



*Thurston County Water Purveyor Meeting
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Water Rights 101
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I. DEVELOPMENT OF WASHINGTON WATER LAW

A Summary

Prior to 1917:

Common Law Riparian Rights

- Both natural and reasonable use theories.
- Both for navigable and non-navigable rivers.
- Recognized priorities of use, domestic being highest priority.

Territorial Laws

- In 1873 and 1875, the territorial legislature passed two laws that recognized elements of the prior appropriation doctrine for irrigation in two counties (Yakima and Kittitas).
- In 1889 and 1891, the first state legislature enacted laws that recognized the prior appropriation for entire state for several purposes.

All disputes were filed in superior court, which is the trial court of general jurisdiction in Washington.

The 1917 Water Resources Act (Ch. 90.03 RCW):

The legislature passed comprehensive water management legislation.

- All existing rights, riparian, and prior appropriation are protected.
- A superior court adjudication process is established to determine these water rights.
- All new rights must be authorized through a permitting process under the "four-part test":
 - available water
 - no impairment
 - a beneficial use
 - not detrimental to the public welfare
- Prior appropriation is established as the guiding law for managing the use of the state's waters--beneficial use and due diligence are required. First in time is first in right.
- No preference, as in many states, for domestic or drinking water. Domestic needs have to compete for any remaining water supplies with other demands including agriculture, commercial uses, and environmental values.

Superior court remained the forum for private disputes and until 1970 was the forum to challenge any permit decisions authorized under the 1917 Act.

1917-1985:

The courts struggled to reconcile management of the water resources as between riparian water rights and prior appropriation rights.

- Issues of priority, appropriation on public land, riparian rights protected as proprietary rights vs. rights based on actual beneficial use.
- In 1984, the Supreme Court decided diversionary riparian rights existing as of the enactment of the water code in 1917 must have applied the water to beneficial use, and the court defined a due diligence period of 15 years from 1917, thereby requiring riparian right holders to have actually beneficially used the water by 1932. *Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985).

The 1945 Groundwater Code (Ch. 90.44 RCW):

In 1945, the legislature passed a comprehensive code for managing the groundwater.

- Incorporates permit and adjudication process into the 1917 Act.
- Exempts small withdrawals from permit process ("exempt wells").
- Provides for establishment of groundwater management areas.
- Prior to 1945, the courts generally recognized a mix of correlative and reasonable use doctrines for use of groundwater.

The 1967 Relinquishment Law (Ch. 90.14 RCW):

In 1967, the legislature passed legislation that provides water rights are relinquished for five years of nonuse. RCW 90.14.130-230.

- The legislation lists many reasons and actions that are either not subject to the relinquishment law or exempt the water right from relinquishment.
- The legislation is in addition to and does not replace the common law loss of water rights for nonuse under the principles of abandonment.

The 1969 Water Right Claims Registration Act (Ch. 90.14 RCW):

In 1969, the legislature passed legislation requiring all appropriators of water who claim a pre-1917 water right (i.e. developed under the common law) and not permitted or adjudicated by a court, to file a claim with the state describing the right. RCW 90.14.041-121.

- The claim protected whatever right exists, and failure to file a claim resulted in loss of right.

- Only those with claims to diversionary water rights had to file a claim; non-diversionary rights such as riparian recreational rights did not have to file a claim, and these remain undocumented.
- Until the water rights represented by claims are adjudicated in superior court, the Department of Ecology cannot protect them by regulating junior water rights that may be impairing the senior water rights. *Rettkowski v. Department of Ecology*, 219 122 Wn.2d 219, 858 P.2d 232 (1993).

The 1969 Minimum Instream Flow Law (Ch. 90.22 RCW):

Also in 1969, the legislature passed a law that provides a process for establishing minimum water flows or levels for streams, lakes, or other public waters.

- Flows are established by rule for the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of said public waters.
- The achievement of wild salmonid production as its primary goal.
- The instream flows are protected with a priority of the date the rule is promulgated.

1970 - Department of Ecology and Pollution Control Hearings Board (PCHB) (Ch. 43.21A and Ch. 43.21B RCW):

In 1970, the legislature passed significant legislation regarding the reorganization of the state agencies.

- Water resources management was moved into the new agency, Department of Ecology.
- The PCHB was created and tasked to provide for a more expeditious and efficient disposition of designated environmental appeals.
 - See Administrative and Judicial Determination of Water Rights, below.

