STATE SUPREME COURT RULING

EXEMPT WELLS CURTAILED

THE HIRST DECISION IS NO SMALL CHANGE, BIAW MEMBERS CAN EXPECT AN IMPACT ON RURAL BUILDING PERMITS

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In October, the Washington State Supreme Court issued its decision in the case of *Whatcom County v. Western Washington Growth Management Hearings Board*, known as "Hirst."

The decision is a major blow to residential development in Washington's counties that will take a monumental push from the Legislature to repair.

At issue was Whatcom County's Comprehensive Plan, which mirrored the Department of Ecology's (Ecology) Nooksack Rule that allowed use of permit-exempt wells in most, but not all, areas of the county covered by the rule. The 1985 rule includes protections for instream flows—a set amount of water determined by Ecology to be necessary to protect fish and wildlife, navigation, recreation and aesthetics.

> "The Court's decision is a disaster for a host of property owners, many of whom have been saving for years to be able to build a modest home away from the traffic and stress of the city.
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> —*BIAW President Dave Main*

Instream flows are considered water rights with priority dates, and thus cannot legally be impaired by subsequent withdrawals. But prior to the *Hirst* decision, exempt wells were generally regarded as exempt from impairment analysis because of their negligible effect on instream flows, and because of their statutory exemption from permitting requirements. Statewide, exempt wells account for only one percent of overall water use. Seeking consistency with Ecology's water rules, the county allowed for the use of exempt wells wherever Ecology's rule allowed them.

A group, including the environmental group Futurewise, appealed the comprehensive plan to the Growth Management Hearings Board (GMHB) on the grounds that the plan failed to adequately protect ground and surface water resources as required by the Growth Management Act (GMA). The GMHB agreed, and ordered the county to revise its plan to require its own determination of water availability, independent of Ecology's rule. The Court of Appeals reversed, holding that the comprehensive plan's consistency and cooperation with Ecology's rule complied with the GMA. The state Supreme Court subsequently accepted review.

In a highly anticipated opinion issued nearly a year after they heard the case, the Washington State Supreme Court reversed the Court of Appeals, and held that "[t]he GMA places an independent responsibility to ensure water availability on counties, not on Ecology." This means that counties must make their own determination—and not rely on Ecology's—of whether an exempt well would impair instream flows and other senior water rights before it can issue a building permit.

As the dissenting opinion points out, this shifts a heavy burden onto building permit applicants, especially if counties are unwilling to bear the burden themselves. Because applicants are required to show proof of an adequate water supply in order to obtain a permit and because reliance on Ecology's prior determinations of water availability no longer suffice as evidence of an adequate water supply, the burden falls now on either counties or permit

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