No. 70796-5-I

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,
Appellant/Cross-Respondent,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,
Respondents/Cross-Appellants,

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.

ERIC HIRST'S, LAURA LEIGH BRAKKE'S, WENDY HARRIS'S, DAVID STALHEIM'S, AND FUTUREWISE'S ANSWER TO THE AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION OF COUNTIES

NOSSAMAN LLP
Jean Melious, WSBA No. 34347
1925 Lake Crest Drive
Bellingham, WA 98229
(360)306-1997
jmelious@nossaman.com
Attorney for Respondents
Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim

FUTUREWISE
Tim Trohimovich, WSBA No. 22367
814 Second Avenue, Suite 500
Seattle, WA 98104
(206)343-0681, Ext. 118
tim@futurewise.org
Attorney for Respondent
Futurewise

TABLE OF CONTENTS

Topic | Page Number

Table of Authorities ii

I. Introduction 1

II. Argument 1

A. WSAC's assertion that an "Ecology interpretation" allows Nooksack Instream Resource Protection Program to exempt permit-exempt wells from the prior appropriation doctrine is contrary to the Water Codes. 1

B. Chapter 173-501 WAC does not support the Counties' interpretation of the Nooksack Instream Resource Protection Program, and the Counties' argument ignores the fact the minimum flows apply to permit-exempt wells not through the permit requirement, but through the priority system 7

C. The WSAC Amicus Brief errs in conflating the requirements in RCW 36.70A.070 to protect surface and ground water with Ecology's minimum flow rule. 13

D. Counties can rely on State Agency recommendations or depart from them as long as they comply with the GMA. 13

E. Counties will not have unmanageable liability for issuing permits that follow state law. 17

III. Conclusion 20

Declaration of Service 21

TABLE OF AUTHORITIES

Cases

Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002) 11, 13
Five Corners Family Farmers v. State, 173 Wn.2d 296, 268 P.3d 892 (2011) 4
Frank Coluccio Const. Co. v. Washington State Dept. of Labor & Industries, 181 Wn. App. 25, 329 P.3d 91 (2014) 3
Kittitas County v. Eastern Washington Growth Management Hearings Bd., 172 Wn.2d 144, 256 P.3d 1193 (2011) 15, 16, 17
Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 11 P.3d 726 (2000) .... passim
Squaxin Island Tribe v. Washington State Dept. of Ecology, 177 Wn. App. 734, 312 P.3d 766 (2013) .... passim
Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013) 6, 13

Statutes

RCW 19.27.097 14
RCW 36.70A.070 .... 15, 19
RCW 58.17.110 14
RCW 90.03.345 4
RCW 90.44.030 .... 5, 7, 9, 13
RCW 90.44.050 .... 8, 9, 11, 13
RCW 90.54.020 .... 7, 8

Regulations

Chapter 173-501 WAC 1
WAC 173-501-030 .... 5, 8, 9
WAC 173-501-060 .... 8, 11
WAC 173-501-070 .... 8, 10
Washington State Register 85-24-073 5

Growth Management Hearings Board Decisions

Kittitas County Conservation Coalition v. Kittitas County, GMHB Case Nos. 07-1-0004c and 07-1-0015, Order Finding Compliance (Aug. 13, 2014) 20

Pollution Control Hearings Board Decisions

Steensma v. Ecology, PCHB No. 11-053, Order Granting Summary Judgment to Ecology (Sept. 8, 2011), 2011 WL 4301319 14

I. INTRODUCTION

Respondents/Cross-Appellants Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim ("Hirst") and Futurewise file this answer to the Amicus Curiae Brief of the Washington State Association of Counties (WSAC Amicus Brief). As this brief will show, WSAC relies on an "Washington State Department of Ecology (Ecology) interpretation" of water law that fails to comply with the Water Codes and the Chapter 173-501 WAC, Instream Resources Protection Program—Nooksack Water Resource Inventory Area (WRIA) 1 (hereinafter Nooksack Instream Resource Protection Program). The Board's order in this case complied with the Growth Management Act (GMA) and this court should affirm it.

