No. 91475-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE FARM BUREAU, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,

Amici Curiae.

AMICUS CURIAE BRIEF OF THE CENTER FOR ENVIRONMENTAL LAW & POLICY

Center for Environmental Law & Policy

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I. INTRODUCTION

The Center for Environmental Law & Policy (CELP) respectfully asks that this Court accept review of the Court of Appeals' decision in *Whatcom County v. Hirst*, No. 70796-5-I (consolidated with Nos. 72132-1-I and 70896-1-I) ("*Hirst*") under RAP 13.4(b)(1) and (b)(4). To assist this Court, CELP offers the following arguments regarding Washington's water resources statutes, cases, and policies.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae CELP is described in the Motion for Leave to File Amicus Brief attached hereto. The Nooksack River Instream Resources Protection Program for Water Resource Inventory Area (WRIA) 1 ("Nooksack Rule") is an instream rule in which CELP has an interest. *See* Ch. 173-501 WAC. The Nooksack Rule implements provisions of the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum Flows Act, Ch. 90.22 RCW, which authorize the Department of Ecology ("Ecology") to establish "minimum water flows or levels for streams . . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters . . ." RCW 90.22.010. The values called out in these statutes are the same values CELP promotes generally, and more specifically in this matter through the

filing of an amicus brief that directs the Court's attention to issues of substantial public interest.

III. STATEMENT OF THE CASE

CELP concurs with and adopts the statement of the case set forth in the Hirst Petition for Review at pp. 3-8 (March 24, 2015).

IV. SUMMARY OF ARGUMENT

This Court should accept review of the Court of Appeals' decision under RAP 13.4(b)(1) and (4) because (1) it is in conflict with prior decisions of this Court and (2) this matter involves several issues of substantial public interest. Allocation of Washington's scarce water resources is a critical statewide issue in light of the state's increasing population and uncertainties in supply created by climate change. Uncontrolled use of permit-exempt wells can and does deplete groundwater resources and streamflows--including those adopted by rule--and can harm fish, wildlife, and other public values. [1]

The Growth Management Act (GMA), chapter 36.70A RCW, requires counties to protect water resources through land use and resource planning. By condoning Whatcom County's clear abdication of its GMA responsibilities to protect water resources, the Court of Appeals created a

[1] Junior permit-exempt wells can and do interfere with stream flows and senior water rights. *Swinomish Indian Tribal Cmty v. Dept of Ecology*, 178 Wn.2d 571,583, 311 P.3d 6 (2013); *Squaxin Island Tribe v. Dept of Ecology*, 177 Wn. App. 734, 737-8, 312 P.3d 766 (2013); *see also* Petition for Review at 6-7.

major inconsistency with existing state law applying "first in time, first in right" principles to permit-exempt wells. The *Hirst* decision has broad and destructive policy implications for future conservation of water resources. If allowed to stand as precedent, it will lead to statewide confusion as to allowable water usage and threaten instream flows, contrary to the GMA's mandate to protect water resources and Ecology's obligation to protect wildlife resources and other public values of instream flows.

V. ARGUMENT

A. The Court of Appeals' decision conflicts with prior decisions of this court.

Review of the Court of Appeals' decision is warranted under RAP 13.4(b)(1) because it is in conflict with several decisions of this Court. *Hoflin v. Ocean Shores,* 121 Wn.2d 113, 125, 847 P.2d 428 (1993).

1. This Court's prior *Postema* and *Swinomish* decisions require instream flows be protected from junior groundwater users.

The Court of Appeals' decision disregards or misapplies the holdings in several of this Court's water resource decisions. RCW 90.22.010 and RCW 90.54.020(3)(a) direct the establishment of instream flow levels to provide for preservation of fish, wildlife, recreation and other values. The surface water regulatory scheme extends to groundwater, and groundwater withdrawals may not impair more senior surface water rights. RCW 90.44.020 -.030. *See also Knight v. City of*

Yelm, 173 Wn.2d 325, 345-6, 267 P.3d 973 (2011) (recognizing that senior water right holder had standing to challenge proposed new groundwater withdrawals). In *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000), this Court recognized that instream flows set by rule (as in the Nooksack basin) are "existing right[s] which may not be impaired by subsequent groundwater withdrawals." RCW 90.03.345; *see also Swinomish,* 178 Wn.2d at 584-5.

