

Importance of the *Hirst* and *Foster* Supreme Court rulings to water utilities

Whatcom County v. Hirst, Western Washington Growth Management Hearings Board et al.

State Supreme Court approves growth board's ban on exempt wells

Ruling against Whatcom County says well drilling can harm 'rural character' in GMA counties

The state Supreme Court issued its decision last October in a major ruling involving rural water supply and the state's Growth Management Act (GMA). The ruling has led to sharply curtailed use of permit-exempt wells as the water supply for new homes in rural areas of counties required to prepare land-use plans under the GMA.

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

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

The county's practice was to allow the drilling of permit-exempt wells in a manner consistent with Ecology's Nooksack Basin Instream Flow rule, under which single domestic wells were not subject to instream flows, even though such areas were "closed watersheds" where the state Department of Ecology has determined that insufficient water is available for granting of new water rights. The growth board's decision challenged this well-drilling policy and required the county to adopt tighter water supply standards in rural areas, to protect groundwater and streams from depletion by new wells.

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

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

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

In her dissent to the court's majority opinion, Justice Debra Stephens said, "The effect of the majority's holding is to require individual building permit applicants to commission a hydrogeological study to show that their very small withdrawal does not impair senior water rights, and then have the local building department evaluate the adequacy of that scientific data. The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells....it potentially puts counties at odds with the Department of Ecology and imposes impossible burdens on landowners."

The court's ruling is the final word in this case, though it has spawned efforts in the Legislature this session, especially in Senate Bill 5239, to overturn its impact on rural development, both in Whatcom County and in other parts of the state where Ecology has adopted instream flow rules similar to the Nooksack Basin rule.

Foster v. Ecology and City of Yelm

Only temporary water withdrawals can be approved under 'OCPI'

Ruling requires strict 'water or water' mitigation of new or amended water rights

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

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

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

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

Legislation to address the problems created by this ruling has been debated in this session of the Legislature, especially in Senate Bill 5239, but no consensus among key stakeholders has yet emerged on what the "Foster fix" should be.