1971 Water Resources Act (Ch. 90.54 RCW):

In 1971, the legislature passed another comprehensive bill that set forth fundamental policies for managing water resources.

- The law created a second authority for setting minimum instream flows for instream resources through water basin plans.
- Creates a preference in the water code for water use for the natural environment by requiring Ecology as regulator of the water, to maintain base flows in rivers for fish, scenic, wildlife and environmental values. RCW 90.54.020(3).
- The standard of “overriding considerations of public interest” was created to allow for impairment of instream flows.

- Coordination required with local and federal governments and other state agencies.

1990 Growth Management Act (Ch. 36.70A, amended Ch. 58.17 RCW):

In 1990, the legislature passed the Growth Management Act to guide local land use planning and permitting.

- Surface and groundwater resources must be protected.
- Appropriate provisions must be made for potable water supplies.
- Comprehensive plans appealed to the Growth Management Hearings Board.

2003 Municipal Water Law (amended Ch. 90.03 RCW):

In 2003, the legislature passed a bill known as the Municipal Water Law to clarify the water rights for municipal water supply.

- Municipal water supplier and municipal water supply purposes are defined.
- Water rights held for municipal water supply purposes are considered in good standing notwithstanding they have not been applied to actual beneficial use.
- A municipal water right's place of use and diligence schedule is more closely tied to the municipality's water system planning, governed by the state Department of Health.

II. ADMINISTRATIVE AND JUDICIAL DETERMINATION OF WATER RIGHTS

A. Department of Ecology

The Department of Ecology is the manager of the public water of the state and authorizes appropriation, diversion, and use of the water. In this role, Ecology makes the decisions to permit new water rights, to authorize the change of existing water rights, and to regulate the diversion of water in accordance with the rights to the water. RCW 43.21A.064.

However, Ecology's decisions on the extent and validity of water rights are considered tentative, pending an adjudication in superior court. The superior courts have exclusive jurisdiction to conduct general stream adjudications, including a final determination of the extent and validity of any water right created prior to 1917 under the common law. RCW 90.03.105-245; *Rettkowski v. Department of Ecology*, 219 122 Wn.2d 219, 858 P.2d 232 (1993).

1. Permitting Process: Application

After 1917 for surface water, and after 1945 for groundwater, new water rights and diversions or withdrawal only permissible as consistent with permitting scheme.

Under the Water Code:

- Applicant must file an application with Ecology. RCW 90.03.250.
- Ecology must investigate application based on a "Four-Part Test":
 1. Whether the proposed use is a beneficial use of water ("beneficial use" is defined both as type of use and a reasonable use of the water such that there is no waste),
 2. Whether water is legally available for the use,
 3. Whether the use of water will injure existing rights to the use of water, and
 4. Whether the use will be in the public interest. RCW 90.03.290.

Ecology may issue a permit only if Ecology answers all of these questions in the affirmative.

2. Permitting Process: Development

Ecology determines the periods of time for the diligent construction of a project (beginning and completion) and the application of water to beneficial use. RCW 90.03.320.

- Actual construction work shall thereafter be prosecuted with diligence and completed within the time prescribed by the department.
- For municipal water rights, Ecology considers the term and amount of financing required to complete the project, delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system, and the supply needs of the public water system's service area, consistent with an approved comprehensive plan under the GMA.
- For "good cause" shown, Ecology must extend the time for developing the water right permit and must grant such further period of "as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected."
- If a permit holder fails to comply with the terms of a permit or any extensions, Ecology must cancel the permit unless the person can show good cause to Ecology why the permit should not be cancelled.

3. Permitting Process: Certificate

When an applicant meets all the conditions of its permit, including the actual beneficial use of the water, Ecology will issue a Water Right Certificate. RCW 90.03.330.

- A water right certificate represents a **vested property right** in the use of water.
- Once certificated, the water right then relates back to the date the original application was filed with the department, which establishes the priority date. RCW 90.03.340 (codifying the “relation-back” doctrine).
- Water rights are regulated based on “first in time is first in right.”
- After a water right is put to full beneficial use and “perfected” it is considered an appurtenant real property interest. Unless severed, the right follows the land.

