Nos. 70796-5-I and 72132-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

WHATCOM COUNTY,

Petitioner,

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Other Party.

BRIEF OF AMICI CURIAE WASHINGTON REALTORS®, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, AND WASHINGTON STATE FARM BUREAU

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I. INTRODUCTION

In this brief, amici curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau focus on one legal issue: whether the "rural element" provisions of the Growth Management Act ("GMA") may be used to override state water law and require a county to impose exempt well restrictions that are inconsistent with the Water Code and applicable Ecology regulations.

The Growth Management Hearings Board ("Board") erroneously concluded that the GMA mandate to protect water resources requires Whatcom County (the "County") to restrict rural development relying on permit-exempt groundwater withdrawals—specifically, by requiring an applicant for a subdivision or building permit to demonstrate that an exempt well will not impair minimum instream flows set in the Nooksack Instream Resources Protection Program rule ("Nooksack Rule") promulgated by the Department of Ecology ("Ecology").

The Nooksack Rule determines where and under what circumstances water is legally available in rural Whatcom County. In the Nooksack Rule, Ecology has determined that in most areas of the basin water is legally available for new single domestic uses. The Nooksack Rule's minimum instream flows do not apply to permit-exempt groundwater withdrawals. The Board misinterpreted the Nooksack Rule and misapplied the *Postema* and *Kittitas County* decisions of the Washington Supreme Court. The Board's

decision is contrary to GMA regulations and unsupported by GMA legislative history.

The Board has neither the authority nor the expertise to decide how legal availability of water should be determined under the Water Code. The Legislature did not intend the GMA to be used to collaterally attack or override state water resource management regulations. Amici urge this Court to hold that a county complies with GMA requirements to protect water resources by adopting policies and regulations consistent with the Water Code and applicable Ecology rules.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau (collectively, "Associations") are described in the Associations' Motion for Leave to File Amicus Curiae Brief filed herewith. The Associations and their members have an interest in ensuring a fair, coherent, and predictable regulatory system in which local land use regulations are consistent with state law and regulations governing water supply for residential real estate development and agriculture.

III. STATEMENT OF THE CASE

The Associations adopt the Statement of the Case set forth in the Brief of Appellant Whatcom County in No. 70796-5-I and the Opening Brief of Whatcom County in No. 72132-1-I.

IV. ARGUMENT

A. Under the Nooksack Rule, water is legally available for new single domestic uses and uses relying on permit-exempt groundwater wells.

1. Ecology has exclusive authority over water right permitting and rulemaking.

Under Washington's Water Code,[1] the Legislature has granted Ecology the exclusive authority to adopt regulations governing water allocation and management, including the authority to set minimum instream flows. RCW 90.22.010; RCW 90.54.040; *see also* RCW 43.21A.020 (establishing Ecology in 1970 as the single state agency with authority "to undertake, in an integrated manner, the various water regulation, management, planning and development programs" previously administered by different agencies). The Legislature has expressly affirmed Ecology's exclusive authority to establish minimum instream flows. RCW 90.03.247 provides in pertinent part:

> No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040.

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[1] The term "Water Code" is used generally to refer to various statutes within RCW Title 90 that address water resource management. Chapter 90.03 RCW, enacted in 1917, established a permit system for surface water appropriation. Chapter 90.44 RCW, enacted in 1945, extended the permit system to groundwater. Chapter 90.14 RCW, enacted in 1967, established a claims registration system for rights that pre-dated the permit system and established procedures and standards for statutory relinquishment of water rights. Chapter 90.22 RCW, enacted in 1969, authorized Ecology's predecessor agency to set minimum water flows or levels for lakes and streams. Chapter 90.54 RCW, the Water Resources Act of 1971, set forth a comprehensive list of state policy "fundamentals" and authorized Ecology to adopt rules for utilization and management of water.

> The provisions of other statutes, including but not limited to RCW 77.55.100 and chapter 43.21C RCW, may not be interpreted in a manner that is inconsistent with this section.

RCW 90.03.247 (emphasis added).

Under this exclusive authority, Ecology adopted a regulation dividing the state into 62 watersheds, commonly known as "Water Resource Inventory Areas" or "WRIAs" (Chapter 173-500 WAC), and has promulgated distinct water resource management regulations for approximately 30 different WRIAs (WAC Chapters 173-501 through 591). Different WRIAs have different rules. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 83-87, 11 P.3d 726 (2000).