While certain wells are exempt from the process of applying for a permit to withdraw groundwater under RCW 90.44.50, they nonetheless are water rights subject to the priority system. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); AGO 2009 No. 6 at 11. *Hirst* fails to acknowledge this Court's holding in *Campbell &Gwinn* that permit-exempt withdrawals may not impair more senior rights.[2] Hirst also fails to recognize that under *Swinomish* and *Postema*, instream flows are established water rights that may not be impaired by subsequent appropriations, including permit-exempt withdrawals. Finally, *Hirst* dismisses *Postema*'s requirement that groundwater withdrawals may not capture or deplete water from streams with instream flow requirements. Instead, the Court of Appeals too narrowly reads *Postema* as

[2] *Hirst*'s sole reference to the water right aspects of permit-exempt withdrawals notes only that permit-exempt withdrawals are authorized under RCW 90.44.050. Slip Op. at 18.

limited to permitted withdrawals, ignoring the fact that permit-exempt withdrawals may also be hydraulically connected to streams. Slip Op. at 21; *Postema*, 142 Wn.2d at 89-90 (rejecting argument that exemptions from permitting system allow impairment of existing water rights).

By removing permit-exempt wells that will impair more senior streamflow rights from Whatcom County's (the "County") GMA obligations to protect water resources, *Hirst* improperly places such wells outside the long-established "first in time" system that governs water use in Washington. It is vital that this Court accept review of the Court of Appeals' analysis and conclusions, and correctly apply this Court's previous decisions in the context of GMA planning.

2. *Hirst* conflicts with *Kittitas*.

In *Kittitas County v. Eastern Washington Growth Management Hr'gs. Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011), this Court held that counties must exercise their GMA-based land use authority to protect water resources: "[t]he County *must* regulate to some extent to assure that land use is not inconsistent with available water resources" (emphasis added). A county's GMA duty to protect water resources is invoked in comprehensive planning, in development and zoning regulations, and in building permit and subdivision approvals. RCW 36.70A.070(5)(c)(iv); RCW 19.27.097(1); RCW 58.17.110(2)(a). In rural areas where no

municipal water supply is available, this GMA-imposed duty necessarily extends to permit-exempt wells.

The Court of Appeals read *Kittitas* as limited to a single narrow issue: the need to include comprehensive plan or zoning language to prevent illegal use of a single exempt well for multiple projects. But *Kittitas* was not so narrowly focused. Rather, this Court held that "[w]hile Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources . . ." *Kittitas*, 172 Wn.2d at 180.

The *Hirst* decision completely fails to acknowledge the basic requirements of the water code[3] and squarely conflicts with *Kittitas'* central water resource holding: that the GMA requires a county to ensure that its development plan protects water resources. *Id.* at 181. This Court should accept review in order to harmonize the fundamental scheme of water resource management with the GMA's requirements.

B. The *Hirst* decision merits review because it creates a sweeping gap in groundwater management and confusion about water supply, raising issues of substantial and statewide public interest.

[3] For example, to be consistent with the water code, GMA planning should ensure that a safe sustaining yield of groundwater is maintained, RCW 90.44.130, and that the priority system is upheld, RCW 90.03.010.

Under RAP 13.4(b)(4), this Court may accept review of a decision that raises issues of substantial public interest. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

1. Hirst allows wholly unregulated use of permit-exempt wells.

The GMA requires that a County's Rural Element protect surface and ground water resources. RCW 36.70A.070(5)(c)(iv). The instant case provides a new take on this issue: If Ecology's Rule does not specifically mention permit-exempt wells, does the GMA require a County to protect surface and ground water resources by regulating development proposing to use water from such wells?

The Court of Appeals' decision erroneously sanctions the County's abdication of its GMA duties, and conflicts with *Kittitas, Postema,* and *Swinomish* by allowing groundwater withdrawals to impair stream flows. Whatcom County asserted--and the Court of Appeals agreed--that it need not regulate development relying on permit-exempt wells because Ecology had not addressed them when it adopted the Nooksack Rule.[4] As amicus, Ecology agreed with this position.[5] In short, Whatcom County and

[4] The Nooksack Rule closes parts of Whatcom County to all new appropriations of water, but does not mention permit-exempt wells. WAC 173-501-040.

