

# Court restricts use of exempt wells

*by Michelle Green, Wenatchee attorney*  
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A recent Washington State Supreme Court ruling impacts the responsibilities of counties within the state to review permit-exempt (household) wells in connection with building permits and subdivision applications.

On Oct. 6, the court issued its decision in *Whatcom County, Hirst, et al. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, which will effectively preclude counties from granting building permits and subdivision applications that intend to rely on permit-exempt wells if the well will impair a minimum, in-stream flow (a rule set to protect river and stream flows at sufficient levels for fish).

The decision directs the counties to go beyond the in-stream flow rules adopted by the Department of Ecology and conduct their own analysis when determining legal availability of water for rural development. What this decision means for each county and for property owners has yet to be determined.

The result of this decision in many counties will be the issuance of building permit moratoriums, burdensome hydrogeology report requirements in connection with even a basic residential building permit application on a rural property, and/or blanket denials of all building permits and subdivision applications for properties within watersheds that are already fully appropriated.

In counties with legislatively approved watershed plans that include “reserve water” in anticipation of future growth (such as Chelan County’s legislatively-approved reserves within the Wenatchee Water Resource Inventory Area), the impacts of this Supreme Court decision will likely be much less extreme.

However, regardless of where you live in our sState, the landscape is changing rapidly with respect to water availability. And, while the topic may be dry (pun intended), the decision has important ramifications for future growth within the state.

The Hirst decision arose from a lawsuit filed by a group of environmentalists against Whatcom County, alleging that county was not satisfying its obligations under the Growth Management Act (“GMA”) by granting building permits that intended to rely upon permit-exempt wells without conducting an independent analysis of water availability. The GMA requires counties to ensure an adequate water supply exists before granting a building permit or subdivision application.

Building permit and subdivision applications in rural areas where water is not provided by a water purveyor often rely on permit-exempt wells, which as the name suggests, do

not require a water permit from the Department of Ecology. Many counties contain watersheds that are subject to in-stream flow rules adopted by Ecology, under which the basin is closed to all new, permitted water rights in order to protect flows for fish.

The Supreme Court held that Whatcom County's comprehensive plan did not satisfy the GMA requirement to protect water availability and that Whatcom County violated state law when it granted building permits that relied on permit-exempt wells.

The Supreme Court stated that the GMA requires an applicant for a building permit for a residence to produce proof that water is both legally available and actually available, and that counties must require a showing that water is available for a building permit when the applicant is relying on a permit-exempt well.

So what does this all mean?

For environmentalists, the decision is a big win. The decision squarely precludes the unchecked growth of single-family residences relying on permit-exempt wells in rural areas.

Permit-exempt wells may not infringe upon senior water rights, which include the minimum in-stream flows set by rule for the protection of fish (in-stream flow rules in our area include the Wenatchee watershed and the Entiat watershed).

Many experts (as well as the dissenting Supreme Court justices) say that the practical result of this court decision will be to stop some counties from granting building permits that rely on permit-exempt wells, halting further rural growth.

Rural growth may likely continue in counties with legislatively-approved watershed plans that include reserve water for future growth, as well as in counties that have implemented a water banking system (where building permit applicants pay a fee to acquire water as part of their building permit process). Landowners and developers should consult Ecology and seek advice from an attorney to determine how this decision impacts their property and development plans.

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