4. Characteristics of a Water Right

A water right has 6 primary characteristics:

- Annual quantity (Qa)
- Instantaneous quantity (Qi)
- Period of use
- Purpose of use
- Authorized point of withdrawal (POW) or point of diversion (POD)
- Authorized place of use (POU)

5. Exemptions for the Permit System

RCW 90.44.050 allows permit exempt wells and groundwater withdrawals for:

- Stock-watering purposes,
- Watering of a lawn or of a noncommercial garden not exceeding one-half acre in area,
- For single or group domestic uses in an amount not exceeding five thousand gallons a day, or
- For an industrial purpose in an amount not exceeding five thousand gallons a day.

When regularly put to beneficial use, permit exempt withdrawals entitled to right equal to permit issued under the code.

6. Loss of a Water Right

Statutory Relinquishment. Any water right holder who voluntarily fails, without sufficient cause to exercise all or a portion of a water right for five consecutive years may relinquish that right. RCW 90.14.160 -.180.

- “Sufficient cause” for non-use include: draught, service in the armed forces, operation of legal proceedings, etc. RCW 90.14.140(1).

- Exemptions from relinquishment include: claimed for power development purposes, claimed for standby or reserve water supply, claimed for determined future development, claimed for municipal supply purposes, a trust water right.

Common Law Abandonment. Under the common law, an intent to abandon, coupled with non-use, may result in abandonment of an existing water right. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769 (1997).

7. Transfer or Change of Water Rights

Transfers or changes to water rights must be done through the application process through Ecology (or Water Conservancy Board).

- The ownership interest in a water right does not per se include a property right to transfer the water right. Transfers occur only as authorized by statute. RCW 90.03.380, 90.44.100.
- Groundwater code allows changes to groundwater permits.
- Unlike the surface water change statute (RCW 90.03.380), ground water change statute (RCW 90.44.100) authorizes an amendment to a permit (inchoate water right) for a change of a well location (point of withdrawal) or to change the manner or place of use.
- In transferring or changing water right, Ecology will:
 - Follow the four-part test.
 - Perform a tentative determination of the extent and validity of the water right.
 - Consider any relinquishment or abandonment issues (potential including of related rights in water right holder's portfolio).
 - Ensure that the changed use will not impair existing water rights.
 - Consider mitigation plans as part of application to mitigate against or offset any potential impacts.

B. Pollution Control Hearings Board

Since 1970, the Pollution Control Hearings Board hears and decides all appeals of Ecology's decisions authorizing water rights and changes to existing water rights, regulating certificated and adjudicated water rights, and assessing penalties.

At the PCHB:

- The hearings are quasi-judicial in nature.
- The scope and standard of review is de novo unless otherwise provided by law.
- The board makes findings of fact based on the preponderance of the evidence.

- An appeal of a final board order (petition for review) is to superior court, which is Washington's trial court.
 - A party may file an application with the superior court for direct review of a board's final order by the court of appeals.
 - The application for direct review must request the board to file a certificate of appealability.
 - The board has 30 days to grant or deny the request to file a certificate of appealability based on specific findings of whether fundamental and urgent statewide or regional issues are raised or the proceeding is likely to have significant precedential value.
 - If the certificate of appealability is denied, review of the board's decision shall be by the superior court. The superior court's decision may be appealed to the court of appeals.

III. MULTI-AGENCY AUTHORITY

Over the years, the authority to use and the regulation of water has expanded beyond the Department of Ecology. It is now important to understand the role of the Department of Health and the role of the Department of Commerce and local governments.

A. Department of Ecology

As described above, Ecology has these primary duties:

- Ecology administers and regulates the use of water.
- Acts on applications for new water rights.
- Acts on applications to change or transfer existing water rights.
- Maintains water rights database.
- Monitors and enforces permit system and authorized uses.

B. Department of Health

Health administers the drinking water program to insure water systems have safe and reliable potable water based on 6 and 20-year projections. RCW 70.119.060; RCW 43.20.050; ch. 246-290 WAC. Health's primary authority comes from its approval of operating permits and water system plans that are required for Group A systems, defined generally as 15 or more connections. See RCW 70.119A.020, -.110; WAC 246-290-020, -100, -106.