II. ARGUMENT

A. WSAC's assertion that an "Ecology interpretation" allows Nooksack Instream Resource Protection Program to exempt permit-exempt wells from the prior appropriation doctrine is contrary to the Water Codes.

The WSAC Amicus Brief argues that counties should be able to rely on instream flow rules, "as adopted and interpreted by Ecology," except when counties do not want to rely on the rules. When counties want to "incorporate[e] new or different approaches or standards, as determined

necessary by local conditions,"[1] WSAC argues that local regulations do not need to be in "lock-step with Ecology ...."[2]

Thus, according to WSAC, Ecology's views determine and limit counties' GMA obligations when, and solely to the extent that, the county wants them to. This is not the correct test. As properly addressed by the Board, the issue is whether Whatcom County's reliance on a particular "interpretation" of the Water Code meets the County's GMA obligation to protect water resources – not whether the County wanted to, or found it convenient to, move in "lock-step" with Ecology. For all of the reasons in this answer, the "interpretation" of water law advanced by the Counties and Ecology does not meet the GMA's requirements to protect water resources and is contrary to the Washington Water Codes.

While this case is an appeal of a Growth Management Hearings Board (Board) order, not an appeal of an Ecology decision, the standards the courts apply to state agency decisions may be helpful in evaluating Ecology's "interpretation." Courts "accord substantial weight to an agency's interpretation within its area of expertise and uphold that interpretation if it reflects a plausible construction of the regulation and is

[1] WSAC Amicus Brief p. 11 ("[C]ounties should be able to rely on Ecology's water resource management regulations. . . without foreclosing the possibility of counties incorporating new or different approaches or standards ...").
[2] WSAC Amicus Brief p. 9.

not contrary to legislative intent. *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926–27, 117 P.3d 385 (2005). But we [the courts] retain ultimate responsibility for interpreting a regulation. *Children's Hosp. & Med. Ctr. v. Dep't of Health,* 95 Wn. App. 858, 864, 975 P.2d 567 (1999)."[3]

Ecology's "interpretation" of the Nooksack Instream Resource Protection Program cannot be relied on because it is contrary to the Water Codes.

> A basic principle of water rights acquired by appropriation is the principle of first in time, first in right. "[T]he first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants".... *Longmire v. Smith*, 26 Wash. 439, 447, 67 P. 246 (1901); see RCW 90.03.010 (codifying first in time, first in right principle); *Neubert*, 117 Wn.2d at 240, 814 P.2d 199. FN2.[4]

To carry out this basic principle, the right to use publicly owned waters comes with a priority date. For a water right permit, the priority date relates back to the date of the application, except that "where minimum flow or levels have been adopted and are in effect when a permit to appropriate is granted, the permit must be conditioned to protect the flows or levels. Thus, the date of approval of the permit, not the date of

[3] *Frank Coluccio Const. Co. v. Washington State Dept. of Labor & Industries*, 181 Wn. App. 25, 36, 329 P.3d 91, 97 (2014).
[4] *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79 – 80, 11 P.3d 726, 734 (2000).

application, dictates whether the water right is subject to the minimum flows or levels."[5] The priority date for a permit-exempt well is the date the well water is put to a beneficial use.[6]

Instream flows also have priority dates. The effective date of a minimum instream flow rule is the priority date for the minimum instream flow.[7] Water rights and permit-exempt wells with a priority date later than the instream flow priority date may not impair the minimum instream flow. As the Court of Appeals wrote in the *Squaxin Island Tribe* decision:

> Permit-exempt wells are legislatively exempt from the public ground waters code's permitting requirement. RCW 90.44.050. But they are subject to the priority system; thus, permit-exempt wells may not impair senior surface water rights such as instream flows. RCW 90.44.030. See also *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) ("[A] minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level.").[8]

The Nooksack Instream Resource Protection Program has a

---

[5] *Postema*, 142 Wn.2d at 80 fn. 2.

