American Water Resources Association
Washington Section
www.waawra.org
MARCH - APRIL

President's Notes

By Allison MacEwan, P.E., AWRA-WA President

Spring greetings to all!

The AWRA-WA Board has been in full swing working together to bring our 2016 programs to our membership. Some of our most visible offerings are the dinner meeting technical programs offered to our members and guests. The locations of these meetings varies throughout the year; we strive to provide programs on both sides of the Cascades, and to engage our student membership as well.

AWRA-WA dinner meetings are scheduled on a monthly or semi-monthly basis and provide an opportunity for the interdisciplinary water resources community to gather in an informal setting, connect with colleaguesv, and learn more about wide variety of cutting-edge water-related topics.

A big "Thank You!" goes out to our dinner meeting speakers who presented during the first quarter of 2016. In January, at our University of Washington Student mixer, Dr. Lynn McMurdie gave an engaging presentation on OLYMPEX: A Ground Validation Field Campaign over the Olympic Peninsula for the Global Precipitation Measurement Satellite.

In February, we met in Seattle to hear Dan Von Seggern, Staff Attorney, Center for Environmental Law & Policy (CELP), provide an update on recent Washington court cases impacting water availability. In March, Brian Walsh, Policy and Planning Section Manager of the Washington Department of Health Office of Drinking Water, shared a presentation on drinking water and climate change which explored many of the risks that climate change poses to Washington's drinking water systems. For those of you who were unable to join these well-attended events, please check out the summaries provided in our the AWRA-WA newsletter. We hope to see you at our future dinner meetings!

In this Issue:

On another note, I have to admit that it has been a relief to enjoy the sunshine in the Seattle area, which appeared this past week.

This balmy spring respite follows what the National Weather Service has reported to be the wettest fall and winter period (October-March) in Seattle since official records keeping began in the 1890's. The good news is that our state's water supply outlook for the remainder of the water year is considerably more favorable than a year ago, as drought conditions have subsided.

Yet crafting long-term solutions to realize a viable and sustainable water supply for all water uses in the midst of climate change, growth and changing regulations remains a present challenge. AWRA-WA plans to examine this challenge as it relates to our rural communities during our 2016 state conference. The conference will focus on rural domestic and municipal water supply. Please mark the October 26th conference date on your calendars – more information will be coming soon!

Save the Date!

The AWRA-WA 2016 State Conference on
Rural Domestic and Municipal Water Supply
Will Be Held on Wednesday, October 26
At the Seattle Mountaineers Event Center, Seattle, WA
Stay Tuned for More Details!

Update from the AWRA-WA UW Chapter

By Amelia Oates, UW Student Representative

The University of Washington AWRA student chapter has several great events planned for the Spring 2016 quarter. We are planning the Cedar River Watershed Tour on April 16, 2016, where we have invited Central Washington University to join on the tour and discuss water resources in Washington State.

We are excited to collaborate with CWU on this field trip and look forward to more field trips and events in the future. We have a couple representatives from the UW chapter participating in the AWRA 2016 Specialty Conference Student Webinar on April 25, 2016.

We are also organizing a Speed Networking event later in May (more details to come), where professionals and students will meet, mingle and are encouraged to make lasting connections. Please e-mail me if you are interested in participating at oatesa@uw.edu.

We are excited to continue collaborating with other student organizations and continue to schedule new, exciting events in the future. We are always looking to grow the student chapter, so if there are any interested students feel free to join us.

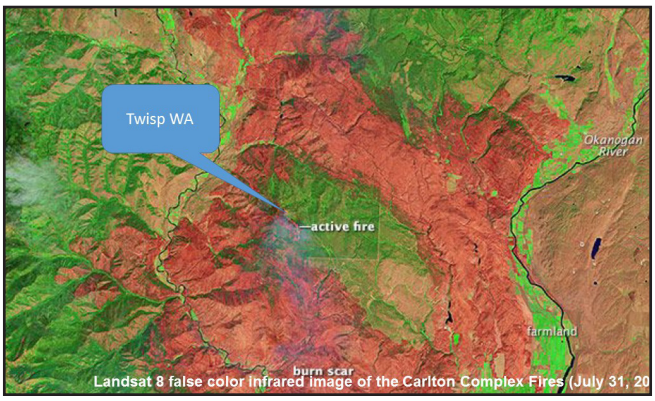
AWRA-WA 2015 Fellowship Winners

By Stan Miller, AWRA-WA Board Member

Due to an extended application period this year the final selection of the 2015 Student Fellowships was not finalized until the January 4, 2016 Board meeting. At that meeting the Board endorsed the selection committee's recommendation that the Sakrison Award for a member of a student chapter be given to **Dallin Jensen of Central Washington University**. The second fellowship winner is **Melanie Thornton from Washington State University**.