- In regard to the Group A systems that would require a water right, Health rules require that the applicant must demonstrate that the water source is in compliance with state water right laws. WAC 246-290-130(3)(b). Under a Memorandum of Understanding with Ecology, Health provides all draft water system plans to Ecology for a water rights assessment, which provides Ecology with the ability to determine if the water system has water rights. See Water Rights and Drinking Water Program Guiding Principles Policy, P-C.06; *also see*

Determination of Water Rights Adequacy in Reviewing Construction Documents and Project, P-C.05.

- Health regulates public water systems (2 or more connections for domestic use and consumption):
 - Reviews and approves public water system plans.
 - Water system plans include authorization as to number of approved connections, water quality, financial and other safeguards to protect the public health.
- Under Health rules, a public water system must provide a water rights assessment, WAC 246-290-100, and no new sources of water may be used by a public water system without first being approved by the Department of Health. WAC 246-290-130.
- Municipal water suppliers have the duty to serve all new service connections within its retail service area approved in its water system plan. WAC 246-290-106.

C. Department of Commerce and Local Governments

- The Department of Commerce is responsible for technical assistance on the local governments' implementation of the GMA. Ch. 36.70A RCW.
- Twenty-nine counties are either required to fully plan under the GMA or have chosen to do so. These counties make up about 95 percent of the state's population. The remaining ten counties must plan for critical areas and natural resource land only under the GMA.
- The local governments are obligated to consider water supply. Local governments' general duties regarding water are found in the Growth Management Act plat and subdivision statutes. Under the GMA, a county required to plan under the GMA is to adopt comprehensive plans and development regulations consistent with the policies of the GMA, which specify the protection of the environment and enhancement of the state's high quality of life including water quality and quantity in both the surface and ground water resources. See RCW 36.70A.020(10) and .070(5)(c)(iv).
- Under the platting statutes, the law provides:
 - (1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine:
 - (a) If appropriate provisions are made for, ... potable water supplies, ...; and
 - (b) whether the public interest will be served by the subdivision and dedication.

- (2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions ..., potable water supplies, If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication.

RCW 58.17.110 (emphasis added).

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

- (1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply.

RCW 58.17.150.

- Under the building code, the local government also must review the available water supply when issuing a building permit that requires potable water supply. RCW 19.27.097 provides:
 - (1) 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. In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.
- The GMA establishes the primacy of the comprehensive plan. The comprehensive plan is the starting point for any planning process and the centerpiece of local planning. Development regulations (zoning, subdivision, and other controls) must be consistent with comprehensive plans.
- Comprehensive plans must address the impacts on surface and ground water resources regarding authorized planning, and in this regard must ensure an adequate water supply for subdivision and building permit applications

IV. MUNICIPAL WATER LAW

The 2003 legislature adopted the MWL, to provide additional certainty and flexibility for municipal water rights.

Significant features of MWL include:

- Defined municipal supply purposes as the beneficial use of water for residential purposes of 15 or more residential service connections or for nonresidential population that is, on average, at least 25 people for 60 days a year.
- If an entity, public or private, uses water for these purposes it is defined as a municipal water supplier and any other water rights it may hold for purposes that are generally associated with use of water by a municipality are also considered municipal water supply purposes.
- Water rights claimed for municipal water supply purposes are not limited to maximum service connection or population figures that may be specified in a water right application or any subsequent water right documents, including the water right permit or certificate if the municipal water supplier has an approved water system plan or other approval from Health. RCW 90.03.260(4)-(5).
- The “place of use” of a water right for municipal supply purposes is specified as the service area under a water system plan or other planning document provided that the water supplier remains in compliance with its plan and the area is consistent with certain land use and watershed plans and regulations. RCW 90.03.386(2).
- Ecology may amend water right documents and related records to reflect that certain water rights are for municipal water supply purposes upon requests from the holders of such rights, and during the processing of water right change applications. RCW 90.03.560.
- Protection of “pumps and pipes” certificates. Water right certificates for municipal supply rights are “rights in good standing” if they were issued by Ecology prior to enactment of the MWL on the basis of system capacity (pumps and pipes). However, after enactment of the MWL all water right certificates are only to issue for the actual beneficial use of water. RCW 90.03.330(3).
 - Ecology has interpreted this section to still require these water rights to comply with the due diligence--to actually apply the water to beneficial use within a reasonable amount of time.
- New water conservation standards and efficiency requirements are to be implemented to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability. RCW 70.119A.180(1).

The importance of defining municipal use is that it:

- i. Is based on quantity not on population.
- ii. The place of use based on service areas and not set geographical areas.
- iii. Inchoate water in "good standing".
- iv. Provides a relinquishment exception.