The Legislature has also given Ecology the exclusive responsibility for water right permitting. Ecology is the only governmental entity—state or local—authorized to make decisions on applications for water right permits. RCW 90.03.290; RCW 90.44.040; RCW 90.44.060; *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) (RCW 90.44.040 "preempts the County from separately appropriating groundwaters"); *id.* at 180 ("Ecology is responsible for appropriation of groundwater by permit").

When a person seeks a permit to appropriate groundwater, Ecology must investigate the application and, before issuing a permit, "Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to

the public welfare." *Postema,* 142 Wn.2d at 79; RCW 90.03.290. This is known as the "four-part test" for water rights. *See Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383-84, 932 P.2d 139 (1997).

The Water Code includes an exemption from the permit requirement for certain groundwater uses: single or group domestic uses not exceeding 5,000 gallons per day; noncommercial lawn or garden use under one-half acre; industrial uses not exceeding 5,000 gallons per day; and stockwatering. RCW 90.44.050; *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011). "Of course, where the exemption in RCW 90.44.050 applies, Ecology does not engage in the usual review of a permit application under RCW 90.03.290, including review addressing impairment of existing rights and public interest review." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002).

Ecology's water resource management regulations take various approaches to exempt wells. In some WRIAs, Ecology prohibits new exempt wells except under an express reservation of water for future uses. *E.g.*, WAC 173-505-090 (Stillaguamish Basin); WAC 173-527-080 (Lewis Basin). In some WRIAs, Ecology requires new exempt well users to purchase mitigation credits or trust water rights to offset their consumptive use. *E.g.*, WAC 173-518-070 (Dungeness); WAC 173-539A-050 (Upper Kittitas). In some WRIAs, Ecology has adopted basin regulations applicable only to surface water and groundwater permits. *E.g.*, WAC 173-507-010, -040

(Snohomish River Basin). Regardless of the differences in approach, the specific provisions of the Ecology regulation determine the extent of legal permitted and permit-exempt water use within each basin.

2. In the Nooksack Rule, Ecology has established minimum instream flows that do not apply to permit-exempt groundwater withdrawals.

Ecology has exercised its exclusive authority to adopt water resource management regulations in the Nooksack River WRIA, which covers most of rural Whatcom County, by adopting an instream resources protection program in Chapter 173-501 WAC (the "Nooksack Rule").[2] WAC 173-501-030 is the minimum instream flow provision. Subsection (1) identifies "stream management units" consisting of the Nooksack River and numerous tributaries. Subsection (2) lists numeric minimum instream flows for each stream at specific times of the year. Subsection (4) explicitly makes those minimum instream flows applicable to "consumptive water right permits issued hereafter for diversion of surface water in the Nooksack WRIA and perennial tributaries" only. WAC 173-501-030(4) (emphasis added).

The Nooksack Rule contains a separate groundwater provision, which extends the Rule's provisions only to groundwater permits or certificates:

> If department investigations determine that there is significant hydraulic continuity between surface water and the proposed

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[2] *See* Washington Department of Ecology, Nooksack Instream Resources Protection Program, Ecology Publication No. 85-11-001 (November 11, 1985) (available at https://fortress.wa.gov/ecy/publications/publications/8511001.pdf).

> groundwater source, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters. If department investigations determine that withdrawal of groundwater from the source aquifers would not interfere with stream flow during the period of stream closure or with maintenance of minimum instream flows, then applications to appropriate public groundwaters may be approved.

WAC 173-501-060 (emphasis added). Thus, the Nooksack Rule's minimum instream flows do not apply to permit-exempt groundwater wells. This feature of the Nooksack Rule is an expression of one of the policy "fundamentals" in the Water Resources Act: "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." RCW 90.54.020(5).

3. In the Nooksack Rule, Ecology has determined that water is legally available for new single domestic uses in most areas of the basin.

The Nooksack Rule includes an explicit exemption for new single domestic uses of surface water or groundwater, as follows:

> Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available.