Dallin is pursuing an Master of Science S in Geological Sciences with a thesis topic of : Nitrates of Atmospheric Origin in Groundwater of the Lower Yakima Valley. Melanie is pursuing a Doctorate in Environmental and Natural Resource Sciences. Her dissertation topic is: Collaborative Modeling in the Spokane River Basin: Engaging Stakeholders to Explore Basin-wide Water Management Strategies.

Join us in congratulating both winners this year! We look forward to reading about your fine work in upcoming issues of the AWRA-WA newsletter and future scientific publications.



Landsat 8 false color infrared image of the Carlton Complex Fires (July 31, 20

UW Launches Graduate Floodplain Management Program

By Bob Freitag, Institute for Hazards Mitigation Planning and Research

The Need For Floodplain Professionals

Floodplains, including shorelines and wetlands, provide ecosystem services along with attractive flat land on which to build. It is no wonder that these are areas of conflict where disasters occur, where there is loss of life, loss of built capital and loss of ecosystem services occur on these lands. This can change.

A recent study estimated that worldwide flood losses will reach $1 trillion per year by 2050. Hurricane Katrina cost more than $100 billion in damage alone. About 40 percent of the U.S. population lives in coastal areas, and population growth there is three times the national average. More and more people are moving into harm's way. And these estimates do not include losses in natural capital. This also can change.

Floodplain management professionals who understand these risks and challenges are needed. To advance the field of floodplain management, the University of Washington has created a graduate degree program, specializing in floodplain management.

The UW Floodplain Management Program

The UW Department of Urban Design and Planning is offering a fully accredited, master's degree focused on managing risks associated with flooding through the Master of Infrastructure Planning and Management Program. The program includes 17 courses, 12 of which are taught online, and five at the UW Seattle campus during two, two-week summer sessions.

The UW curriculum provides the needed professional knowledge, skills and abilities required by prospective employers. Coursework presents a broad view of water management and associated risks. Water-related courses address stream and coastal mechanics, water management, law and current issues within the larger profession of floodplain management. Core courses present key concepts about infrastructure, systems thinking, infrastructure finance and the fundamental aspects of strategic and contingency planning, emergency management and policy analysis. In addition, students explore the impacts and management required of the changing climate.

The first summer session is rich in fieldwork. Students have hands on exposure to real rivers and coasts. Students demonstrate concepts in coastal and stream mechanics in their natural environments.

In the second summer session students build a flood risk reduction plan for an at-risk community addressing coastal, riverine, and surface flooding.

The curriculum culminates with a "capstone" project that includes two courses and is designed to help students synthesize knowledge they learned across the program and apply it to a real-world project, conduct research, and develop a case study. As with other course projects, students can explore subjects that may benefit their respective employers.

A few of past projects by graduate students that

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Hirst v. Whatcom County: A Report From the Confluence of Water Rights, Rual Water Supply, and Growth Management

By Jaqueline Brown Miller, Washington Department of Health Office of Drinking Water

Introduction

On October 20, 2015, the Washington Supreme Court heard oral argument in Hirst v. Whatcom County[1]. The Court's decision is eagerly awaited by water law and growth management practitioners. Hirst represents the most recent conflict over efforts to balance domestic rural water supply with instream resources when rural property owners seek to drill domestic water wells that rely on permit-exempt groundwater withdrawals in basins where minimum instream flows ("MIFs") are not consistently met.

The primary issues presented in Hirst are:

1. Under the Growth Management Act ("GMA"), how far must local governments go -- through their comprehensive plans and development regulations -- to assure they do not authorize local development in the absence of legally available water or in a manner that generally harms water resources?
2. How do local GMA responsibilities intersect with Washington's surface water and groundwater codes and with the Washington Department of Ecology's ("Ecology") regulatory authority for administering them?

Relevant GMA and Land Use Provisions

Under the GMA and the Planning Enabling Act, most local governments must create county-wide planning policies, a comprehensive plan, and development regulations. Comprehensive plans must be consistent with planning policies, development regulations must be consistent with comprehensive plans, and decisions regarding project approvals are evaluated for consistency with development regulations.[2]

The Legislature recognized the inextricable link between land use and water use and that the pursuit of prosperity and associated expanding land development will continue to increase competition for water resources.[3] Thus, Washington land use laws require local governments to:

- Develop land use planning documents that are informed by the goal of protecting the environment and enhancing quality of life, including water quality and water availability.[4]
- Enact comprehensive plans and development regulations that provide for protection of the quality and quantity of groundwater used for public water supplies[5]; enhance rural and non-urban areas, including rural character, or patterns of land use and development compatible with fish habitat and consistent with protecting natural surface flows and groundwater recharge; and include measures to protect rural character by protecting surface water and groundwater resources.[6]
- Approve land plats and land subdivisions only with an affirmative finding that appropriate and adequate provisions for potable water supply are in place.[7]
- Approve building permit applications only with affirmative evidence of adequate and legally available water supply.[8][9]

Relevant Water Law Provisions

Ecology protects instream resources, in part, by establishing regulations that set and protect minimum instream flows -- MIF rules. Under Washington law, MIFs established by rule are water rights protected under the priority system from impairment by junior water rights and by unpermitted water use.[10]

In determining whether to issue new water right permits, Ecology determines whether the new proposed water right will impair any senior water rights, including MIF water rights established by rule. However, in

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1. Whatcom Cnty. v. Hirst, et al., Court of Appeals, Div. 1, No. 70796-5-1 (February 23, 2015) (on appeal Hirst, et al. v. Whatcom Cnty. and the W. WA GMHB, WA Supreme Court, No. 91475-3 (C/A 70796-5-I -- consolidated w/72132-1-I & 70896-1-I)).