In 2007, Ecology and Health finalized a policy for implementation of the MWL. Ecology Policy No. 2030. This policy was Ecology and Health's interpretation of the MWL and is not necessarily shared by all water users including municipal water suppliers.

V. THE GROWTH MANAGEMENT ACT

The local governments' authority under the GMW has become more and more a critical element of water allocation. Two of the more important GMA provisions are:

*RCW 58.17.110(2): A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, **potable water supplies**, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;.... (Emphasis added.)*

*RCW 19.27.097(1): 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. In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply. (Emphasis added.)*

A. Supreme Court Opinions

The Supreme Court has issued several opinions regarding the scope of the local governments authority.

1. *Knight v. City of Yelm*,
173 Wn.2d 325, 267 P.3d 973 (2011)

JZ Knight filed a petition in Thurston County Superior Court under the Land Use Petition Act (LUPA) to challenge the City of Yelm's approval of five preliminary plat applications. The homes in the subdivisions would obtain their water from the City, in its capacity as a municipal water supplier. Knight contended that the approvals were unlawful under the City of Yelm's code, and RCW 58.17.110(2), which provides that subdivisions shall not be approved unless "[a]ppropriate provisions are made for . . . potable water supplies" Knight asserted that this requirement was violated based on her contention that the City did not hold adequate water rights to supply water to all the proposed new homes. The parties differed on the quantities of water that were authorized under the City's water rights, and the City had applications pending before Ecology to secure additional water rights to serve some of the homes. Ecology filed an amicus curiae brief in support of Knight's position.

The Superior Court ruled that, under RCW 58.17.110, the City must find proof of potable water supplies to serve the developments *before* final plat approvals can be issued, and that the City therefore erred in specifying in the preliminary plat approvals that such proof could be required either before issuance of final plat approvals or, later, before issuance of building permits. Further, the Superior Court stated in its opinion that when the City considers final plat approvals it "would have to require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions." Thus, the Superior Court ruled that it would not be sufficient to merely show that applications for changes of existing water rights, or for new water permits, were pending before Ecology, to demonstrate that provisions are made for adequate water supply to support final plat approvals.

The City and the development proponents appealed the Superior Court's decision to the Court of Appeals, Division II. The Court of Appeals issued an unpublished decision that reversed the Superior Court's decision and ruled in favor of the City on the ground that Knight failed to establish standing to bring the lawsuit.

Knight's petition for discretionary review of the Court of Appeals' decision was granted by the Supreme Court. The Supreme Court reversed the Court of Appeals' decision, and held that Knight had standing to challenge the City's decisions to approve the subdivision applications based on her concerns over potential impairment of her water rights:

Knight has shown sufficient prejudice to satisfy RCW 36.70C.060(2) [LUPA's standing provision]. Her interest is not abstract. Knight owns land 1,300 feet away from the proposed subdivisions, and she has senior water rights within the same aquifer as Tahoma Terra's proposed sources of water for the new development. She presented allegations that the City is overdrawing its water rights and that it has insufficient water supplies to

serve the proposed developments, allegations bolstered by [Ecology] in an amicus brief filed in support of Knight's LUPA petition in the superior court.

Knight, 173 Wn.2d at 342.

As a result of its reversal of the Court of Appeals' decision, the Supreme Court reinstated the Superior Court's decision in favor of Knight. Since the City had earlier conceded that appropriate provisions for potable water supplies for the subdivisions would have to be shown before final plat approvals could be granted, the Supreme Court's opinion does not include any holding pertaining to the Superior Court's earlier ruling that, under RCW 58.17.110, adequate water supply must be confirmed at the final subdivision approval stage. However, the Court's holding on standing is significant in establishing that concerns over water availability and potential impacts from water use can be grounds for standing to challenge a land use decision under LUPA.