WAC 173-501-070(2). This exemption—which includes uses that also qualify for the groundwater permit exemption in RCW 90.44.050—applies to use of surface water or groundwater in all areas except for Whatcom Creek.

Exempt single domestic uses are not affected by the closures in the Nooksack Rule (except for Whatcom Creek), and are not subject to curtailment in the event that the minimum instream flows are not met.

This exemption means that, except in the area of Whatcom Creek, water is legally available for single domestic use. The Supreme Court has stated that "[s]tream closures by rule embody Ecology's determination that water is not available for further appropriations." *Postema*, 142 Wn.2d at 95. If a stream closure embodies a determination that water is *not* available for certain new uses, then it follows logically that an explicit exemption from that closure for other types of uses (in this case, uses exempt from permitting under RCW 90.44.050) embodies a determination that water *is* legally available for those specific uses.[3]

In summary, in the Nooksack Rule Ecology has already determined that, except in the area of Whatcom Creek, water is legally available for a permit-exempt groundwater well serving a new single-family house. Such an exempt well is not subject to the minimum instream flows or stream closures established in the Nooksack Rule. Through the groundwater permit exemption in RCW 90.44.050, the Legislature has provided that such an exempt well is also not subject to the four-part test for obtaining a water right

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[3] This does not mean that water will always be "factually" available. The distinction between water that is "factually available underground" and water that is "legally available"

permit. Under state law, a building permit applicant proposing to rely on a single domestic exempt well consistent with WAC 173-501-070 is not required to demonstrate that the exempt well will not impair instream flows.

B. The Board erred in fashioning a GMA mandate inconsistent with the requirements of applicable water resource regulations promulgated under the state Water Code.

The Board concluded that the policies and development regulations incorporated in the County's rural element, "though generally representing important efforts, fail to limit rural development so as to protect rural surface and groundwater quantity . . . and do not meet the GMA mandates . . ."[4] Specifically with respect to water supply, the Board concluded that County policies and regulations do not satisfy the GMA mandate to protect water resources, even though they do not allow exempt wells for subdivisions or single-family building permits in an area "where DOE has determined by rule that water for development does not exist."[5] According to the Board, "this is not the standard to determining [sic] legal availability of water."[6]

The Board's ruling rests on the fundamental premise that the County's policies and regulations are consistent with the Nooksack Rule—but that consistency with the Nooksack Rule is not good enough. The Board erroneously concluded that the County's restriction on exempt wells for

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because its use is consistent with applicable state water law is addressed in *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 179-80, 256 P.3d 1193 (2011).

[4] CP 1550.

[5] CP 1554-57.

subdivisions "falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals."[7] With respect to the County's restriction on exempt wells for single-family building permits, the Board erroneously relied on a letter from Ecology to Snohomish County addressing the effect of the 2006 Skagit Rule, Chapter 173-503 WAC—an entirely different basin regulation—to conclude that Whatcom County violated the GMA because "a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows."[8]

1. Under *Kittitas County*, counties must address water availability issues in a way that is consistent with state water law.

In *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011), the issue was whether Kittitas County's subdivision regulations—which allowed applicants to circumvent the groundwater permit exemption in RCW 90.44.050 by artificially dividing a larger project into a series of smaller plats, each relying on a permit-exempt well—could be reconciled with the GMA's mandate to protect water resources. *Kittitas County*, 172 Wn.2d at 154, 175-76.

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[6] CP 1556.
[7] CP 1555.
[8] CP 1557.

In *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002), the Supreme Court held that a subdivision developer who drills a well on each lot is entitled to only one permit exemption for a "group domestic" withdrawal, and the combined withdrawal from all wells in the subdivision cannot exceed 5,000 gallons per day. *Campbell & Gwinn*, 146 Wn.2d at 12-15. *Campbell & Gwinn* had the immediate practical effect of restricting the allowable density of plats using exempt wells. "Developers, not unreasonably, have noticed that small projects do not always bear the regulatory burdens of big ones and have attempted, at least on paper, to structure their projects accordingly." *Kittitas County*, 172 Wn.2d at 190 (Chambers, J., concurring). By enabling this subterfuge by subdivision applicants, Kittitas County failed to protect water resources because it "tacitly allows subdivision applicants to evade this court's rule in *Campbell & Gwinn*." *Kittitas County*, 172 Wn.2d at 177.