2. See RCW 36.70A.011, .020, .040, .060, .070, .080, .100, .120, .130, et seq. and RCW 36.70.545.

3. RCW 90.54.010. In addition, RCW 36.70A.020(12) identifies the GMA planning goals that are to guide comprehensive plans and development regulations, which have been interpreted to include water. See Cascade Columbia Alliance v. Kittitas Cnty., E. WA GMHB, Case No. 98-1-0004, Final Decision and Order, 5 (Dec. 21, 1998). The water code is also interrelated with land use decision making. See, e.g., RCW 90.54.090 (Local jurisdictions "shall whenever possible, carry out power vested in them in manners which are consistent with the provisions of [the water code]") and RCW 90.54.130 (Ecology "may recommend land use management policy modification it finds appropriate for the further protection of ground and surface water in this state.").

4. RCW 36.70A.020(10).

5. RCW 36.70A.070(1).

6. RCW 36.70A.090(15)(d) and (g).

7. RCW 36.70A.070(5)(c)(iv); RCW 36.70.330.

8. RCW 58.17.110(2); RCW 58.17.150(1).

9. RCW 19.27.097(1).

10. In basins that have established MIF water rights by MIF rule, subsequent appropriations are junior to MIF water rights and, thus, cannot be authorized. The priority date for a MIF water right, created by rule, is the rule's effective date. RCW 90.03.345. The priority date for a permit-exempt well is the date the water is put to beneficial use. Five Corners Family Farmers v. State, 173 Wn.2d 296, 304, 268 P.3d 892 (2011). See also Squaxin Island Tribe v. Dep't of Ecology, 177 Wn. App. 734, 737 n.3, 312 P.3d 766 (2013) (holding that neither water rights obtained through the permitting process nor water rights obtained by beneficially using water from an exempt groundwater well may impair a senior MIF water right).

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areas where municipal water is not available from an established water purveyor, particularly in rural areas, the need for domestic water often is met through individual wells that rely on permit-exempt groundwater withdrawals (essentially wells that are for domestic uses in an amount not exceeding 5,000 gallons per day ("gpd").[11] Even though these withdrawals, once perfected, are water rights, Ecology does not subject them to its pre-approval impairment analysis because water withdrawals via private exempt wells are exempt from Ecology's permitting system. Therefore, these water rights are being established with no analysis or assurance that the new groundwater appropriation does not impair senior MIF water rights or any other senior water right.[12]

Introduction to the Hirst Litigation

It was within the context of the above-described legal and policy framework that Hirst and Futurewise challenged Whatcom County's local land use regulations on grounds that they allegedly fail, under the GMA, to protect surface and groundwater quality, water availability, or water for fish.[13]

Hirst/Futurewise argue that the GMA requires counties to enact growth management regulations that (1) restrict or prohibit development if that development relies on permit-exempt withdrawals in areas where MIFs are not met and (2) protect the rural character by protecting surface water and groundwater resources.[14]

A complicating nuance is that Ecology's MIF rules are inconsistent — some address permit-exempt water withdrawals as they relate to MIFs and others do not. Hirst/Futurewise argue that the GMA requires counties to protect MIFs from permit-exempt water withdrawals, even where Ecology's MIF rules are silent regarding whether it is legal for permit-exempt wells to impact MIFs. They also argue that the GMA requires counties to accomplish this protection by passing county regulations that prohibit permit-exempt water withdrawals in areas where such withdrawals would impair MIFs.[15]

Whatcom County, on the other hand, argues that it is sufficient for county regulations to prohibit new development if the development would rely on permit-exempt well water that Ecology has determined to be unavailable (through a MIF rule that explicitly addresses permit-exempt wells).[16] According to Whatcom County, if an Ecology MIF rule is silent regarding the allowable impact of exempt wells on MIFs, then a local government may default to the position that water to support permit-exempt wells is legally available.[17] According to Whatcom County, Hirst/Futurewise's position, if taken to its logical conclusion, would upset the regulatory system that governs water rights because it would insert local governments into roles and responsibilities allocated to Ecology.[18]

Evolution of the Case Law Leading up to Hirst -- Campbell and Gwinn, JZ Knight, and Kittitas

The GMA[19] and the Planning Enabling Act[20] have long required that counties and cities link their land use planning with surface and ground water planning, both in their general planning efforts and when reviewing specific projects. However, until relatively recently there has been little judicial review of these state-imposed local mandates or of the proper integration of state and local water resource management and land use planning. Recent judicial scrutiny seems to be prompted by more extreme water scarcity and conflicts over water[21], growing scientific understanding of the connection between surface water and ground water, the lack of clarity over the regulation of permit-exempt wells, and, as shown by *Swinomish Indian Tribal Community v. Washington State Department of Ecology*[22], the MIF rules that are increasingly affecting the confluence of water rights and land use law.