2. *Kittitas County v. Eastern Washington Growth Management Hearings Board*,
172 Wn.2d 144, 256 P.3d 1193 (2011)

This case involved a challenge to development regulations issued by Kittitas County pursuant to the Growth Management Act (GMA). Futurewise and two local conservation organizations appealed the County's development regulations before the Eastern Washington Growth Management Hearings Board (Board). The Board, among other things, ruled that the regulations violated the GMA because they allowed the filing of multiple applications for separate subdivision projects with common ownership or a common scheme of development. The Board reasoned that the GMA was violated because the County failed to require either that a single application for land division be filed for a common development, or that multiple applications include sufficient information, to better enable the County to determine whether a project could qualify for a groundwater permit exemption for group domestic use under the Groundwater Code, RCW 90.44.050, and the Washington Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). In *Campbell & Gwinn*, the Supreme Court held that a common residential project involving division of land can only qualify for one group domestic permit-exempt use of groundwater not exceeding 5,000 gallons per day. The Board concluded that these omissions in the County's subdivision regulations violated the GMA's requirement for the protection of water resources under RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv).

The County and several other parties sought judicial review of the Board's decision, and the case was accepted for direct review by the Court of Appeals. Ecology filed an amicus curiae brief supporting the Board's decision on grounds that the Board's water ruling requiring revision of the regulations was necessary for the County to meet requirements under the GMA, which requires the protection of groundwater resources, and RCW 58.17.110(2), which requires findings that "[a]ppropriate provisions are made for . . . potable water supplies" for subdivision application approvals by local

governments. Ecology maintained that the Board correctly applied the law on the water issue, and correctly articulated the County's obligations and authority when reviewing a proposed development that seeks to supply water to homes through permit-exempt groundwater wells under RCW 90.44.050.

Subsequent to the filing of Ecology's amicus curiae brief, the Court of Appeals consolidated the case with a separate case involving a challenge to the County's Comprehensive Plan under the GMA, and certified the matter to the Supreme Court, which accepted it for review. The Supreme Court affirmed the Board's decision on the water issue and held that local governments have responsibilities and obligations under the GMA and other land use laws to protect water resources, and that they are not preempted from taking actions that affect the use of water by Ecology's authority under the water resources statutes. The Court concluded that "the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning." *Kittitas Cnty.*, 172 Wn.2d at 179.

The Court affirmed the Board's ruling that the County's Development Regulations failed to comply with the GMA because they do not adequately protect water resources:

Without a requirement that multiple subdivision applications of commonly owned property be considered together, the County cannot meet the statutory requirement that it assure appropriate provisions are made for potable water supplies. Instead, nondisclosure of common ownership information allows subdivision applicants to submit that appropriate provisions are made for potable water through exempt wells that are in fact inappropriate under Campbell & Gwinn when considered as part of a development, absent a permit.

Kittitas Cnty., 172 Wn.2d at 180.

Further, in a holding that has major water management ramifications throughout the state, the Court concluded that in implementing RCW 58.17.110 and RCW 19.27.097, counties must ascertain that water is *legally* available, and not just *physically or factually* available, before they can approve applications for subdivisions and building permits. The Court rejected the County's position that it was only required to ascertain that water is physically available, e.g., through hydrogeological data showing that a well could successfully yield water, to determine that there is an appropriate provision for potable water supply to approve a subdivision under RCW 58.17.110:

To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to the law.

Id. The Court further pronounced that, while counties are responsible to make land use decisions, including determinations of whether adequate water supply is legally available to support proposed subdivisions and building permits, and to comply with GMA provisions requiring the protection of water resources through land use planning, Ecology has a role to assist counties in such activities:

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.

Id.

3. *Whatcom County v. Western Washington Growth Management Hearings Board*,
186 Wn. App. 32, 344 P.3d 1256 (2015)

The impact of the Supreme Court's decision in *Kittitas County* is now being felt elsewhere in the state, including Whatcom County. Like the lengthy legal battle in Kittitas County, Whatcom County has been involved in defending amendments to its comprehensive plan since at least 2005. There the primary challenge has also been in regard to rural land designations. In the first petition for review of Whatcom County's amendments to its comprehensive plan and development regulations, the GMHB determined that the rural densities failed to protect the rural character. *Futurewise v. Whatcom County*, GMHB Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005). The GMHB Final Order was appealed, and eventually the Supreme Court accepted review and in *Gold Star Resorts, Inc. v. Futurewise* issued a decision affirming the Order in part and remanding it in part. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009). The Court affirmed the GMHB's finding that Whatcom County must revise its comprehensive plan to conform to 1997 amendments to the GMA that set out criteria for establishing limited areas of more intensive rural development and rural densities (LAMIRDs). However, the Court also reversed the GMHB's reliance on a fixed standard regarding rural densities, finding that that the GMHB improperly relied on a "bright line" rural density rule of no more than one residence per five acres. *Id.* at 734–35 (citing *Thurston County v. WWGMHB*, 164 Wn.2d 329, 357–60, 190 P.3d 38 (2008)).

