WASHINGTON STATE'S LEGISLATURE PROVIDES RELIEF TO RURAL COMMUNITIES

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U.S. Environmental, Land and Natural Resources Alert

On January 19, 2018, after months of water rights and real estate uncertainty and legislative deadlock, Washington Governor Jay Inslee signed the "*Hirst* fix" into law. The Legislature passed the "fix" in response to a controversial 2016 Washington Supreme Court decision, commonly known as the "*Hirst* decision," that limited how counties approved building permits using permit-exempt wells for a water source. The "fix" is intended to clear up questions regarding domestic water use and the practical moratorium on rural development. Below, we lay out the key provisions of ESSB 6901 and analyze its potential impacts for landowners, developers, and counties.

WASHINGTON WATER RIGHTS 101

Washington waters belong to the public and cannot be owned by any individual or group. A person may be granted a right to use a certain volume of water for a defined purpose in a specific place. Washington follows the doctrine of "prior appropriation," which means that the first water users have rights senior to those who obtain their water rights later. This is commonly called "first in time, first in right." Essentially, it means that if a water shortage occurs, senior water rights get first priority. The Washington Department of Ecology ("Ecology") issues and manages water rights permits (authorization to take water) and water rights certificates (documentation of a "perfected" water right put to full beneficial use).

However, not every water user must obtain a water right permit. Under Washington law, there is an exemption that allows for small uses of groundwater without a permit in four situations: (1) domestic uses of less than 5,000 gallons per day; (2) industrial uses of less than 5,000 gallons per day; (3) irrigation of a lawn or non-commercial garden, a half-acre or less in size; and (4) stock water. [1] Permit-exempt groundwater wells often provide water where there is no available community source for single family homes, small subdivisions, and irrigation of small lawns and gardens.

Ecology also regulates water use by establishing instream flows. Instream flows provide adequate water for fish, wildlife, recreation, and other beneficial uses in streams and rivers. Currently, Ecology has adopted instream flows for half of the state's watersheds and the Columbia River. Because instream flows have a priority date like all other water uses, instream flows do not affect senior water rights, established either through permitting or use of a permit-exempt well. However, once established by rule, instream flows can affect junior rights. When groundwater interacts with surface water, instream flows can limit not only surface water diversions but new wells in a watershed.

THE *SWINOMISH*, *FOSTER*, AND *HIRST* DECISIONS

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The "*Hirst* fix" seeks to address uncertainty for land owners and rural communities created by a series of Washington Supreme Court decisions: *Swinomish Indian Tribal Community v. Department of Ecology*, [2] *Foster v. Department of Ecology*, [3] and *Whatcom County v. Hirst, et al*. [4]

In *Swinomish*, the Washington Supreme Court affirmed a 2001 instream flow rule that effectively cut off the Skagit River Basin to new water rights. Since the decision, there has been a moratorium on new wells in order to preserve stream flows, which, in some cases, has led to property owners going bankrupt and other financial harms. [5]

In *Foster*, the Washington Supreme Court rejected an Ecology decision granting a new water right permit to the City of Yelm. Ecology based its decision to issue the permit on a finding of "overriding considerations of the public interest," notwithstanding the fact that the city's proposed water withdrawal would deplete stream flows. Ecology relied, in part, on an out-of-kind mitigation to offset the withdrawal's environmental impacts. The court held that withdrawals of water that impair minimum flows based on overriding considerations of public interest cannot permanently impair senior water rights with earlier priority. This decision has impacted prospective water right permit applicants who can no longer rely on out-of-kind mitigation.

In *Hirst*, Whatcom County sought review of the Growth Management Hearings Board's decision that the rural element of the county's comprehensive plan and zoning code failed to comply with the Growth Management Act ("GMA"). The GMA requires fast-growing cities and counties to develop comprehensive plans to manage population growth. As part of those plans, counties are required to ensure water availability. The Washington Supreme Court held that the county's plan failed to sufficiently protect water resources under the GMA. Rather than relying on Ecology's determinations as to whether water was available, the court held that counties must make independent assessments about water availability to ensure that new development does not impair senior water rights, including instream flows.