Ecology v. Campbell and Gwinn, LLC

In 1999, in the Yakima River Basin where water rights were not being issued because water supply was insufficient, developer "Campbell and Gwinn" began developing twenty residential lots without filing a water right application. The developer argued it could legally drill a series of single wells, each serving one or two lots, and obtain water rights for each well under the water-permit exemption set forth in RCW 90.44.050, because each well would use less than the 5,000 gpd limitation. Ecology sued to stop Campbell and Gwinn, asserting "daisy-chaining" wells together to support one larger, artificially segmented development was not authorized under the permit exemption.[23]

The case went to the Washington Supreme Court, which held that the 5,000 gpd exemption could not be used to allow collective withdrawal of more than 5,000 gpd in a proposed residential subdivision, even if multiple wells would each serve one individual lot and each well would be used to withdraw less than 5,000 gpd.[24] This case clarified that qualifying for the exemption does not depend solely on

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11. See RCW 90.44.050.

12. While permit-exempt wells are legislatively exempt from permitting requirements under RCW 90.44.050, "they are subject to the priority system"

13. Hirst, et al. v. Whatcom Cnty., GMHB Case No. 12-2-0013, Final Decision and Order, 12 (June 7, 2013). See RCW 36.70A.070(5)(c)(iv).

14. Hirst, GMHB Case No. 12- 2-0013, 21 (2013).

15. Id. at 16, 17-18.

16. Id. at 18-19.

17. See Supp. Br. of Whatcom County, at 6-8, available at https://www.courts.wa.gov/content/Briefs/A08/91475-3%20Supp%20Brief%20-%20Resp.pdf; TV Washington (TVW) link to the oral argument before the Washington Supreme Court, available at: http://www.tvw.org/watch/?eventID=2015101023.

18. See Suppl. Br. of Whatcom County, 2-3, 6-8; see oral argument at TVW.

19. Chapter 36.70A RCW and as codified through chapter 19.27 (the Washington Building Code) and Chapter 58.17 RCW (the State Plats and Subdivisions Act).

20. Chapter 36.70 RCW.

21. In Washington, most of the available water, and in many areas, even more than that, has been appropriated.

22. 178 Wn.2d 571, 311 P.3d 6 (2013).

23. WA Dep't. of Ecology v. Campbell and Gwinn, L.L.C., 146 Wn.2d 1, 4-8, 43 P.3d 4 (2002).

24. Campbell and Gwinn, 146 Wn.2d 1, 10–13 (2002).

Page 2: UW took our resident floodplain course include:

- **Flood / Fire / Flash Flooding Twisp, Washington:** Much of the larger Twisp WA rural developed community was damaged by wildland fire in 2015. Post Fire flooding was expected. This team researched ways to reduce flooding following wild land fires for the coming flood season and as well as impacts expected over the long term due to changes in the climate and resulting changes in land cover.
- **Living with a Dynamic Landscape:** Sea levels are expected to rise between one and four feet along the Oregon Coast within our students' lifetime and much high during the lives of our children. At the same time, coastal land is the most densely developed and some of the most valuable land in the country. This presents an interesting problem and opportunity -- how can the value and utility of existing coastal lands be maximized knowing that it is a disappearing asset?
- **Arlington floodplain development:** During the 2015 floodplain class, students worked with the City of Arlington WA to determine how forecasted changes in our climate would impact a particularly challenging floodprone site zoned for business.
- **Typhoon Yolanda:** When Typhoon Yolanda /Haiyan made landfall in the Philippines, our University of Washington Department of Urban Design and Planning course on Floodplain Management was entering its sixth week of instruction. The class departed from the syllabus, changed focus and held a mini-charrette over two class periods to discuss possible risk reduction alternatives for the impacted city of Tacloban.
- **City of Chennai, India:** As with Yolinda, when the City of Chennai was flooded during our 2015 floodplain management class session, we again departed from the syllabus to devise risk reduction strategies. The flooding that impacted Chennai was different from that of Tacloban in that Chennai experienced extensive surface freshwater flooding.

Public Recognition

Floodplain practitioners have acknowledged the relevancy of our program through the granting of awards to awarded UW program students. University of Washington students have won awards for four out of the past five Association of State Floodplain Managers (ASFPM) student competitions.