[6] *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304, 268 P.3d 892, 896 – 97 (2011).

[7] RCW 90.03.345.

[8] *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wn. App. 734, 737 fn. 3, 312 P.3d 766, 768 fn. 3 (2013). *See also* AR 1387, *Hirst v. Whatcom County*, Growth Mgmt. Hearings Bd., Western Wash. Region Case No. 12-2-0013, Final Decision and Order (June 7, 2013) ("FDO") at 40 of 51. "AR" refers to the Certified Administrative Record with sequential page numbers prepared by the Board. We omit the preceding zeroes.

priority of date of 1986.[9] Ecology's "interpretation" that the Nooksack Instream Resource Protection Program does not apply to junior permit-exempt wells – those that were put to a beneficial use after the effective date of the Rule – does exactly what RCW 90.44.030 prohibits: it allows "permit-exempt wells [to] impair senior surface water rights such as instream flows."[10]

Ecology's "interpretation" has the effect of allowing permit-exempt wells to impair senior water rights. As was documented in the Hirst and Futurewise Appellants' Brief & Brief of Respondents, from 1986 to 2009, the Nooksack River failed to meet instream flows 72 percent of the time during the July-September flow period.[11] Under Ecology's "interpretation," water rights holders, potentially including those with priority dates as old as 1986, would have to curtail their water use if they would affect the instream flows, but permit-exempt well users, including those with a 2014 priority date, may always take water, no matter how many senior water users are curtailed and no matter if the instream flow is reduced to zero.

---

[9] WAC 173-501-030; Washington State Register 85-24-073 filed Dec. 4, 1985, effective date Jan. 4, 1986.

[10] *Squaxin Island Tribe*, 177 Wn. App. at 737 fn. 3.

[11] AR 1263, R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80.

Ecology's "interpretation" thus impermissibly gives junior permit-exempt well users a "'jump to the head of the line' in priority."[12] As the Board recognized, the record established that permit-exempt well use in closed watersheds has increased dramatically, drawing down underlying aquifers and reducing groundwater recharge of streams.[13] Between 1986 and 2011, exempt wells in WRIA 1 increased 270 percent, from an estimated 3,294 wells to an estimated 12,195 wells.[14] Approximately 77 percent of the increase was in the parts of WRIA 1 closed to the appropriation of water part or all of the year.[15]

Under Ecology's "interpretation," junior permit-exempt well users have absolute priority over the instream flow water right and over senior water users with priority dates after the effective date of the Nooksack Instream Resource Protection Program. Therefore, when junior permit-exempt users take water that impairs instream flows, more senior permitted water users may be subject to curtailment to preserve instream flows. This shifts the burden of complying with the minimum stream flows to more senior water rights holders that do not use permit-exempt

---

[12] *Swinomish Indian Tribal Community v. Washington State Dept. of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6, 19 (2013).
[13] See AR 1371, FDO at 24 of 51.
[14] AR 1263, R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80.
[15] *Id.*

wells. So Ecology's interpretation again violates RCW 90.44.030 because junior permit-exempt wells are allowed to pump water with no regard for consequences, placing a greater burden on senior water rights holders.

Because Ecology's interpretation violates RCW 90.44.030 and the "basic principle … of first in time, first in right,"[16] it cannot stand. And counties cannot reasonably claim that relying on such an "interpretation" meets their GMA obligation to protect water resources.

B. Chapter 173-501 WAC does not support the Counties' interpretation of the Nooksack Instream Resource Protection Program, and the Counties' argument ignores the fact the minimum flows apply to permit-exempt wells not through the permit requirement, but through the priority system.

