

## Hirst Decision Discussion on KGMI 2016.12.31

### Opener:

The Hirst Decision is not about water. It's about preventing you from living on your land in rural Whatcom County.

It is the culmination of the efforts of Futurewise, a radical leftist 'environmental' and land use restrictionist organization, Eric Hirst, David Stalheim, Jean Melious, Wendy Harris, and Laura Lee Brakke, who have filed a series of appeals of Whatcom County's comprehensive Plan to the Growth Management Hearings Board, an unelected group of political appointees with the power to review that plan.

Those efforts have resulted in the downzone of more than 6000 parcels of land in rural Whatcom County. For the petitioners, the downzones weren't enough. They filed this last appeal, arguing that the Comp Plan failed to adequately protect water quantity and quality, to prohibit property owners from drilling wells on their property to supply water for domestic consumption.

The GMHB found for the petitioners. The court of Appeals reversed, and the Washington State Supreme Court reversed again and found for the petitioners that indeed, "...the county's comprehensive plans does not satisfy the GMA's requirements to protect water availability or water quality. However, we affirm the Court of Appeals' holding that the Board did not abuse its discretion in declining to make a finding of invalidity. We therefore reverse the Court of Appeals in part and remand to the Board for further proceedings consistent with this opinion."

Whatcom County's response was to impose a temporary moratorium on the acceptance of permit applications for projects that rely on an exempt well for domestic water in rural Whatcom County.

Those property owners, many of whom have made large investments in studies and engineering work required by Whatcom County's front-loaded permit process, are left in limbo with no relief visible on the horizon. Their property is virtually worthless.

The ordinance imposes a burden on those property owners to establish that their "appropriation" of water will not adversely affect instream flows, an analysis impossible to make. It offers no economically viable alternative.

However, Justice Madsen of the Supreme Court, writing a concurring opinion, stated, "I write separately to emphasize it is the burden of the State and local governments, independently and in cooperation, to determine water availability in the first instance. This is not a burden to be shifted onto individual permit applicants."

Interestingly, an owner may still drill a permit-exempt well on land in rural Whatcom County and use the water for stock watering, irrigation, or industrial uses.

The court's ruling remands the matter to the Hearings Board for further action and supports the Board's decision not to impose an order of invalidity.

The Court places no immediate burden on the county other than to plan determine water quantity and quality. The county is presently immersed in a multi-faceted effort to do just that.

The county, however, chose to heed advice from Thomas Loranger, the Department of Ecology's Water Resources Program Manager, who wrote, "Ecology views the Court's decision as applying prospectively from the date of the Court decision."

Neil Caulkins, the chief civil deputy prosecutor in Kititas County, disagrees. He writes, "So, while counties can declare moratoria, it's probably not a good idea to do so. In any event, I don't think that the failure to declare a moratorium

would be an instance of GMA non-compliance (particularly if the county has commenced a study of its water issues as discussed below).”

In my opinion, the members of the Whatcom County Council have demonstrated that they would rather screw property owners than risk the wrath of the Growth Management Hearings Board.

It’s amazing how much onerous regulation you can impose if you don’t bear the cost yourself, isn’t it?

The County’s budget does not suffer because of this decision. The affected property owners, some ruined financially, will seek relief at the Board of Equalization. Their property taxes will be reduced, but the county’s levy-based tax system will shift the resulting burden to the rest of the property tax payers in Whatcom County.

In this elegant way, everybody gets the shaft.

Take a minute to remember the names of the people who did this to you: Futurewise, David Stalheim, Jean Melious, Eric Hirst, Wendy Harris, and Laura Lee Brakke.

Whatcom County officials who participated are as follows:

Jack Louws, County Executive.

Whatcom County Council members Carl Weimer, Rud Browne, Satpal Sidhu, Barry Buchanan, and Todd Donovan.

Council members Ken Mann and Barbara Brenner voted against the interim ordinance that followed the temporary moratorium. They deserve your support.

### **How Did We Get Here?**

The Nooksack instream flow rule was established in 1985 in accordance with Chapter 173-510 WAC. (See RCW 90.030.345. “Establishment of reservations of water for certain purposes and minimum flows or levels as constituting appropriations with priority dates”)

“An instream flow is a specific stream flow level (in cubic feet per second, cfs) measured at a control point location in a given stream, that is established to protect instream resources including fish, game, wildlife, scenic, aesthetic and other environmental values, navigational values, birds, and recreational values.” Thomas Loranger.

Originally, instream flows were “reservations” or “protected flows”, but, over time, and as a result of various court decisions, they have morphed into “rights”. In Hirst, the Supreme Court uses the term “senior instream flows”, a phrase that the court apparently invented out of whole cloth.

A new exempt well is an appropriation, and it is not allowed to impact instream flows. Domestic uses require an uninterrupted water supply, but new appropriations must be interrupted when instream flows are not met. As a result, new domestic appropriations are not allowed in basins closed because the instream flow rule is not being met.

How often does this occur?

DOE: “Our analysis of stream flow data in WRIA1 indicates instream flows have not been met on average 142 days per year, and there are no years when instream flows have been fully met for the entire year.”

“This means water for new domestic uses is not available year-round...without documentation that there would be no impact on surface waters.”

No years.

Obviously, the problem is with the design of the instream flow rule, which, by that design, cannot be met in any year.