- Last year Adnya Sarasmita, reprinting her team won second place for their paper on Mitigating Calgary, Alberta's Vulnerability to Flooding.
- In 2014, Kristen Vitro, also representing her team, won 2rd place for addressing Preventing Flood Damage to Businesses in Historic Downtown Snoqualmie, WA. Francisca White, representing her team, won 3rd place for addressing Mitigating Total Flood Impacts through Intentional Flooding in Agricultural Land along the Lower Nooksack River.
- Megan Olson won in 2013 for her Thesis on Fish and Floods: Implementation of the 2008 Biological Opinion on the National Flood Insurance Program in

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Thanks to Our Basin Sponsors!

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who ultimately withdraws the water and puts it to beneficial use. Project context also is a relevant factor to be considered in determining if the exemption applies. Also, determining whether the exemption applies must be done prior to well construction.[25]

JZ Knight v. City of Yelm, et al.

In 2008, JZ Knight, who owned a Group A water systemn[26] near Yelm, challenged the City of Yelm's approval of several developments, asserting that sufficient legally available water did not exist to support Ecology's approval of the developments' water right applications. Knight could no longer use certain wells comprising her senior water right due to surface water having gone dry. She asserted that, if approved, the developments' appropriations would impair her use. The Thurston County Superior Court held: "[Under RCW 58.17.110,] Yelm must make findings of 'appropriate provisions' for potable water supplies by the time of final plat approval. . . . *[S]uch findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions.*"[27]

Based on this reasoning, JZ Knight won her case.

Kittitas County, et al v. Eastern Washington Growth Management Hearings Board

2011 brought to a close seven years of litigation over Kittitas County's comprehensive plan and development regulations. The County's planning efforts were challenged before the Growth Management Hearings Board ("GMHB" or "Board"), which held that the county did not comply with the GMA's mandate to protect water resources because its "subdivision regulations allow[ed] multiple subdivisions side-by-side, in common ownership, which [could] use multiple exempt wells ... contrary to the GMA's requirements to protect water quality and quantity."[28] The Board connected the GMA's mandate to protect water with the *Campbell and Gwinn* Court's interpretation of RCW 90.44.050 as disallowing the "daisy-chaining" of exempt wells when total groundwater use would exceed the 5,000 gpd permit exemption cap.[29]

The Washington Supreme Court affirmed the Board. The Court held that counties would evade the Court's Campbell and Gwinn holding if they separately evaluate multiple subdivision applications for properties that are all part of the same artificially segmented development. In doing so, counties could approve subdivisions of land in reliance on the availability of permit-exempt wells under circumstances in which Campbell and Gwinn would require Ecology to issue water permits under RCW 90.44.050.[30]

The Court rejected arguments made by the parties that RCW 90.44.040 preempts counties from separately appropriating groundwater, holding that RCW 90.44.040 does not prevent counties from protecting public groundwater from detrimental land uses or from enacting local regulations that are consistent with Washington's water code. In fact, held the Court, "*several relevant statutes indicate that the County must regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources.*"[31]

The Court contrasted the role of Ecology with the role of local governments, observing that while Ecology is responsible for permitting groundwater appropriation, counties are responsible for land use decisions that affect groundwater resources, including the subdivision of land. Ecology should maintain its statutory role and also assist counties in their land use planning, so they can meet their duty to adequately protect water resources in addition to assuring that appropriate provisions are made for potable water supply. Interpreting RCW 58.17.110 as only requiring counties to assure water is physically underground would effectively allow them to condone the evasion of Washington's water permitting laws and impose a costly burden on nearby property owners with existing water rights.[32]

In 2014, Kittitas County adopted an ordinance to comply with the Supreme Court's decision — Ordinance No. 2014-055. The Board the ordinance[33] and it is being called a template for other local governments.

The Hirst Case -- on Review before the Supreme Court

Like Kitsap County,[34] Whatcom County has undergone a lengthy process of defending amendments to its comprehensive plan and development regulations against assertions that they are legally inadequate under the GMA. Whatcom County began defending its planning efforts in 2005 and the Board found the County's comprehensive plan and development regulations did not comply with the 1997 GMA amendments that required enhanced protections to rural character.[35] In 2009, the Washington Supreme Court affirmed the Board's decision.[36]

In 2012, in an effort to comply with the 2009 decision, Whatcom County amended its planning regulations, enacting Ordinance 2012-032, which

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25. Id.

26. See RCW 70.119A.020(4).

27. JZ Knight v. City of Yelm, et al., Thurston Cnty. Superior Court Case No. 08-2-00489-6, Amended Findings and Conclusions (November 7, 2008), aff'd JZ Knight v. City of Yelm, et al., 173 Wn.2d 325, 267 P.3d 973 (2011) (emphasis added).

28. Kittitas Cnty., v. E. WA Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 175, 256 P.3d 1193 (2011) (internal citations omitted).