The Court rejected Kittitas County's argument that it was preempted from reviewing the legal availability of water supply prior to making land use decisions. *Id.* at 178-79. The Court explained: "Nothing in the text of chapter 90.44 RCW expressly preempts consistent local regulation." *Id.* at 178 (emphasis added). The Court further explained:

> While 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, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use in a manner that is consistent with the laws

> regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources.

Id. at 180 (emphasis added). The operative concept is *consistency* with state law—a requirement underscored in the Water Resources Act, Chapter 90.54 RCW, which provides that counties "shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter." RCW 90.54.090 (emphasis added).

2. The Board misapplied *Kittitas County*, *Postema* and the Nooksack Rule.

Kittitas County stands for the proposition that the GMA requires protection of water resources through *consistent* local regulations, i.e., local policies and regulations that ensure compliance with—rather than evasion of—state water law. *Kittitas County*, 172 Wn.2d at 181. The Board turned *Kittitas County* on its head by ruling that the GMA requires the County to adopt water use regulations that are inconsistent with RCW 90.44.050 and the Nooksack Rule. If the County were to enact a development regulation requiring a single-family building permit applicant to demonstrate that a permit-exempt well would not impair minimum instream flows, such an ordinance would nullify the permit exemption in RCW 90.44.050 and the explicit exemption for single domestic uses in the Nooksack Rule—a conflict with state law that would violate Article XI, §11 of the Washington Constitution. An ordinance conflicts with state law and is unconstitutional if

it prohibits what the state law permits. *Dep't of Ecology v. Wahkiakum County*, ___ Wn. App. ___, 2014 WL 5652318 (Court of Appeals, Division II, No. 44700-2-II) (November 4, 2014) (holding unconstitutional a local ordinance prohibiting land application of class B biosolids, in conflict with state statute and Ecology regulations); *see Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). The Legislature did not intend such a result when it added the "rural element" provisions to the GMA.

The Board's reliance on *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), is misplaced. *Postema* addressed issues of water availability and impairment in the context of water right *permit applications*, not exempt wells.[9] When the Court explained that "a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals," 142 Wn.2d at 81, it was referring to *permitted*

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[9] *Postema,* 142 Wn.2d at 73 (issues arise from Ecology's "denial of applications for groundwater appropriation permits"); 78 (parties disagree on "whether hydraulic continuity requires denial of a groundwater application"; Postema "contends that there must be a significant measurable effect on surface waters before a groundwater application may be denied"; PCHB held that "permit applications must be denied"); 78-79 (superior courts ruled that "water applicants must have the opportunity to present their factual cases on the question of impairment or any of the other criteria justifying denial of a water application"); 79-80 ("before a permit to appropriate may be issued,..."; the "decision whether to grant a permit to appropriate water is within Ecology's exercise of discretion"; "whether to issue a permit for appropriation of public groundwater..."); 81 (appellants contend that "before a groundwater application may be denied. . ."); 82 ("RCW 90.03.290 mandates denial of an application where existing rights would be impaired"; appellants "cite no statute . . . requiring that economic considerations influence permitting decisions once minimum flows are set"); 83-84 ("If the statute's requirements are not satisfied, a permit cannot be issued"); 84 (rule provides that "if a permit is issued for a surface water source for which minimum flows have been set, the permit may have to be conditioned to assure maintenance of the base flows"). (Emphasis added.)

groundwater withdrawals and not exempt wells. *Postema*, 142 Wn.2d at 80 n.2; RCW 90.03.247 (requiring conditioning of *permits* to protect flows).

Mr. Postema raised the groundwater permit exemption in an attempt to establish a "de minimis" exception to the no-impairment standard for a water right permit. *Postema*, 142 Wn.2d at 89-90. The Court categorically rejected that argument because the four-part test—including the no-impairment standard—simply does not apply to exempt wells: "As to RCW 90.44.050, legislative exemptions from the permitting system do not determine what impairment means." *Id.*

The Board and the Hirst Petitioners[10] incorrectly read *Postema* to mean that a minimum instream flow or stream closure in a rule must be treated as absolute, independent of any specific conditions, limitations, or exemptions accompanying it.[11] None of the appeals in *Postema* involved express limitations or exclusions—such as those contained in the Nooksack Rule—in a rule establishing a minimum instream flow.[12]

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[10] *See* Appellants' Brief & Brief of Respondents Eric Hirst, et al., at 30.