[5] Ecology contended in its Court of Appeals amicus brief that the Nooksack Rule does not address permit-exempt wells. State of Washington, Department of Ecology's Amicus Curiae Brief at 13. Ecology concedes, however, that "under *Kittitas*, in order to comply with the GMA, the County's Comprehensive Plan must include measures that ensure that future development in rural areas will not adversely affect water availability." *Id.* at 8.

Ecology argue that because the 1985 instream flow rule does not address permit-exempt wells, the County may disregard the statutory scheme and 30 years of this Court's precedents on water and exempt wells. That cannot be the case. *See* WAC 365-196-715(4); 735(1).

The County's fundamental error is to conflate "consistent with" Ecology's rules with "limited to" them. Ecology's rules are a floor, not a ceiling, and no authority is cited for the proposition that a county need only reiterate a rule to satisfy the GMA. To the contrary, "the County is not precluded, and in fact, is required to plan for the protection of water resources in its land use planning." *Kittitas,* 172 Wn.2d at 179.

The fact that the Nooksack Rule does not regulate permit-exempt wells should not equate to a *per se* finding that such wells do not harm GMA-protected water resources, nor that they *de facto* provide adequate water supply under the building permit and subdivision laws. RCW 19.27.097; RCW 58.17.110(2)(a); WAC 365-196-825(1).[6] *Hirst*, however, improperly makes these assumptions.

Not only is *Hirst* wrong on the law, but the decision creates a major gap in water resource management. If counties are excused from their responsibility to regulate development that would use permit-exempt

[6] Rather, exempt wells are outside Ecology's permitting authority, which makes it all the more critical that counties, which *are* in a position to regulate development relying on permit-exempt wells, assess their impact on instream flows.

withdrawals, both the prior appropriation system, RCW 90.03.010, and the GMA's requirement to protect water supplies, RCW 36.70A.070(5)(c)(iv), would be eviscerated throughout the state. Here, Whatcom County's failure to protect water resources in its Rural Element has resulted in a large number of unpermitted, unregulated ground water withdrawals,[7] without consideration of the effect on senior instream flows.

Allowing unrestrained growth in permit-exempt wells is a dangerous public policy with statewide implications. Extensive development based on these wells' junior water rights sets up an inevitable conflict with more senior right holders. This Court should accept review of this case in order to head off this potential statewide conflict.

2. *Hirst* will lead to confusion and inconsistent results in water resource protection under the GMA.

Treatment of exempt wells varies greatly among the various river basin rules.[8] Many rules, including those in some of the most populous or water-short areas in Washington, do not mention exempt wells.[9]

[7] Between 1986 and 2011, the number of permit-exempt wells in WRIA 1 increased from approximately 3294 to approximately 12,195. Petition for Review at 6, note 16.
[8] For example, the Snohomish River rule exempts "domestic inhouse use for a single residence" from regulation, but makes no specific mention of exempt wells. WAC 173-507-050(2). On the other hand, the Methow River rule bars new exempt wells in certain areas without a water right. WAC 173-548-050.
[9] The rules for the Snohomish, Cedar-Sammamish, Green-Duwamish, Puyallup, Nisqually, and Okanogan river basins, *inter alia,* do not specifically address exempt wells. *See* Chapters 173-507, 173-508, 173-509, 173-510, 173-511, and 173-549 WAC.

Moreover, no instream flow rule has been adopted in more than 30 Water Resource Areas in Washington.[10] By interpreting the GMA to require nothing more than copying and pasting Ecology's rules, *Hirst* would lead to enormous inconsistencies in water resource protection in different areas of the state. This Court must accept review in order to resolve these questions not only for Whatcom County, but the entire state.

VI. CONCLUSION

For the reasons set forth above, amicus curiae CELP respectfully requests that this Court accept review of the Court of Appeals' decision in this matter.

Respectfully submitted this 22d day of May, 2015.

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[10]See Chs. 173-500 through 173-564 WAC for a complete list of the WRIAs and rules.

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Dear Clerk of the Court-

Please find attached the Center for Environmental Law & Policy's Motion to file Amicus Curiae Brief (including Declaration of Service), and the Brief proposed for filing. If either document does not properly transmit, please contact me by email or at the below address.

Thank you.

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