RCW 90.54.020(3)(a) provides that:

> (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

This section creates a mandatory duty to retain minimum flows. The provision for conflicting "withdrawal of waters" makes no distinction between water rights; they are all treated the same, whether they are

---

[16] *Postema*, 142 Wn.2d at 79 – 80.

exempt from the requirement to obtain a water right permit or not. Further, it is important to recognize that, since permit-exempt wells do not require permits, the permit system does not apply the "first in time, first in right" doctrine to junior permit-exempt wells. [17] It is the overarching state law of prior appropriations, not the permit system, that protects senior minimum flows from impairment by junior permit-exempt wells.[18] The Nooksack Instream Resource Protection Program must be interpreted in the light of these legislative commands.

The WSAC Amicus Brief identifies the exemption for permit-exempt wells in WAC 173-501-030(4), WAC 173-501-060, and WAC 173-501-070. But viewed in the light of RCW 90.54.020(3)(a), these provisions do not exclude permit-exempt wells from the minimum flow requirements in WAC 173-501-030.

WAC 173-501-030(2) provides "[i]nstream flows are established for the stream management units in WAC 173-501-030(1) as follows: ..." listing the various instream flows by the various river and stream segments. This provision does not exclude permit-exempt wells.

The WSAC Amicus Brief, on page 5, claims that WAC 173-501-030(4) "provides that 'future consumptive water rights permits' for

---

[17] RCW 90.44.050.

[18] *Squaxin Island Tribe*, 177 Wn. App. at 737 fn. 3

surface waters are expressly subject to the instream flows ..." implying that the instream flow water right is only protected from the types of water withdrawals authorized by a water right permit. This proposition not only misrepresents water law, as discussed above, but it also misreads WAC 173-501-030(4). That subsection provides in full that:

> (4) Future consumptive water right permits issued hereafter for diversion of surface water in the Nooksack WRIA and perennial tributaries shall be expressly subject to instream flows established in WAC 173-501-030(1) through (3) as measured at the appropriate gage, preferably the nearest one downstream and at all other downstream control stations, except for those uses described in WAC 173-501-070 (1) through (3).

The reason for this requirement is that "where minimum flow[s] or levels have been adopted and are in effect when a permit to appropriate is granted, the permit must be conditioned to protect the flows or levels."[19]

The initial clause in WAC 173-501-030(4) is not an exemption for permit-exempt wells; rather, it is an instruction to Ecology to condition the permits it issues to ensure compliance with the Nooksack Instream Resource Protection Program as the Water Code as the *Postema* decision requires. For permit-exempt wells, there is no permit for Ecology to condition. Nonetheless, permit-exempt wells must still comply with the priority system, including the priority date of an approved instream flow.[20]

---

[19] *Postema*, 142 Wn.2d at 80 fn. 2.

[20] RCW 90.44.050; RCW 90.44.030; *Squaxin Island Tribe*, 177 Wn. App. at 737 fn. 3.

The clause creating an "except[ion] for those uses described in WAC 173-501-070(1) through (3)" does exempt water rights existing when the instream flow rule was adopted (WAC 173-501-070(1)), "[s]ingle domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering)" withdrawals from streams (WAC 173-501-070(2)), and nonconsumptive uses (WAC 173-501-070(3)). Ecology agrees that WAC 173-501-070(2) applies only to stream withdrawals, not ground water withdrawals, writing on page 17 of its amicus brief that "WAC 173-501-070, the section that provides an exemption from the instream flows and closures, says nothing about the groundwater permit exemptions, and generally allows the use of surface water for 'single domestic' purposes." Ecology's interpretation of that subsection is consistent with the plain language of WAC 173-501-070(2) with its reference to "Whatcom Creek" and "all other streams." Note also that in footnote 14 on page 17, Ecology also says that the exemption in WAC 173-501-070(2) does not apply to subdivisions. That interpretation is also consistent with the plain language of WAC 173-501-070(2) which limits the stream withdrawals to "[s]ingle domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering)" stream withdrawals and excludes the "group domestic

uses" that RCW 90.44.050 exempts from the requirement to obtain a permit from Ecology before withdrawing ground water.[21]

WAC 173-501-060 also does not explicitly exempt permit-exempt wells. WAC 173-501-060 provides in part that "[i]f department investigations determine that there is significant hydraulic continuity between surface water and the proposed groundwater source, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters." Again, this provision implements Ecology's duty to condition permits to protect the minimum flows.[22] It does not say that permit-exempt wells are exempt from the minimum flows or limit the minimum flows to water rights permits.