In response to the Supreme Court's decision in *Gold Star Resorts*, Whatcom County amended its ordinances only to have them challenged again before the GMHB. Over the next four years, the GMHB issued additional final orders and compliance orders,

continuing to find the County out of compliance with the rural element requirements under RCW 36.70A.070(5)(c). In 2013, the GMHB issued the Final Decision and Order that is now the subject of a current appeal. *Hirst, et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 7, 2013) (on appeal *Whatcom County v. Hirst, et al.*, Court of Appeals, Div. 1, No. 70796-5-I.). In its 2013 Order, the GMHB recognized that the newest petitions challenging Whatcom County's most recent ordinance, Ordinance No. 2012-032, included a challenge beyond the previous issue of Lake Whatcom water resources, and now included the protection of surface and groundwater resources under RCW36.70A.070(5)(c)(iv). The GMHB stated the issue as:

Failure to protect surface and groundwater quality, failure to protect water availability, failure to protect water for fish and the comprehensive plan is internally inconsistent.

Id. at 12.

In addressing this issue, the GMHB made findings that are seen as broadly defining the local jurisdictions' authority to determine water availability for the purposes of regulating land use planning and developments. The Order went beyond the issue in *Kittitas County* which, as described above, rejected an ordinance that allowed separate subdivision applications for properties that were part of the same development to rely on the water codes groundwater permit exemption instead of applying for a water permit from the Department of Ecology. This practice has been described as the "daisy-chaining" of plat applications. *Id.* at 40.

In a lengthy and detailed analysis that relies on several decisions by the Supreme Court, including *Kittitas County* and *Postema v. Washington Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000), the GMHB held that protection of instream flows in the rural element of the comprehensive plan is paramount in land use planning under the GMA, and where groundwater withdrawals will impair instream flows to the detriment of the instream resources, Whatcom County must protect these groundwater resources from further depletion, notwithstanding that the withdrawals may be legally authorized under the groundwater permit exemption and also under Ecology's regulations.

Notably, the GMHB did not give the County the discretion to simply rely on Ecology's Nooksack River instream flow rules, Ch. 173-501 WAC, which do not explicitly govern permit exempt groundwater withdrawals. Rather, the GMHB independently considered all of the evidence presented, including no less than 13 reports and studies, to conclude that while Whatcom County's ordinances did not allow "daisy-chaining," they failed to protect ground and surface waters from permit exempt uses. *Hirst*, at 42. Under *Postema*, the County must develop regulations that meet a standard of no impairment to instream flows by further groundwater withdrawals. *Id.* at 40. If the groundwater withdrawal is in a basin that is closed to new surface water appropriations or if Ecology has set minimum flows that are not consistently met, "there is a presumption that no additional water is legally available." *Id.* at 42.

As in Kittitas, here the GMHB relied on several sections of the GMA regarding the protection of the environment and water resources. The GMA was passed by the legislature with stated goals that planning consider conserving fish and wildlife habitat and the protection and enhancement of water quality and the available water supply. RCW 36.70A.020; *Hirst*, at 20-23. In planning for rural areas, set forth in a county's rural element of its comprehensive plan, the land use patterns and development are to be compatible with use of the land by wildlife and fish, and are to be consistent with groundwater and surface water discharge. RCW 36.70A.020; *Hirst*, at 20-23. The rural element is to include measures that protect surface and groundwater resources. RCW 36.70A.070(5)(c)(iv); *Hirst*, at 20-23. The land use element of the comprehensive plans must protect the quality and quantity of the groundwater used for public water supplies. RCW 36.70A.070(1); *Hirst*, at 20-23.

Based on these goals, local governments must make a finding that there is appropriate provision made for potable water supply prior to approving subdivision applications. RCW 58.17.110; *Hirst*, at 20-23 (*citing Kittitas County*, 172 Wn.2d at 178-79, and *JZ Knight v. City of Yelm, et al.*, 173 Wn.2d 325, 267 P.3d 973 (2011)). Further, prior to approval of a building permit, the permit applicant must have a certificate of available water issued by an authorized purveyor (e.g., city water) that has available water under a water right. RCW 19.27.097; *Hirst*, at 20-23. Otherwise, the applicant must have a water right or be able to verify the existence of an adequate water supply. RCW 19.27.097; *Hirst*, at 20-23.