Many Washington counties have been relying on Ecology's determinations about water availability, but after *Hirst* counties had to make their own assessments as to whether there was enough water, physically and legally, to approve any building permit that relied on a permit-exempt well, i.e., whether the water supply could meet the needs of the residents of the development without impairing instream flows or other senior water rights. This determination can be expensive and time-consuming, requiring significant expertise that many counties do not have readily available. As a result, in response to the decision, many counties severely restricted approvals of building permits for houses and subdivisions relying on permit-exempt wells — in some places effectively halting construction entirely. [6]

THE "*HIRST* FIX:" ESSB 6901

ESSB 6901, which applies to wells constructed after January 19, 2018, [7] focuses on Water Resource Inventory Areas ("WRIA") [8] impacted by the *Hirst* decision and also establishes standards for rural residential permit-exempt wells outside of those areas. The law allows counties to revert to relying on Ecology's instream flow rules for water availability determinations and allows rural residents access to water from permit-exempt wells for home building.

The "fix" divides the fifteen WRIAs that it affects into those that have previously adopted a watershed plan and those that did not. If a WRIA does not have a watershed plan [9] in place, Ecology must establish a local committee to develop a watershed restoration and enhancement plan. These committees are chaired by Ecology,

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and members represent the main stakeholders: tribes with reservation land and usual and accustomed harvest land within the WRIA; the Washington State Department of Fish & Wildlife; each county, city, and irrigation district within the WRIA; the largest water purveyor within the WRIA; and organizations representing the construction industry; and environmental and agricultural groups within the WRIA.

Until watershed plans are developed and implemented, ESSB 6901 sets out interim standards allowing a maximum of 950 or 3,000 gallons per day for domestic water use, depending on the watershed, and establishes a one-time fee of $500 for landowners building a home using a permit-exempt well. [10] The fee is in addition to existing well drilling fees under RCW 18.104. [11] For watersheds that do not have existing instream flow rules, the law maintains the current maximum of 5,000 gallons per day for permit-exempt domestic water use.

Ecology must engage in rulemaking to incorporate watershed plan provisions under certain conditions. In the seven WRIAs with completed watershed plans [12] and the nine WRIAs that have not completed watershed plans yet, [13]Ecology must initiate rulemaking if the planning unit fails to adopt an updated watershed within the prescribed timeline or if the updated plan recommends a change to the fee or water use limit prescribed in ESSB 6901. In the nine WRIAs that currently lack complete watershed plans, building permit recipients must employ low-impact development techniques. Ecology generally has the power to adopt rules in other situations if it is believes it is necessary.

The law also prescribes requirements for counties. Under sections 202(5)(a) and 203(4)(a)(i), counties are required to record relevant water use restrictions with the property title, either limits of 950 gallons per day or 3,000 gallons per day, depending on the specific watershed. If applicable under section 203(4)(b), counties also need to record the potential for curtailment to 350 gallons per day during a declared drought.

Finally, section 304 appropriates $300 million over the next fifteen years in projects that help stream flows and fish and section 301 establishes a task force to review the Washington Supreme Court decision, *Foster v. Department of Ecology*, and make recommendations to the legislature by November 15, 2019.

POTENTIAL IMPACTS

The new law applies to wells constructed after January 19, 2018. Wells constructed prior to this date constitute evidence of adequate water supply. Ecology asserts that ESSB 6901 will not change the way it handles water right permit decisions. Specifically, Ecology stated that: "[o]ur approach to water right permit decisions will not change. The bill did not modify sections of statute affecting our permitting decisions, authority, and approach except as it relates to processing permits under the 'Foster Pilot' in Sections 301 and 302." [14]

Many stakeholders believe that ESSB 6901 will have positive impacts for rural landowners and developers. Senator Doug Ericksen stated that the law "will allow construction to proceed across Whatcom County and the entire state" and that it brings "relief to thousands of property owners who were threatened by Hirst." [15] The Washington Farm Bureau stated that "[w]hile it's not a perfect bill, it is a good bill for Washington farmers, and fish." [16]

In contrast, environmental groups and some tribes are concerned that the law does not adequately address water protection and that it could create water shortages for the very landowners the law tries to help. The Center for Environmental Law and Policy notes that "[u]nrestricted groundwater withdrawals can impair the rights of senior water holders, including users of existing wells who are now seeing their wells go dry." [17] Snohomish County

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Senator John McCoy, a member of the Tulalip Tribes, expressed concern that the new law allows for "unfettered drilling" that will lead to water shortages. [18]

Further, ESSB 6901 does not include Skagit County because "[a]dditional requirements apply" as a result of *Swinomish Indian Tribal Community v. Department of Ecology*. According to Senator Kevin Van de Wege, the primary sponsor of ESSB 6901, Skagit County was excluded from the new law "at the request of tribes that are already working on water measures in that county." [19]

CONCLUSION

Overall, ESSB 6901 addresses many landowners' concerns by allowing them to build on their land and will help bolster development in rural Washington. However, Skagit County will not be affected by the "*Hirst* fix," and it will take some time for Ecology and counties to implement the new guidelines. We will continue to monitor impacts and report on ongoing developments as local committees, counties, and Ecology attempt to implement and comply with ESSB 6901 through development of watershed plans and/or rulemaking.