It is also worth noting that an owner of a permit-exempt well can apply to Ecology for water rights permit and certificate to document their right to use ground water.[23] Under WAC 173-501-060, permits and certificates Ecology issues for permit-exempt wells must be conditioned to protect the minimum flows if the aquifer is in hydraulic continuity with surface water just as the certificates for non-exempt wells must be conditioned. WAC 173-501-060 does not exempt permit-exempt wells

---

[21] *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002) "The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use …."
[22] *Postema*, 142 Wn.2d at 80 fn. 2.
[23] RCW 90.44.050.

from the Nooksack Instream Resource Protection Program. Rather it aids Ecology in administering the water right permit and certificate system.

On pages 5 and 6, the WSAC Amicus Brief argues it was improper for the Board to consider a letter from Ecology advising Snohomish County on how to address the water impacts of new development because the instream flow rules are different in different basins.[24] This argument fails for two reasons. First, as we have seen, the Nooksack Instream Resource Protection Program applies to permit-exempt wells. Second, Ecology provided the letter to Whatcom County, stating that it contained "information that may be of interest and/or helpful to you."[25] The letter was the only information in the record stating Ecology's views of the effects of new development on closed basins, and the Board properly reviewed the letter Ecology provided to Whatcom County.

In sum, in attempting to read an exemption for permit-exempt wells into the Nooksack Instream Resource Protection Program, the WSAC Amicus Brief makes a fundamental error of water law. The WSAC Amicus Brief's entire analysis is based on the assumption that the requirement to avoid impairment of senior instream flow water rights is

---

[24] See AR 450 – 57, Ex. C-678 Ecology, Maia Bellon letter to Clay White, Snohomish County Planning and Development Services (December 19, 2011) at 1 – 8.
[25] AR 809, Ex. R-082 at 4 Kasey Ignac, Ecology, email to Whatcom County PDS.

only applied through Ecology's water rights permitting system. But, as is well established in statutes and case law, permit-exempt wells are exempt only from the permitting requirement.[26] Instead, instream flows apply to permit-exempt wells through the priority system.[27] WSAC's argument fails because it does not address the fundamental state law requirement for junior water users to avoid impairing senior instream flow water rights, whether or not a permit is required for the junior water use.

C. The WSAC Amicus Brief errs in conflating the requirements in RCW 36.70A.070 to protect surface and ground water with Ecology's minimum flow rule.

Pages 6 through 8 of the WSAC Amicus Brief argue that Whatcom County could rely on Ecology's water resource management regulations. The problem with this argument, as was explained in Hirst *et al.*'s Answer to Ecology's Amicus Brief, is that the requirements of the Nooksack Instream Resource Protection Program are not the same as the requirements of the GMA.[28]

D. Counties can rely on State Agency recommendations or depart from them as long as they comply with the GMA.

---

[26] RCW 90.44.050; *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4, 9 (2002); *Squaxin Island Tribe,* 177 Wn. App. at 737 fn. 3; *Swinomish Indian Tribal Community*, 178 Wn.2d at 598 (permit exempt wells may not "jump to the head of the line").
[27] RCW 90.44.030; *Squaxin Island Tribe*, 177 Wn. App. at 737 fn. 3.
[28] See the Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise Answering Amicus Curiae Department of Ecology pp. 8 – 15.