Whatcom County filed a petition for review of the Board's decision in Skagit County Superior Court, and Futurewise filed a petition for review in Thurston County Superior Court to challenge the Board's denial of its request for a "declaration of invalidity." After the cases were consolidated in Skagit County Superior Court, Whatcom County and Futurewise both filed motions to the Court of Appeals, Division I seeking direct appellate review, which were granted. As a result, this case bypassed the Superior Court and went directly to the Court of Appeals. Ecology filed an amicus curiae brief in support of the County, which argued, among other things, that the Board erred in ruling that the County failed to comply with the GMA because the Board misread the Nooksack Rule by concluding that the instream flows and stream closures under that rule apply to permit-exempt uses of groundwater.

The Court of Appeals ruled in favor of the County and reversed the Board's decision on the water resources issues. The Court closely followed Ecology's amicus brief and held that the County complied with the GMA by including a provision that would help prevent the "daisy-chaining" of permit-exempt wells, and a regulation providing that land use applications will not be approved if water use is disallowed under an Ecology water management rule. The Court further held that the County did not violate the GMA by not requiring that land use applications be denied when applicants propose to obtain water through a permit-exempt well in an area that is closed to new appropriations, or where instream flows are not met, under Ecology's Nooksack Rule. The Court agreed with Ecology's interpretation that permit-exempt groundwater use is not governed under

the Nooksack Rule. And, perhaps most significantly, the Court held that to comply with the GMA's requirements to protect water resources, counties must act consistently with Ecology's rules—and that counties are not required to be more restrictive of water use than Ecology is under its rules.

Futurewise filed a petition requesting the Supreme Court to accept review of the Court of Appeals' decision, which was granted. Oral argument before the Supreme Court was held on October 20, 2015.

On October 6, 2016, the Supreme issued its decision affirming the Growth Management Hearings Board and reversing the Court of Appeals. The Court rejected the argument made by Ecology that if the instream flow rule did not specifically state exempt ground water withdrawals in an area, the County's GMA planning may properly determine that a building permit can be issued with an exempt water withdrawal, despite the fact the area was closed to any other water permits because of the impairment to instream flows.

4. *Fox v. Skagit County*,
Court of Appeals No. 733150-I

The Foxes filed a Petition for Writ of Mandamus against Skagit County which requested the Skagit County Superior Court to issue an order requiring the County to approve the Foxes' building permit application. Ecology and the Swinomish Indian Tribal Community were granted intervention as parties in this case and opposed the Foxes' request for a writ of mandamus.

The Foxes have a building permit application pending before the County, which the County has deemed to be "incomplete" because the Foxes have not demonstrated that they have an adequate supply of water for their proposed house under RCW 19.27.097. Under the Supreme Court's decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), counties are required under RCW 19.27.097 to determine that an adequate supply of water is legally (and not just physically) available before a building permit can be issued. The Foxes would obtain their water supply from a permit-exempt well in the Skagit River Basin. Based on information provided by Ecology to the County, the County has determined that adequate water supply is not legally available because the Foxes' domestic water use would be subject to interruption when minimum instream flows under the Skagit River Basin Instream Flow Rule, WAC 173-503, are not met.

The Foxes are advancing several legal theories to support their position that they qualify for a building permit. Among other things, they contend that the groundwater permit exemptions shield a prospective water user from all regulation, that all landowners have a form of riparian or "correlative" right that is an "irreducible right" to water beneath their land, and that the Skagit Rule does actually not govern permit-exempt groundwater use.

In December 2014, after hearing oral argument, the Superior Court ruled in favor of Ecology and the Tribe and denied the Foxes' petition. The Court concluded that the Foxes did not demonstrate that they have an adequate legal water supply to support approval of their building permit application because the Skagit Rule governs groundwater use and an interruptible water supply is not adequate to support a home. The Foxes have appealed the Superior Court's decision to the Court of Appeals, Division I, where the parties are currently engaged in briefing.

Based on the Supreme Court decision in *Whatcom County*, including the Court's direct reference to the case, we should expect the Supreme Court to affirm the Court of Appeals.

Tribal Water Rights