulation, which is senior to the exempt well the Foxes planned to drill to supply their new home.

Because a well subject to interruption cannot provide a reliable water supply to a home, as required by the state building code, the court found water to be "not legally available" for the proposed building.

The Foxes have appealed the decision to the state Supreme Court, so litigation might not yet be over in this case. The Supreme Court has not yet said if it will agree to hear the case. On September 28, the court declared that it won't decide whether to hear this case until after its October 6 ruling in *Whatcom County v. Eric Hirst, et al.*, described above.

3. Bassett v. Ecology

This case stems from a Dungeness-area property group's petition to Ecology to reopen watershed rulemaking. Ecology rejected the petition and litigation is now in Thurston County Superior Court, with a hearing date on October 21.

Petitioners Bassett and Olympic Resource Protection Council object to Elwha-Dungeness WRIA 18's instream flow rule that requires purchase of mitigation credits for drilling of wells and other new water supplies in the watershed. They claim that Ecology couldn't legally use OCPI as the basis for adopting the Dungeness WRIA 18 rule.

Legislation passed last session and signed by Governor Jay Inslee, ESSB 6315, preserves the out-of-stream water reservation that is part of Ecology's instream flow rule for WRIA 18.

In addition to their OCPI objections, the petitioners in this case assert that Ecology set instream flows that were too high relative to base flows in the affected streams, that Ecology violated the state water code by not applying the four-part test required for a water appropriation as part of setting the WRIA 18 instream flows, and that Ecology should have done a maximum-net-benefits analysis before setting the instream flows, as is required before Ecology can grant other kinds of water rights.

4. Foster v. Ecology and City of Yelm

On March 4 the state Supreme Court issued an order denying requests from water utilities and cities that it reconsider its October 2015 ruling in a major municipal water rights case, *Foster v. Department of Ecology and the City of Yelm*.

The court's denial means that only temporary water withdrawals can be approved by the Department of Ecology when it believes "overriding considerations of the public interest" (OCPI) justify allowing a water use. The denial means Ecology cannot use OCPI to approve a new municipal water right, as sought by the City of Yelm in this case.

In its October 2015 *Yelm* decision, the court ruled that the Department of Ecology cannot issue a new municipal water right if the plan for mitigating the new right allows for any impairment of a senior instream-flow water right. The decision rejected the Department of Ecology's assertion of OCPI in approving Yelm's water withdrawal permit, which the city backed with an extensive mitigation plan to minimize impacts on stream flows and to improve overall stream and habitat conditions in the watershed affected by the new withdrawal.

Legal briefs filed last November by the Washington Water Utilities Council (WWUC), the Association of Washington Cities, and the Cities of Lacey and Olympia urged the Supreme Court justices to reconsider their decision, arguing that it incorrectly interpreted the OCPI provision in state law—in RCW 90.54.020(3)(a)—to allow only temporary withdrawals of water that might impair stream flow, such as for short-term drought relief, and not for permanent appropriations of water such as the new municipal water right sought by the City of Yelm.

The WWUC's brief pointed out numerous places in state water law where the term "withdrawal" is synonymous with a permanent water appropriation such as a municipal water right, arguing that the OCPI provision gives Ecology authority to issue new municipal water rights that are mitigated as much as possible to reduce adverse impact on stream flows.

Commenting on the decision by the court to deny reconsideration of its October 2015 ruling, WWUC attorney Adam Gravley said, "Clearly, this is a disappointing result. My initial reaction is surprise that the court did not revise the opinion to clarify some of the wording. This decision will no doubt now prompt various suggestions as to whether and how to address water statutes that use the word 'withdrawal.'"

Legislation to address the problems created by this ruling have been discussed and likely will be the subject of bills introduced next session, but no consensus among key stakeholders has emerged that would make passage and enactment of a "legislative fix" likely next year.