On pages 7 and 8, the WSAC Amicus Brief argues that counties can adopt approaches to protecting surface and ground water that are consistent with Ecology's water resources rules and comprehensive resource program. We agree, as long as the requirements of RCW 36.70A.070(5)(c)(iv) are met. The entire problem, as the Board clearly addressed in its FDO, is that these requirements were not met in this case.

The WSAC Amicus Brief on pages 8 and 9 argues that counties "may seek and rely on Ecology's input regarding water availability and whether a specific development proposal may utilize a permit-exempt well within an area subject to an applicable instream flow rule in Title 173 WAC." This formulation of the County's GMA obligation is inconsistent with the GMA, which requires counties to assure actual and legal availability of potable water prior to building permit or subdivision approval.[29] It is also inconsistent with the Washington State Supreme Court's statement in the *Kittitas County* decision:

> ¶ 60 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

[29] RCW 58.17.110 and RCW 19.27.097. *See also* AR 1369, FDO at 22 of 51. WSAC includes a bare acknowledgment of this GMA obligation in its brief (WSAC Amicus Brief at p. 8 – 9) but fails to address the fact that the responsibility for making this determination lies with the county, not with Ecology. See *Steensma v. Ecology,* PCHB No. 11-053, Order Granting Summary Judgment to Ecology (Sept. 8, 2011) at 7 – 9, 2011 WL 4301319, 3 – 5, upholding Ecology's argument that the Legislature determined that the County, not Ecology, is "the appropriate entity to make the decision" on the availability of potable water for a subdivision.

> 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.[30]

As this quote shows, Ecology retains its role in issuing water right permits and certificates and should also assist counties in their land use planning to protect water resources including meeting the requirements of RCW 36.70A.070(5)(c)(iv). But counties are responsible for deciding whether a particular permit application complies with the county comprehensive plan and development regulations. And these laws require finding that water is available for development.

On pages 10 and 11, the WSAC Amicus Brief argues that the Board's order in this case should be dismissed because Whatcom County was penalized for aligning its regulatory approach with Ecology's water resource management regulations. This argument fails for two reasons. First, as this brief has shown, the Water Codes and Ecology's Nooksack Instream Resource Protection Program do not exclude permit-exempt wells from their coverage. Second, the GMA requires the Board to determine whether Whatcom County's comprehensive plan and

---

[30] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 180, 256 P.3d 1193, 1210 (2011).

development regulations comply with the goals and requirements of the GMA, not Ecology's instream flow rules.[31] Whatcom County's comprehensive plan simply did not comply with the GMA.[32]

On pages 11 and 12, the WSAC Amicus Brief argues that counties may lack the resources and expertise to comply with the Board's ruling. Further, the WSAC Amicus Brief claims, without any citation to the record, that the Board's order requires counties to second guess Ecology. The Board's order does not require counties to second guess Ecology. In fact, the Ecology letter the Board referred to as evidence of Ecology's views of "the effect of closed basins and instream flows on rural residential development" was provided to Whatcom County by Ecology.[33] The solution to any lack of expertise is not to ignore the GMA requirements to protect water resources. Nor is the solution to substitute Ecology's water rules (where they exist) for the GMA. Rather, the solution is for Ecology to provide the technical assistance envisioned by the *Kittitas County* decision, and for counties to follow the GMA in making their planning decisions.[34]

---

[31] *Kittitas County*, 172 Wn.2d at 156, 256 P.3d at 1199; *Kittitas County*, 172 Wn.2d at 164, 256 P.3d at 1203 "County development regulations must also comply with the requirements of the GMA."
[32] AR 1370 – 86, FDO at 23 – 39 of 51.
[33] AR 1388, FDO at 41 of 51, referencing AR 456, Ex. C-678 Ecology, Maia Bellon letter to Clay White, Snohomish County Planning and Development Services (Dec. 19, 2011) at 7.
[34] *Kittitas County*, 172 Wn.2d at 180, 256 P.3d at 1210.