[11] CP 1555 (citing *Postema* for the proposition that "where Ecology has set minimum instream flow [sic] by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows").

[12] In *Postema,* one group of appellants contended that the applicable minimum instream flow should be construed as creating a "limited" water right with an implied "direct and measurable impact" standard for impairment from groundwater permits. *Postema*, 142 Wn.2d at 81-83. The Court was addressing that contention when it stated that "even if the WRIA regulations could be read as establishing a limited minimum flow right (which, as explained below, they do not do), they would be inconsistent with the statutes and invalid." *Id.* at 83. The Hirst Petitioners take that statement out of context to suggest that the Nooksack Rule exemptions are invalid. Appellants' Brief & Brief of Respondents Eric Hirst,

To analyze the effect of the Nooksack Rule's instream flows, the Board relied on an Ecology letter to Snohomish County regarding Ecology's 2006 Skagit Rule, concluding that "according to Ecology," an applicant for a building permit or subdivision must demonstrate "that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows."[13] That Ecology letter had nothing to do with the Nooksack Rule, Whatcom County, or the County's compliance with the Water Code. Nevertheless, the Board asserted that "[w]hile Snohomish County facts differ, the applicable legal principles are the same."[14] The "applicable legal principles" are certainly not the same between the Nooksack Rule and the 2006 Skagit Rule. *Compare* WAC 173-501-070 *with* former Chapter 173-503 WAC.[15]

Unlike the Nooksack Rule, the 2006 Skagit Rule did not include any exemption for single domestic uses, and explicitly prohibited new permit-exempt wells except pursuant to specific "reservations" subsequently invalidated by the Supreme Court in *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) (holding that Ecology did not have authority to rely on "overriding considerations of the public interest" to

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et al., at 30-33. That argument amounts to an improper collateral attack on the Nooksack Rule. *See* Part IV.C below.

[13] CP 1557. *See also* Appellants' Brief & Brief of Respondents Eric Hirst, et al., at 10.

[14] CP 1556 n.154.

[15] *See* http://www.leg.wa.gov/CodeReviser/WACArchive/Documents/2013/WAC-173-503-CHAPTER.pdf.

establish reservations reallocating water subject to the 2001 minimum instream flows in the Skagit Rule). *Swinomish* did not address GMA requirements for protection of water resources. Nothing in the Skagit Rule or *Swinomish* requires Whatcom County to override the state's groundwater permit exemption or the Nooksack Rule in its GMA planning.

3. The Legislature specifically considered and rejected the Board's approach to "water availability" in the GMA.

Had the Legislature intended to require impairment review for exempt wells, it would have done so expressly in the GMA. In 1990, the Legislature considered but ultimately did not adopt changes to the groundwater permit exemption in RCW 90.44.050 that would have made new exempt wells subject to the same impairment review as water right permit applications. Courts will consider sequential drafts of legislation in order to determine legislative intent. *See Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006). Under the version of the GMA legislation passed by the House of Representatives, all new groundwater uses, including uses exempt under RCW 90.44.050, would have been subject to an Ecology permit review process similar to the four-part test in RCW 90.03.290. The House Bill Report for ESHB 2929, as passed by the House on February 15, 1990, states "the existing water right exemption that allows users of less than 5,000 gallons per day of well water to use water without obtaining a water right is eliminated . . . a permit may be required in areas that have groundwater

problems." Section 58 of the bill would have created a new well notification and permitting requirement:

> The department may require the person making the notification in subsection (2) of this section to apply for a water right permit if the area within which the withdrawal would occur is known or believed to have problems related to water availability, water quality, interference with existing rights, or other related problems which could be adversely affected by additional withdrawals of ground water. The department may deny an application required under this subsection or condition a permit if water is not available, if the use is not a beneficial use, if the use would adversely affect existing water rights, if the use would threaten water quality or if the use would be inconsistent with a local comprehensive plan.

ESHB 2929 (1990), Sec. 58(3).