29. Kittitas, 172 Wn.2d 144, 175-76 (2011) (internal citations omitted).

30. Id. at 177.

31. Id. at 178-79, citing RCW 36.70A.070(1), (5)(c)(iv), RCW 19.27.097, RCW 58.17.110 (emphasis added).

32. Id. at 180.

33. Kittitas Cnty. Conservation Coalition, et al. v. Kittitas Cnty., Order Finding Compliance, Case Nos. 07-1-0004c and 07-1-0015 (August 13, 2013).

34. Some have called the Hirst case Kittitas II.

35. Futurewise v. Whatcom Cnty., GMHB Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005).

36. Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009).

amended the Comprehensive Plan's Rural Element Policy 2DD-2.C.2 through .9, adopting by reference various pre-existing County regulations.[37]

GMHB Decision – Held Whatcom County's Updated Planning Efforts Invalid

Hirst/Futurewise alleged that Whatcom County's 2012 updated planning ordinance No. 2012-032 fails to comply with the GMA regarding the protection of surface and groundwater quality, water availability, and water for fish.[38] The Board agreed.

In its decision, the Board relied on principles from the Supreme Court's Kittitas decision, setting the stage for its evaluation of Whatcom County's regulations. The Kittitas principles recited by the Board include: Counties cannot practicably assure there will be adequate potable water supply, which they must do before approving building permits and subdivision applications, without first ensuring that local land use plans and regulations are consistent with water availability.[39] Local governments must "plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process" [40]and local governments —not Ecology —are responsible for making decisions on water adequacy as part of land use decision making, particularly with respect to exempt wells."[41]

The Board next turned to the question of whether Whatcom County adopted measures that fully apply the GMA's water resources requirements under the local circumstances.

Relying on the Supreme Court's Postema decision, the Board determined that a development application must be denied if the applicant intends to rely on a new withdrawal from a hydraulically connected groundwater source in a basin that Ecology has explicitly closed to groundwater withdrawals or that Ecology effectively has closed by promulgating a MIF rule that establishes a MIF water right, which subsequent groundwater withdrawals likely would impair.[42]

In determining that the applicable MIF rule – the Nooksack Rule -- closed the basin to further groundwater withdrawals unless a project proponent could show those withdrawals would not impair MIF water rights, the Board seems to have relied on a 2011 letter from Ecology to Snohomish County officials that Ecology provided to Whatcom County staff as an example of what happens to groundwater availability in a basin when there are unmet MIFs – the basin is closed to additional withdrawals, including from exempt wells.[43]

Following the 2011 Ecology letter and Postema, the Board determined that Nooksack Rule closed the basin to any further groundwater withdrawals, including those from permit-exempt wells, unless a project proponent can demonstrate, factually, that the subject groundwater is not in hydraulic connectivity with an impaired surface water body protected by the Nooksack rule.[44]

The Board acknowledged that Policies 2DD-2.C.6 and .7 only allow the county to approve a subdivision or building permit that relies on a permit-exempt well if the proposed well site/groundwater falls outside the boundary area that Ecology explicitly has determined, by rule, has no water available for development. However, held the Board, "this is not the standard to determining legal availability of water,"[45] and "this restriction falls short of the Postema standard, as it does not protect instream flows from impairment by groundwater withdrawals."[46] Policy 2DD-2.C.6 and .7 and the regulations they adopt by reference "do not require the County to make a determination of legal availability of groundwater in a basin where instream flows are not being met."[47]

The Board held that the GMA mandates that comprehensive plan measure protect rural character, defined as development and land use patterns consistent with protecting natural surface water flows. Based on this reasoning, Whatcom County's regulations did not comply with the GMA: "[Policy 2DD-2.C.6] does not govern development in a way that protects surface water flows and thus fails to meet the requirements of RCW 36.70A.070(5)(c)(iv);"[48] and "2DD-2.C.7 fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells as required by RCW 36.70A(5)(c)(iv)."[49]

Division 1 Court of Appeals Decision – Overturned the Board's Decision

May Local Governments Defer to Ecology Rules, even if Ecology's Rules Are Not Conclusive on the Issue of Water Availability for Exempt Wells

Whatcom County appealed the Board's decision. The Court of Appeals agreed with certain broad principles set forth by the Board, [50] but seemed somewhat incredulous that the Board would fault Whatcom County for seeking to meet the GMA's requirement to determine the availability of water by following consistent Ecology regulations regarding the availability of water. The Court wrote, "The Board concluded that the County's use of Ecology's rules as a means of meeting the requirements of the GMA fails to comply with this statute. Rather, the Board appears to conclude that the County must make its own, separate determination of the availability of water in order to fulfill the requirements of the GMA."[51, 52]