E. Counties will not have unmanageable liability for issuing permits that follow state law.

On page 12, the WSAC Amicus Brief argues that "[c]ompelling counties to disregard Ecology's water resource management regulations and make a separate, independent, and conflicting determine of surface flow impairment and water rights exposes counties to potential liability." But nobody, not the Board, and certainly not Hirst and Futurewise, want counties to make water rights decisions. Instead, the Board and Hirst and Futurewise want counties to adopt comprehensive plan provisions and development regulations that comply with the GMA. Then, we want counties to implement those policies and regulations through fair and timely permit decisions, taking into account any recommendations that Ecology provisions the counties. That is what the *Kittitas County* decision requires[35] and what the Board proposed.[36]

Contrary to the WSAC Amicus Brief, also on page 12, the record in this case shows that Ecology has not contended that water is available in the Nooksack Basin. Rather, the record shows Ecology has made it clear that water is not available; its "interpretation" in this case merely asserts that permit-exempt well users have an inalienable right to the very last drop. As the Board's order documented, Ecology's own guidance on

---

[35] *Id.*

[36] *See* AR 1390, FDO at 43 of 51.

water availability in the Nooksack Basin explicitly recognizes that most water "is already legally spoken for."[37] Ecology further states that "[i]ncreasing demands for water from ongoing population growth, diminishing surface water supplies, declining groundwater levels in some areas during peak use periods, and the impacts of climate change limit Ecology's ability to issue new water rights in this watershed."[38]

What the WSAC Amicus Brief is really arguing for, as expressed on pages 12 and 13, is for this Court to continue to allow Ecology and Whatcom County to ignore the lack of available water,[39] ignore the fact that minimum flows are not being met,[40] and adopt a nonsensical "interpretation" of the Nooksack Instream Resource Protection Program. Contrary to WSAC's brief and Ecology's "interpretation," the Nooksack Rule does not protect junior permit-exempt wells from senior instream flow rights. Rather, the purpose of an instream flow rule is to protect instream flows from impairment by junior users. It does not matter whether those junior users must apply for a permit, or whether they are

---

[37] AR 1370, FDO at 23 of 51, citing AR 421, Ex. C-671-G Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1.
[38] AR 421, Ex. C-671-G Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1.
[39] *Id.*
[40] AR 1263, R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80.

permit-exempt. It is the state's prior appropriation priority system that brings exempt wells under the coverage of the minimum flows.[41]

The GMA requires Whatcom County to adopt a comprehensive plan and development regulations that protect surface water and groundwater resources.[42] Contrary to the impression that WSAC attempted to create in its Amicus Brief, this is not an impossible task. In fact, Kittitas County has adopted a comprehensive plan and implementing regulations that comply with the GMA. The key provisions include:

- New ground water users within the Yakima Basin will have to demonstrate that they have a legal right to use their water source and new ground water users will have to mitigate their impacts on the Yakima River in the short-term and the Yakima River and its tributaries under the permanent program. This mitigation will protect surface and ground water flows.
- Kittitas County is required to mitigate the impacts on the Yakima River caused by the residential development in the county using permit-exempt wells as water sources. The goal of this commitment is that during low water years those home owners will be able to continue to use their wells without being curtailed.

---

[41] *Squaxin Island Tribe*, 177 Wn. App. at 737 Fn. 3.
[42] RCW 36.70A.070(5)(c)(iv).

- The comprehensive plan policies will require consideration of water capacity in settling rural densities.[43]

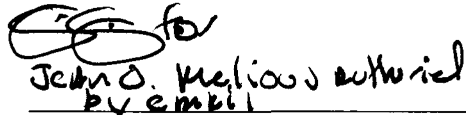
The Board found that these policies and regulations complied with the GMA requirements "to protect rural character and to protect surface water and groundwater resources as required by RCW 36.70A.070(5)."[44] Like Kittitas County, Whatcom County has every ability to adopt a GMA-compliant approach to protecting its water resources. When it does so, the County will not have to worry about liability for its water availability determinations because they will be made based on actual water availability, not some "interpretation" that is based on a legal fiction.