The rule is aspirational in design, with minimum flows predicated on what the fish would like, even though the flows are not present in the river and probably never have been. The extra water required by the rule is called “exceedance”. In the Nooksack Rule, the exceedance is 50%. In my opinion, and that of certain lawyers familiar with water law, exceedance should be outlawed in the design of instream flow rules.

A rule that cannot ever be met is not a proper application of the law, is it?

The present rule was written in 1985. A new rule could be written by DOE as a regulation. Unfortunately, the current political climate might result in the Department of Ecology writing a rule that would have higher flows based on what the fish would like rather than a rule based on hydrogeology and on data about flows present in the river. I’ll have more later, on why the 1985 rule must be replaced.

New statutory language to protect domestic uses would be necessary to protect property owners. The legislature is working on this issue.

### **Is Whatcom County engaged in Water Planning?**

Whatcom County has so many water planning initiatives in motion that I can’t name them all. The Planning Unit, empowered under 90.82, The Watershed Planning Act, to develop a watershed management plan with maximum citizen involvement, has seen its role diminished and many of its statutory functions usurped by the Joint Board, which consists of Whatcom County, The City of Bellingham, the Lummi Nation, the Nooksack Tribe, and PUD #1. I don’t think that Whatcom County, as the Planning Unit’s lead agency, has fulfilled its responsibility to properly support the Planning Unit.

Instead, resources have been diverted elsewhere, many to the PUD and others to the Joint Board. A report titled, “Phase 2- Data Collection and Conceptual Model Development” of the “Groundwater Conceptual Model Report” was prepared for the “WRIA 1 Watershed Management Project Joint Board”. Phases 1 and 3 of the model are being held by the County as confidential, and phase 4 has been commenced.

The “Whatcom County Streamflow Analysis” was conducted by PUD #1, whose name appears at the top of the cover sheet. Interestingly, on page 13, it states, “Reviewing the summarized majority data presented in Table 9, a few trends stand out. The first is that the average discharge over the period of record is generally increasing...”, “Over the period of record, and from 2011 through 2015, there is no common trend for maximum discharge identified.”, and, “While the past five years are fresh in the collective memory, the trends observed in them might be opposite from the long-term trend.”

So much for the argument that the rivers are drying up.

There is water planning all over the place in Whatcom County, but not all of it is visible to the citizenry. The amount of money spent on the efforts is colossal, and much of it is hidden from public view. Much, if not most, of the money is not subject to review by the Whatcom County Council.

What we’re seeing is an attempt by the City of Bellingham, The Lummi Nation, and Whatcom County Public Utility District #1 to control the water in Whatcom County, and we’re seeing this process facilitated by Whatcom County government. Standing in the background are the Puget Sound Partnership, the Salmon Recovery Board, and, of course, Governor Inslee.

After they have the water (To properly plan, you know. It’s for your own good.), they’ll sell it back to us, and they’ll ration it to make certain that we are using it efficiently.

## What About That Instream Flow Rule?

Ecology did not conduct a maximum net benefit test in 1985 under 90.54.020 and wrote the rule with insufficient data. As I stated, the rule is based on 50% exceedance. It was not subjected to the four-part test, which turns on availability, beneficial use, no impairment of existing rights, and no detriment to public welfare. I think we're seeing some detriment to public welfare.

Tom Pors, a water attorney, wrote, "In fact, Ecology has never made four-part test findings or conducted a maximum net benefits test before adopting any of its 29 instream flow protection rules, many of which have the unintended effect of closing basins to new appropriations for domestic, municipal or other uses without rigid water for water replacement mitigation."

The Joint Board would prefer to form a water board to manage WRIA 1, but first there should be an adjudication. At the present time, this is not an adjudicated basin. Until there is an adjudication, water rights in WRIA 1 have not been clearly delineated.

There is no ability to form a water board in WRIA 1 under the current statute owing to RCW 92.90.030(2)(b)(i), which requires that an instream flow rule must have been adopted in the area under the water board since 1998.

## What is a Water Right?

A water right is a right to remove a specific quantity of water from a specific body of water at a specific location and put it to beneficial use. In Washington state, you must perfect the right by using it for the specified use.

### Statutory references:

Chapter 90.03 RCW is the Water Code

RCW 90.03.345 "Establishment of reservations of water for certain purposes and minimum flows or levels as constituting appropriations with priority dates."

RCW 90.03.245 "Determination of water rights--Scope"

Chapter 90.54 Water Resources Act of 1971

RCW 90.54.05 "The legislature recognizes the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish. The legislature finds that an effective way to meet the water needs of people, farms, and fish is through strategies developed and implemented at the local watershed level. The objectives of these strategies are to supply water in sufficient quantities to satisfy the following three water resource objectives:

Chapter 90.82 RCW "Watershed Planning"

RCW 90.82.005 "The purpose of this chapter is to develop a more thorough and cooperative method of determining what the current water resource situation is in each water resource inventory area of the state and to provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development.

It is necessary for the legislature to establish processes and policies that will result in providing state agencies with more specific guidance to manage the water resources of the state consistent with current law and direction provided by local entities and citizens through the process established in accordance with this chapter.

[ 1997 c 442 § 101.]

Chapter 36.70A RCW “Growth Management--Planning by Selected Counties and Cities”

RCW 36.70A.010 “**Legislative findings.**”

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

[ 1990 1st ex.s. c 17 § 1.]