However, the Legislature did not adopt these requirements. Instead, the GMA legislation passed by the Legislature and signed into law required local governments to review the availability of potable water for a proposed building permit. Laws of 1990, 1st Ex. Sess., ch. 17, §63 (codified as RCW 19.27.097). When it added the rural element provisions to the GMA in 1997 (Laws of 1997, ch. 429, §7), the Legislature did not intend RCW 36.70A.070(5)(c)(iv) to accomplish indirectly the result it had explicitly considered and rejected in 1990. The legislative history of the GMA does not support the Board's conclusion that Whatcom County must deny a permit for a new building or subdivision unless the applicant can demonstrate that an exempt well will not cause adverse impact on minimum instream flows.

4. The Board's decision conflicts with GMA regulations.

The Board's interpretation of the GMA's rural element provisions goes far beyond the role established for local governments in the GMA, which is to review legal water availability consistent with the requirements of the Water Code and Ecology regulations. *Kittitas County*, 172 Wn.2d at 181. As explained in Part IV.A above, Whatcom County's approach to exempt wells is consistent with applicable state law, specifically, with Ecology's Nooksack Rule. This approach complies with the GMA regulations on "potable water" promulgated by the Washington Department of Commerce:[16]

> If the department of ecology has adopted rules on this subject, or any part of it, local regulations should be consistent with those rules. Such rules may include instream flow rules, which may limit the availability of additional ground or surface water within a specific geographic area.

WAC 365-196-825(3) (emphasis added). *See also* WAC 365-196-700(1) (requiring local GMA plans and regulations to be integrated with existing laws relating to resource management); WAC 365-196-735 (listing state agency permits and regulations that local governments should take into account in their GMA planning, including water right permits and instream resource protection regulations).

Ecology has, by rule, determined that water for single domestic uses is available without regard to the minimum instream flows in the Nooksack

Rule. WAC 173-501-070(2). Local governments are responsible for finding that potable water is legally available prior to approving subdivisions, short plats, or building permits,[17] but under *Kittitas County* and the GMA regulations, "legal availability" must be determined consistently with state law and Ecology rules. RCW 36.70A.070(5)(c) does not empower—let alone obligate—a county to disregard Ecology's determination of availability under the guise of protecting rural character.

C. The Hirst Petitioners' "water availability" challenge is an improper collateral attack on Ecology's Nooksack Rule.

The County's consistency with state water law gave rise to this GMA appeal in the first place. The Hirst Petitioners do not like the Nooksack Rule because it does not prohibit exempt wells and because it explicitly determines that, except in the area of Whatcom Creek, water is legally available for new single domestic uses. The Hirst Petitioners argued to the Board that the County's regulations incorporating Ecology's Nooksack Rule "do not solve the problem of proliferation of individual exempt wells . . ."[18] Before this Court, the Hirst Petitioners suggest that the exemptions in the Nooksack Rule are invalid and should be ignored. *See* n.12 *supra*. The Hirst Petitioners'

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[16] The Department of Commerce is required by the Legislature "to adopt criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of the [GMA]." WAC 365-196-020(2); *see* RCW 36.70A.190(4).
[17] RCW 58.17.110; RCW 19.27.097; WAC 365-196-745(1)(a), (l), (m).
[18] CP 1531.

arguments amount to a collateral attack on the Nooksack Rule—an improper subject for a GMA appeal. *See* RCW 34.05.510; RCW 36.70A.280(1).

The Hirst Petitioners have opportunities under the Administrative Procedure Act to amend or challenge an Ecology regulation with which they disagree. RCW 34.05.330; RCW 34.05.570(2). The GMA is not a vehicle for nullifying state water resource rules or the groundwater permit exemption. Allowing the GMA to be misused to achieve that end will result in a legal morass of overlapping and contradictory requirements for people trying to build homes in Whatcom County and elsewhere.

V. CONCLUSION

For the foregoing reasons, the Court should set aside the Board's Final Decision and Order and hold that Whatcom County's rural element complies with RCW 36.70A.070(5)(c)(iv) by requiring water supply for rural development to be consistent with the Nooksack Rule.

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CERTIFICATE OF SERVICE

I certify that on November 20, 2014, I caused a copy of the foregoing Brief of Amici Curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau to be served on all parties and amici by U.S. Mail at the addresses below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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