

Righting the Rules

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RIGHTING THE RULES: Whatcom County goes to court again next week, this time facing the Supremes. And on the eve of the update of their Comprehensive Plan, might significant portions of the Comp Plan unravel?

The Whatcom County Planning Commission held a public hearing earlier this month on proposed amendments to the land use chapter of the Comp Plan, and will continue to hold meetings through the end of the year as the county prepares to finalize its 20-year planning document by June of 2016. Meanwhile, on Oct. 20, the Washington State Supreme Court will hear arguments that portions of the current Comp Plan dealing with water resources are inadequate. Despite the likelihood the Supremes may agree those plans are inadequate, the county really has no alternative underway.

In 2013, the state Growth Management Hearings Board, which reviews county Comp Plans, found county land-use policy was not sufficiently protective of rural character and did not adequately protect surface and groundwater supply. Specifically, the Hearings Board found the rural element of county's Comprehensive Plan for growth "fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells." The county, the board found, had oversubscribed well withdrawals in basins that suffer inadequate supply for a significant portion of the year, and "has not employed effective land use planning that contains measures to protect water supply and water quality."

The county appealed the determination to the state Court of Appeals. And in 2014, the Appeals Court ruled narrowly on behalf of the county, based in large measure on briefs filed by the state Dept. of Ecology. Ecology asserted that, "In finding these provisions inadequate, the board misread the scope of Ecology's water management rule for the Nooksack River Basin. Under its express language, this Rule does not govern permit-exempt groundwater use. Contrary to the board's decision, the Nooksack Rule does not mandate that permit-exempt groundwater is no longer available for new uses in rural areas of the county in all instances and that land use applications relying on wells for water supply must always be denied."

Yet, Ecology's recital of the Nooksack Rule is at odds with Ecology's rules for other rivers and water bodies around the state, notably the Skagit River. Ecology concedes that "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."

In arriving at their rules, Ecology applies a balancing principle that considers "overriding considerations of public interest" (OCPI) to water supply. Ecology uses OCPI as a tool to approve water right permits when water availability is limited, but it appears the public

benefits of approval outweigh impacts on stream flows. In other words, Ecology's balancing rule favors humans over fish, water consumption over water conservation. The "overriding considerations" are in some cases heedless of existing water rights.

The Court of Appeals decided not to touch those more comprehensive concerns, though, and overturned the GHMB findings, treating the Nooksack River as distinct and distinguishable from other river basins—essentially pretending that instream flow issues in Whatcom County are different in class and in kind from flow issues 20 miles away in Skagit. The Appeals Court failed to fully apply the earlier Supreme Court opinion in Swinomish that held that instream flows are a water right and must be protected from impairment.

Petitioners, including the public policy group Futurewise, pressed their concerns forward, gaining review of the matter by the Supreme Court this month.

While it's always a risk to read the mind of the courts and predict verdicts, it does seem fairly certain the Supremes will seek clarity and consistency to Ecology's erratic rulemaking authority.

A hint at clarity may have tumbled out last week when the Supreme Court reversed Ecology's decision to issue a water right permit to the City of Yelm based on what the court found to be an inadequate OCPI balancing rule. Yelm, a Thurston County city of about 7,500 people, had sought additional water appropriations to accommodate future population growth. But the court cancelled Yelm's water permit because it will impair minimum stream flows in the Deschutes and Nisqually basins.

There are differences between Yelm's water concerns and Whatcom County's predicament, but what's notable is the Supremes reassert the fundamentals and their findings in Swinomish. And the GMHB relied heavily on the Supreme's ruling in Swinomish to determine Whatcom's water resource planning was inadequate and heedless of supply. The Appeals Court glossed Swinomish when it overturned the GMHB determination. In Yelm, the Supremes come full circle to say, no, those findings are important and should not be glossed.

"Several foundational principles of water law bear repeating," the Supremes observe in Yelm—notably, that junior water appropriations may not impair or diminish a senior water right. Reasserting their Skagit reasoning, they found Ecology's use of "the OCPI exception does not allow for the permanent impairment of instream flows.

"We reaffirm our holding in Swinomish," the majority concluded, "the OCPI exception is not an end-run around the appropriation process or the prior appropriation process doctrine."

At the risk of prediction, it does seem likely Whatcom's water planning is due for additional revision from the high court. The problem is county policymakers were not persuaded to seek changes to that planning following the initial findings of the GMHB

and have spent their time—and more than a quarter of a million taxpayer dollars—crafting legal arguments little better than sophistry. If their case goes down, there's no Plan B.