Water Rights and Rural Residential Development
The Hirst Decision and the Hirst “Fix”

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Presentation

- Land Development, Growth Management, and Water
- Who regulates the use of exempt wells for residential development
- Hirst Decision
- Hirst “Fix” – ESSB 6091/RCW 90.94
Land Development, Growth Management Act, and Water

- Prior to the enactment of the Growth Management Act (GMA) there was no state requirement to evaluate water supply before issuing a building permit or approving a subdivision.

- The first iteration of GMA passed in 1990. Required:

  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. (RCW 19.27.097)

- Similar provision in 58.17.110

- Interpreted to mean physical availability and not extend to legal availability
Land Development, Growth Management Act, and Water

- Spokane County Regional Health District implemented 19.27.097 and 58.17.110 in Spokane County.

- Building permits and subdivisions were reviewed to see if water was physically available and potable:
  - Building Permit: Well log, 4 hour pump test with 1 gpm, bacteriological test and nitrate test.
  - Subdivision: well on each lot, or a hydrogeological evaluation

- Water was presumed to be legally available.
Land Development, Growth Management Act, and Water

- Using permit exempt wells for development is convenient and less expensive.
  - No infrastructure costs.
  - No need to obtain water rights.
  - No ongoing operation and maintenance of water system.

- Throughout the 1990s it became increasingly difficult to get a new water right permit.

- Establishing a new water system in the last 20 years has been difficult

- 2 options: connect to an existing system or use a permit exempt well
Land Development, Growth Management Act, and Water

- The permit exempt well subdivision.

- 1997 Attorney General Opinion
  - A group of wells drilled by the same person or group is considered a single withdrawal

- 2002 – Ecology v. Campbell & Gwinn
  - Proposed 20 lot development with a well on each lot.
  - Each lot is not entitled to water allowed by the permit exemption
  - The entire development is allowed the water allowed by exemption.

- One exemption is enough water for 350 gallons per day indoor use and 1,550 square feet of outdoor irrigation.
Who regulates the use of exempt wells for residential development?

- **Washington State Department of Health.**
  - A permit exempt well is not a public water system

- **Washington Department of Ecology.**
  - Administers Washington Water Code
  - The permit exempt well is exempt from the permitting so there is no regulatory nexus with the water code
  - The regulatory nexus for a permit exempt well is at the point a land use decision is made – a subdivision or a building permit.

- **Local Health Districts**
  - Make decisions about the physical availability.
  - Refer applicants to Ecology related to legal water availability, usually don’t require a demonstration that Ecology has been consulted.
Who regulates the use of exempt wells for residential development?

- Counties
  - Make land use decisions, but we do not have the authority to administer the water code.

- Kittitas County v. Eastern Washington Growth Management Hearings Board
  - Kittitas County code allows County to condone the evasion of state’s water permitting laws.
  - Ecology ought to assist counties in their land use planning to adequately protect water resources.

- Hirst Case
  - Whatcom County relies on Ecology regulation for the Nooksack River Basin (WAC 173-501)
  - Hirst et al contend regardless of Ecology rule, flows are not met, new water right permits are not issued, nor should new permit exempt wells be allowed.
Hirst Decision

- The GMA places an independent responsibility to ensure water availability on Counties, not on Ecology.

- Counties may not rely on Ecology’s inaction in failing to close a basin as a determination that water is presumptively available for appropriation.

- Chaos ensues
  - Whatcom County moratorium on new building permits
  - Pierce, Okanogan, and Spokane Counties establish new regulations for building permits.
  - King and Snohomish Counties include a disclaimer stating a building permit is not a guarantee of available water

- Property values decline, some lenders wary of construction loans for homes using permit exempt wells
Hirst Decision

- Uncertainty in watersheds (WRIAs) with older instream flow regulations
Hirst Decision – Spokane County

- New Countywide regulations establishing setbacks of new wells from existing wells.
- Little Spokane Basin – need a water right or mitigation.
- Water Bank – Buy an existing large water right, break it up and sell smaller amounts for new permit exempt uses.
The Hirst “Fix” – ESSB 6091

- The Hirst Decision is a major legislative issue. In 2017 Republicans won’t pass Capital Budget unless there is resolution to the issue.

- ESSB 6091 signed into law on January 18, 2018 and codified as RCW 90.94

- Now RCW 19.27.097 explicitly states how a county processes a building permit reliant on an exempt well.
  - Grandfathers all wells drilled before January 19, 2018.
  - In non-Hirst Basins well log is all that is required to demonstrate legal availability

- In Hirst Basins
  - New $500 fee
  - Record water use limitation of 3,000 gallons per day on an annual average
  - Local governments required to develop a plan to offset estimated water use from permit exempt wells put into use over the next 20 years
The Hirst “Fix” – RCW 90.94

- Group of local governments and stakeholders (Planning Unit) must develop a plan to offset new permit exempt domestic uses that will be established over the next 20 years

**Initiating Governments**
- Spokane County
- Stevens County
- Pend Oreille County
- City of Spokane
- Whitworth Water District

**Planning Unit**
- Spokane Tribe
- Kalispel Tribe
- Colville Tribe
- Ecology
- WDFW
- City of Deer Park
- Spokane Conservation District
- Spokane Regional Health District
- Spokane County Water District #3
- Spokane County Farm Bureau
- Spokane County Cattlemen
- Spokane Home Builders Association
- Trout Unlimited
- League of Women Voters
- Spokane Riverkeeper
- Center for Environmental Law and Policy
- Eloika Lake Association
- Responsible Growth Northeast
- Citizens Against Newport Silicon Smelter
The Hirst “Fix” – RCW 90.94

- Offset can be accomplished through water right acquisitions, projects that retime water from spring to summer.
- Little Spokane Plan adopted by Ecology by February 1, 2021
- If a plan is not completed then Ecology is required to do rulemaking.
- Nooksack Basin (Whatcom County) and Nisqually Basin plans were due February 1, 2019
  - Nisqually completed a plan and it was adopted by Ecology
  - Nooksack did not complete a plan and Ecology is developing a regulation.
- Proposed regulation:
  - 3,000 gallons per day on an annual average down to 500 gallons per day maximum
  - ½ acre of outdoor irrigation down to 1/12 of an acre (3,630 sq. ft.)
Contact Information

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