



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.
- Through out 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.



The image shows a real estate sign for 'Hidden Valley Estates'. At the top, it says 'HIDDEN VALLEY' with a small graphic of a valley. Below that is a map showing a subdivision layout with lots numbered 1 through 14. The map is divided into three sections: 'KITITIAS FOOTHILLS' on the left, 'CLE ELUM PROPERTIES' in the center, and 'HIDDEN VALLEY ESTATES' on the right. A road labeled 'LEO LANE' runs through the bottom of the map. A red starburst graphic with the text 'NEW PRICE' is overlaid on the map. Below the map, the sign reads: 'VIEW LOTS FOR SALE', '3-4 ACRES with Spectacular Panoramas', 'From \$119,900', 'All Utilities Including DSL', 'NOW TAKING LOT RESERVATIONS', and 'More Info at www.CleElumLandandHomes.net'. At the bottom of the sign, it says 'Charles Peterson' and '206-459-3242' with a small 'TR' logo. The sign is set against a background of a grassy field and hills.

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.



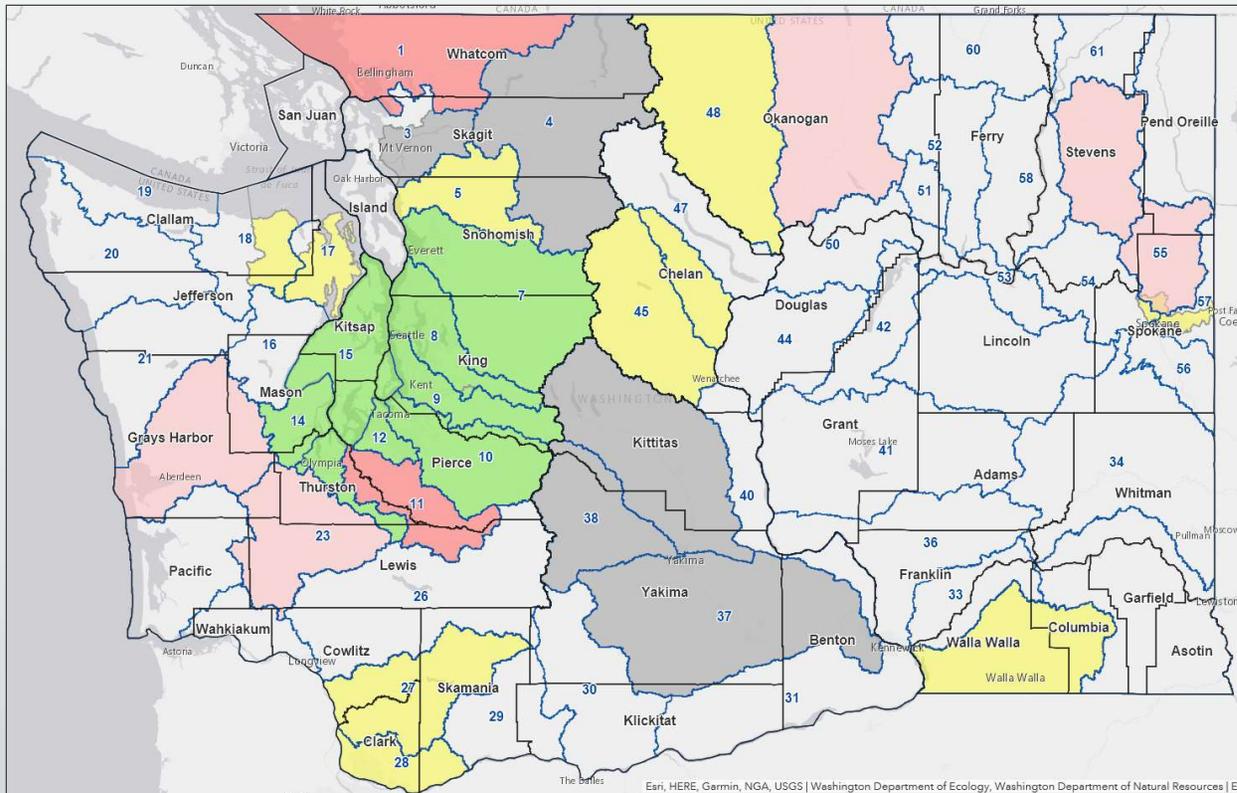
Hirst Decision

- 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



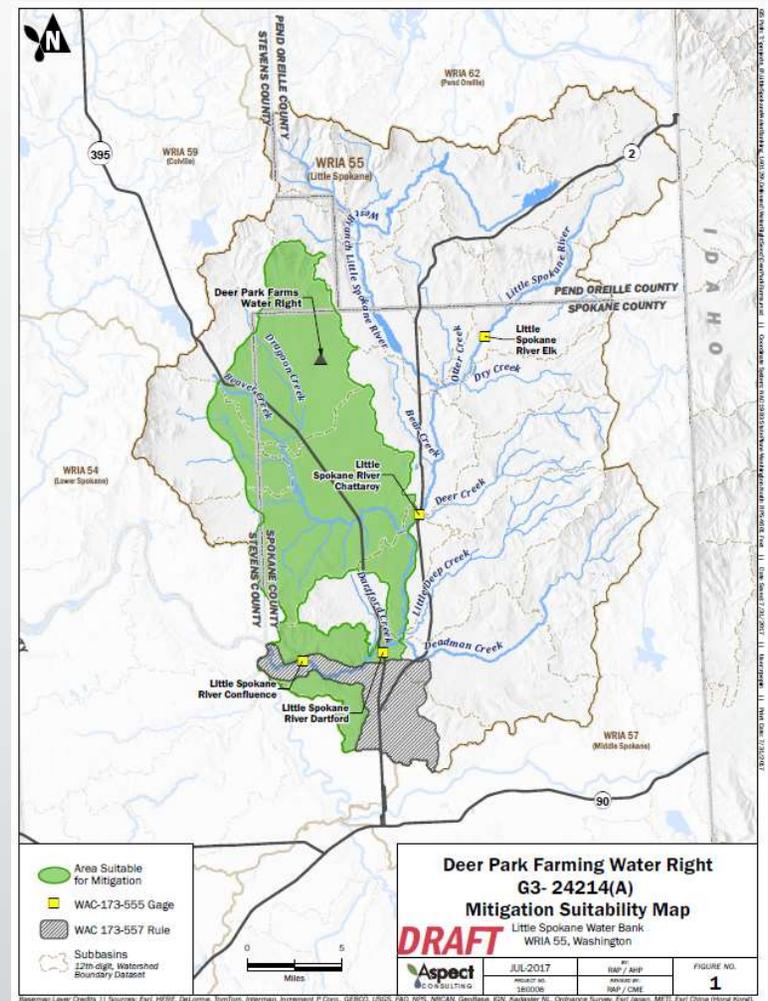
Hirst Decision

- 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 retimes 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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