The Court found that the Washing-

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37. See Hirst, et al. v. Whatcom Cnty., GMHB Case No. 12-2-0013, Final Decision and Order, 39-42 (June 7, 2013).
38. Hirst, GMHB Case No. 12-2-0013, 12 (June 7, 2013).
39. Id. at 22, citing Kittitas Cnty., 172 Wn.2d 144, 178-79.
40. Id. at 23, citing Kittitas Cnty., 172 Wn.2d at 180.
41. Id.
42. Id. at 40.
43. Id. at 41-42.
44. Id.
45. Id. at 41.
46. Id. at 40.
47. Id. at 40 - 41.
48. Id. at 41.
49. Id. at 42.
50. Whatcom Cnty. v. W. WA Growth Mgmt. Hearings d., 186 Wash.App. 323, 45-46, 44 P.3d 125 (2015).
51. Id. at 48 (emphasis added).
52. Whatcom Cnty., 186 Wash.App. 323, 46, 48 (2015).

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Washington State

- In 2011 Jeana Wiser won for a project for which she was Lead Research Assistant on Project Safe Haven: Vertical Evacuation Opportunities on the Washington Coast,

For more information, visit University of Washington's Master of Infrastructure Planning and Management with a Floodplain Management Degree Option webpage.

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ton Supreme Court, in Kittitas, anticipated consistent, not inconsistent, local regulations by counties in land use planning to protect water resources.[53] With the goal of consistency in mind, the appeals court deemed it appropriate for the County to incorporate Ecology's regulations to assess water availability and held that this approach is consistent with the GMA.[54]

Should the Hearings Board have Relied on a 2011 Ecology Letter to Construe the Nooksack Rule?

Next, Court was critical of the Board's interpretation of the extent to which Ecology's Nooksack MIF rule closed Whatcom County's water basins to further appropriation. The Court held that the Board erred when it determined that water is not available for permit-exempt withdrawals in WRIA 1 (which contains the Nooksack Basin in Whatcom County) and that all development permits must be denied if the applicant cannot demonstrate that a proposed new permit-exempt groundwater withdrawal will not impair Nooksack Rule MIFs.[55]

The appeals court explained that the Board should not have relied on the 2011 letter from Ecology to Snohomish County officials about the way Ecology interprets the Skagit basin MIF rule. The Court held that because the letter merely explained how Ecology interprets Snohomish County's Skagit basin MIF rule, the Board erred in extrapolating it to the Whatcom County Nooksack MIF rule.

Ecology filed an amicus brief disagreeing with the Board's application of the 2011 Ecology letter to Whatcom County, arguing that the Whatcom County-oriented Nooksack Rule, unlike the Snohomish County Skagit basin rule, does not expressly mandate groundwater closures to certain private permit-exempt wells in rural areas of Whatcom County or, in all instances, the denial of development applications that rely on these wells.[56]

In other words, Ecology argued that the Nooksack basin in Whatcom County is not closed to permit-exempt wells and their withdrawals, regardless of what Ecology said to Snohomish County in the 2011 letter and regardless of what Ecology staff may have said to Whatcom County staff about how the logic set forth in the 2011 letter might apply to the Nooksack Rule.

The Court of Appeals held that the Board erred in applying information in the letter about the Skagit River Basin MIF rule in Snohomish County to the Nooksack Basin in Whatcom County.

The appellate court also recognized, based on Postema, that different basin rules contain different language and expressly declined "to search for a uniform meaning to rules that simply are not the same."[57]

In sum, the appellate court overturned the Board's decision because it felt the decision effectively would require that the County reach a legal conclusion regarding water availability for permit-exempt wells that is not consistent with Ecology's interpretation of the Nooksack Rule.[58]

Does the Prior Appropriation Doctrine Apply to County GMA Decisions?

Hirst argued, under Postema, that a MIF set by Ecology rule is an existing water right that may not be impaired by subsequent groundwater withdrawals, including withdrawals from permit-exempt wells. Accordingly, argued Hirst, the Washington Supreme Court's decisions in Postema and Swinomish support the Board's conclusion that the GMA requires Whatcom County to avoid authorizing exempt-well activities that cause impairment to surface waters and, in particular, impairment to MIF water rights.

Hirst argued that this is true even if Ecology's Nooksack Rule did not explicitly foreclose all groundwater availability to permit-exempt wells because the Nooksack rule was promulgated before Ecology understood the hydrologic connection between groundwater and surface water and Swinomish requires that the original intent of Washington water law change with advances in our understanding of science (indicating that the position taken by Ecology in its amicus brief was rooted in the days before advances in our understanding of hydrogeology were made).[59]

In dismissing this argument, the Court did not squarely address this issue. Rather, the appeals court wrote that the Board's reliance on the standards set forth in Postema to invalidate the County's regulations was misplaced, because the facts in Postema addressed decision criteria for evaluating groundwater appropriation permit applications, not permit-exempt withdrawals. The appeals court apparently felt Postema's principles should not be extended to cases dealing with permit-exempt wells.[60] The appeals court also wrote that Swinomish is factually distinguishable because it involved the Skagit Basin Rule, a rule in which Ecology expressly prohibited permit exempt withdrawals that would impair MIFs.[61]

