WATER RIGHTS FOR APPRAISERS

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Disclaimer...

- Water rights are complicated!
- The validity of water rights is highly case-specific.
- The availability of water rights is highly location-specific.
- Seek council!
  - From water right attorneys
  - From the Department of Ecology
  - From the county
We manage water resources to meet the needs of people and the natural environment, in partnership with Washington communities.
Overview

• Water rights 101
• The *Hirst* decision and permit-exempt wells
• Rural water availability
What is a water right?

The right to use water:

• For a specific beneficial use.
• For a specific quantity.
• During a specified season.
• From a specific point of diversion or withdrawal.
• At a specific place.
Establishing a water right

Water rights can be established through:
- A “claim”;
- A permit application submitted to the Dept. of Ecology; or
- A permit-exempt use.

Prior Appropriation
- “First in time, first in right”.
- Seniority based on a priority date.
Maintaining a water right

Water rights are only valid to the extent that they are beneficially used.

- **Abandonment**: failure to use your water for a extended period of time and intention to give up the right.
- **Relinquishment**: failure to beneficially use your water for a period of 5 years or longer and failure to qualify for a “sufficient cause” of nonuse.
  - See RCW 90.14.140.
Investigating the validity of a water right

• Just because a property “has a water right” that does not mean the right is valid (or fully valid).

• Due diligence on the “extent and validity” of the right is vital!
  • When was the water first used on the property?
  • Has the water right been continuously beneficially used on the property?
  • Has there been 5 or more consecutive years of nonuse or partial nonuse?
    • If not, did it qualify for an exception to relinquishment?
  • Does the current water use match the elements on the water right?
SPECIAL TYPES OF WATER RIGHTS
Permit-exempt wells

For certain groundwater uses, landowners may drill a well (and use the water) without first getting a water right permit from Ecology.
- Permit-exempt wells are still a water right and cannot impair senior users.

Under RCW 90.44.050, permit-exempt uses include:
- A single home or groups of homes (up to 5,000 gpd);
- Livestock (no gallon per day limit);
- A non-commercial lawn or garden one-half acre in size or less (limited to reasonable use); and
- Industrial purposes, including irrigation (up to 5,000 gpd).
Instream flow rules

“A water right for the river”

- Are set to protect fish, wildlife, and other instream resources
- Have a priority date
- Do not put water back instream
- Ecology doesn’t issue water rights that would impair instream flows at times they are not being met
The *Hirst* Decision and Permit-Exempt Wells
Whatcom County v. Hirst, et al. (2016)

- Appeal of Whatcom County’s Comprehensive Plan.
- Ruling in October, 2016 from the WA State Supreme Court.

Ruling

- The plan failed to sufficiently protect water resources under the GMA.
- Counties have an independent responsibility to ensure that new permit-exempt uses do not impair senior uses, including instream flows.
- Counties cannot allow even *de minimus* impairment to instream flows.
Rural property owners find there’s no water at the pump | Sen. Jan Angel

Thu Apr 6th, 2017 10:59am • OPINION

War Of The Wells: Hirst Decision Draws Stealthy Demonstration To Washington Capitol

By JEANIE LINDSAY • FEB 26, 2017

Local View: Anti-growth interests obstruct new jobs, affordable housing

Bill aimed at helping rural land owners fails to pass key committee

OLYMPIA
WITH THOUSANDS SEEKING TO BUILD RURAL HOMES, WILL LEGISLATURE CUT OFF WATER FOR FISH?

ADIEL KAPLAN • February 13, 2017
Negotiated Solution: ESSB 6091

ENGROSSED SUBSTITUTE SENATE BILL 6091

Passed Legislature - 2018 Regular Session

State of Washington 65th Legislature 2018 Regular Session

By Senate Agriculture, Water, Natural Resources & Parks (originally sponsored by Senators Van De Wege, Rolfes, and Frockt)

READ FIRST TIME 01/12/18.

1 AN ACT Relating to ensuring that water is available to support development; amending RCW 19.27.097, 58.17.110, 90.03.247, and 90.03.290; adding a new section to chapter 36.70A RCW; adding a new section to chapter 36.70 RCW; adding a new chapter to Title 90 RCW; creating a new section; providing an expiration date; and declaring an emergency.
Key Elements of 6091: Homebuilding

In Hirst basins:
- People can build homes using a permit-exempt well; potential impacts to instream flows authorized.
- $500 fee for each new home.
- Water use restrictions.

Did not affect:
- Basins with instream flow rules with specific requirements for permit-exempt uses, the Skagit, and the Yakima.
- Wells drilled before the bill passed.
- Commercial, industrial buildings, or buildings not needing a building permit.
Key Elements of 6091: Other Provisions

- **Projects and Funding:** $300 million over 15 years for streamflow restoration projects statewide.
- **Planning:** Significant planning effort to offset the impact of new permit-exempt withdrawals.
- **GMA:** Counties can rely on Ecology rules for GMA compliance.
- **Metering:** Pilot program for metering new domestic uses in the Dungeness and Kittitas.
- **Foster:** Legislative task force to study the WA Supreme Court’s Foster decision. 5 Foster pilot projects authorized.
So, where might water be available?
For new water right permits...
For new permit-exempt withdrawals
Key Concepts

- The waters of Washington belong to the people of the state – individuals can obtain the **right to use water**.

- Just because a property “has a water right” that does not mean the right is valid (or fully valid).
  - Due diligence on the “extent and validity” of the right is vital!

- New water rights in many parts of the state are difficult (and time intensive) to obtain.
More Information

• “A Landowners Guide”

• The Dept. of Ecology website
  https://ecology.wa.gov