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[1] RCW 90.44.050.

[2] 178 Wn.2d 571 (2013).

[3] 184 Wn.2d 465 (2015).

[4] 186 Wn.2d 648 (2016).

[5] Brandon Stone, *Skagit County not included in new water legislation*, SKAGIT VALLEY HERALD (Jan. 28, 2018) https://www.goskagit.com/news/skagit-county-not-included-in-new-water-legislation/article_d71a7ba6-19e2-5452-b57c-8a47153844ba.html.

[6] *New law in response to the "Hirst decision*," WASHINGTON DEPARTMENT OF ECOLOGY (Feb. 1, 2018 2:06 pm) https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Case-law/Hirst-decision.

[7] Wells constructed before January 19, 2018, given certain conditions, are assumed to have adequate water supply under Section 101(5): "Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of this section is deemed to be evidence of adequate water supply under this section."

[8] Washington is broken down into 62 WRIAs. Ecology studies and regulates water resources by WRIAs.

[9] The Watershed Planning Act, Chapter 90.82 RCW, established a framework for developing local solutions to watershed issues, providing a process for citizens in a watershed to assess the status of their water resources and determine how best to manage them. Between 1998 and 2012, 44 watershed-based planning groups developed plans and 33 groups adopted their plans. *Watershed plan archive*, WASHINGTON DEPARTMENT OF ECOLOGY (Feb. 13, 2018 4:12 pm) https://ecology.wa.gov/Water-Shorelines/Water-supply/Streamflow-restoration/Watershed-plan-archive.

[10] *New law in response to the "Hirst decision,"* WASHINGTON DEPARTMENT OF ECOLOGY (Feb. 1, 2018 2:06 pm) https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Case-law/Hirst-decision.

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[11] *ESSB 6091: Ecology's Initial Policy Interpretations*, Washington Department of Ecology (Feb. 1, 2018) https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrxfile/WaterRights/wrwebpdf/6091-EcologyPolicyInterpretations.pdf. Note that ESSB 6901 does not define "domestic use," but Ecology interprets the law "to limit water use under the exemptions in RCW 90.44.050 for domestic water use and watering of a non-commercial lawn or garden."

[12] This includes Nooksack, Nisqually, Lower Chehalis, Upper Chehalis, Okanogan, Little Spokane, and Colville WRIAs.

[13] This includes Snohomish, Cedar-Sammamish, Duwamish-Green, Puyallup-White, Chambers-Clover, Deschutes, Kennedy-Goldsborough, and Kitsap WRIAs.

[14] *ESSB 6091: Ecology's Initial Policy Interpretations*, Washington Department of Ecology (Feb. 1, 2018) https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrxfile/WaterRights/wrwebpdf/6091-EcologyPolicyInterpretations.pdf.

[15] *Legislature passes Hirst 'fix,'* LYNDON TRIBUNE (Jan. 19, 2018) https://www.lyndentribune.com/news/legislature-passes-hirst-fix/article_e6a8db76-fd5a-11e7-9c2d-377cd98c54fa.html.

[16] Don Jenkins, *Washington Farm Bureau lauds 'Hirst' Fix*, CAPITAL PRESS (Jan. 22, 2018) http://www.capitalpress.com/Water/20180122/washington-farm-bureau-lauds-hirst-fix.

[17] Dan Von Seggern, *WA State Legislature Passes Flawed "Hirst Fix,"* CENTER FOR ENVIRONMENTAL LAW AND POLICY (Jan. 25, 2018) http://www.celp.org/2018/01/25/wa-state-legislature-passes-flawed-hirst-fix/.

[18] Don Jenkins, *Washington Farm Bureau lauds 'Hirst' Fix*, CAPITAL PRESS (Jan. 22, 2018) http://www.capitalpress.com/Water/20180122/washington-farm-bureau-lauds-hirst-fix.

[19] *Id.*

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