The upshot of the Court's ruling is that it is legal for local governments to make determinations that water is legally

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53. Id. at 50-51, citing Kittitas, 172 Wn.2d at 178 (emphasis added).
54. Id. at 51.
55. Id. at 56.
56. Id. at 57-58.
57. Id. at 56-57, citing Postema, 142 Wn.2d 68, 87 (2000) (emphasis added).
58. Id. at 60.
59. Id. at 62-63.
60. Id. at 55.
61. Id. at 62-63.

available for permit-exempt groundwater wells that support building and subdivision applications, even where there are unmet senior MIF water rights and a likelihood of hydraulic connectivity — as long as an associated MIF rule does not expressly regulate permit-exempt wells or otherwise state that groundwater is unavailable for development.

Before the Washington Supreme Court

Individuals and organizations that filed briefs in the Hirst case include Whatcom County, Hirst and Futurewise, Ecology, the Center for Environmental Law and Policy, the Washington Association of Counties, and the Washington Association of Realtors.

On October 20, 2015, the Supreme Court heard oral argument for this case. At oral argument, the attorney representing Hirst and Futurewise argued:

- The GMA requires local governments to assure that water is legally available before allowing growth and requires local governments to plan for water availability.
- Whatcom County must do an impairment analysis of whether proposed development will impair existing senior water rights, including an analysis of hydraulic connectivity between the proposed water use by the permit-exempt well and senior water rights, including MIFs.
- There is only one functional difference between permit-exempt water withdrawals and permitted water rights, and that is the permit requirement. Both types of water rights are subject to the water code, including the first in time, first in right requirement.
- The applicable MIF rule – the Nooksack Rule – explicitly provides that no more groundwater is allowed to be withdrawn in the basin where a MIF would be impaired – the rule does not explicitly exclude permit-exempt withdrawals from the requirement that no more groundwater can be withdrawn when, to do so, would impair a MIF water right.
- The various parties view the Nooksack Rule differently. Ecology's believes that because the Nooksack Rule does not explicitly extend to permit-exempt withdrawals, the junior permit-exempt wells are exempt from any obligation to protect senior water users. Hirst, on the other hand, believes that the rule's failure to mention permit-exempt wells means that permit-exempt withdrawals, under Cambell and Gwinn, must still meet the requirement to not impair senior water rights. Where Ecology is not doing this analysis, under the GMA, it falls to the county to perform the analysis.
- At oral argument, the attorney representing Whatcom County argued:
- The GMA requires local land use planning to be cooperative and consistent with Ecology's management of water resources.
- The GMA does not require that an impairment analysis to be done by local governments, and counties are entitled to follow Ecology's lead on how to interpret and implement MIF rules.
- Whatcom County defers to Ecology's Nooksack rule. Therefore, the County does not need to obtain, from project applicants, an affirmative demonstration of lack of hydraulic continuity.
- Under Postema, the GMA does not have to be given priority over Ecology's MIF rule, based on its plain language.
- While the GMA seems to give local governments flexibility, in certain circumstances, to be more protective than Ecology (because of the GMA's short, broad, and vaguely worded mandate for counties to protect groundwater, surface water, and water quality), in the present case, the County is restrained by the operation of the Nooksack Rule and cannot do more than Ecology.
- The GMA is not the forum to address the concern of Hirst and Futurewise over Ecology's interpretation of the Nooksack MIF Rule. Arguments being made by Hirst and Futurewise would require that the County duplicate, and possibly contradict, Ecology's water resource management decisions, a result that the GMA would not require.

The crux issue is: before allowing development, does the GMA require that local governments "assure water availability" or that they "assure water availability as managed by Ecology." Hirst and Futurewise argued that Ecology's position that its Nooksack MIF rule does not apply to permit-exempt wells must fail because (1) it is not supported by the rule's plain language and (2) it violates the first in time, first in right priority rule. Whatcom County argues that local governments are entitled to defer to Ecology, and where Ecology has not addressed the issue, local governments may default to a determination of water availability.

Implications

The Supreme Court's decision in Hirst may shift evaluations and decision-making over the availability of water resources that historically have been within the sole jurisdiction of the State. Consistent with what several modern scholars have been advocating, the decision may determine that the GMA gives this responsibility to local governments – further integrating the powers of different levels of government in assuring that growth does not exceed the carrying capacity of available water. Essays written by these scholars, and the Hirst case, raise provocative questions about allowing water resource considerations to become a more driving force in land use planning. The Supreme Court's decision may provide direction to local governments as to whether, under the GMA, they may, must, or cannot defer to the discretion of state agencies, even where they have been in working in collaboration with them. Particularly regarding the availability of water resources, the Court's Hirst decision could challenge the very attributes of Washington water law by subjecting them to local land use planning and decisions.

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