III. Conclusion

Respondents respectfully request that the Court of Appeals uphold the decision of the Growth Management Hearings Board.

Respectfully submitted on this 24th day of December, 2014.

NOSSAMAN LLP



Jean O. Melious, WSBA No. 34347
Attorney for Respondents Hirst et al.

FUTUREWISE

Tim Trohimovich, WSBA No. 22367
Attorney for Respondent Futurewise

---

[43] *Kittitas County Conservation Coalition v. Kittitas County*, GMHB Case Nos. 07-1-0004c and 07-1-0015, Order Finding Compliance (Aug. 13, 2014), at 13 – 14 of 23, 2014 WL 4809403, 8 – 9.

[44] *Id.* at 18 of 23, 2014 WL 4809403, 11.

DECLARATION OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on December 24, 2014, I caused the following documents to be served on the following parties in the manner indicated: Answer to the Amicus Curiae Brief of Washington State Association of Counties.

Washington State Court of Appeals
Division I
One Union Square
600 University St
Seattle, WA 98101-1176
Original and One Copy

	By United States Mail postage prepaid
X	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
	eFiled by JIS Link

Ms. Diane L. McDaniel
Attorney General of Washington
1125 Washington Street SE
PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702
Attorneys for the Growth Management Hearings Board

	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By E-Mail (by agreement): dianem@atg.wa.gov

Ms. Karen Frakes
Senior Deputy Prosecutor
Whatcom County
311 Grand Avenue
Bellingham, WA 98225
(360)676-6784

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: kfrakes@co.whatcom.wa.us

Mr. Jay Derr, Mr. Tadas A Kisielius, & Mr. Duncan Greene
Van Ness Feldman GordonDerr
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: jpd@vnf.com; tak@vnf.com; dmg@vnf.com

Ms. Jean Melious
Nossaman LLP
1925 Lake Crest Drive
Bellingham, WA 98229

	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email (by agreement): jmelious@nossaman.com

Mr. Alan Marriner
Assistant City Attorney
City of Bellingham
210 Lottie Street
Bellingham, Washington 98225
Tel: (360) 778-8270

	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: amarriner@cob.org (Courtesy copy only, by agreement)

The Hon. Robert Ferguson
Attorney General
Mr. Alan M. Reichman
Assistant Attorney General
Office of the Attorney General/
Ecology Division
PO Box 40117
Olympia, WA 98504-0117

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: Alan.Reichman@atg.wa.gov

Ms. Rachael Paschal Osborn
P.O. Box 9743
Spokane, WA 99209
(509) 954-5641

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: rdpaschal@earthlink.net

Mr. David L. Monthie
DLM & Associates
519 75th Way NE
Olympia, WA 98506
(360) 357-8539

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: dlmandassoc@comcast.net

Mr. Bill Clarke
Attorney at Law &Government Affairs
1501 Capitol Way S Ste 203
Olympia, WA, 98501-2200

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: bill@clarke-law.net

Ms. Sarah Ellen Mack
Tupper Mack Wells PLLC
2025 1st Ave Ste 1100
Seattle, WA, 98121-2100

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: mack@tmw-law.com

Ms. Alethea Hart
Snohomish County Prosecutor's Office
3000 Rockefeller Ave
Everett, WA, 98201-4046

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: ahart@snoco.org

Mr. Josh Weiss
WA State Assn of Counties
206 10th Ave SE
Olympia, WA, 98501-1311

X	By United States Mail postage prepaid		By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery		By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid		By Federal Express or Overnight Mail prepaid
X	By Email: jweiss@wacounties.org		By Email:

Signed and certified on this 24th day of December, 2014,

Tim Trohimovich, WSBA No. 22367