

Court ruling on wells may constrain rural development

[Projects officials OK must have legal access to water](#)

By [Jake Thomas](#), Columbian staff writer

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You can still dig a well in Washington state, but drawing water from it has become more complicated for some rural property owners.

As the result of a state Supreme Court ruling, county governments must now apply more scrutiny to where property owners intend to secure water before signing off on new developments. The court's 6-3 ruling is expected to have particular consequences for a source of water often used for rural property developments.

Clark County officials are still considering what the court's decision, issued Oct. 6, will mean, but it's raised concerns that development will halt or become more expensive in parts of the fast-growing county.

"Clearly, it's going to cause some consternation, especially among people building in rural areas," said Jamie Howsley, a land-use attorney who serves as government affairs director for the Building Industry Association of Clark County and the Clark County Association of Realtors. "At a minimum, it will require someone seeking a building permit to seek a step that will be very expensive that they didn't have to do previously."

The ruling could effectively result in moratoriums or severe restrictions on building in some rural parts of the county, Howsley said.

Tim Trohimovich, the director of planning and law for the Seattle-based environmental group Futurewise, which litigated the case, said requiring county governments to prove that new buildings or subdivisions have legal access to water is fair.

"We think the county needs to be responsible and not allow people to create new lots that don't have a source of water," he said. "That's just basic consumer protection, right?"

State law allows for "permit-exempt wells," groundwater wells that serve single homes or small subdivisions and are exempt from permitting requirements if they draw no more than 5,000 gallons of water each day. Prior to the ruling, counties could rely on "instream flow rules" from the state Department of Ecology to determine if these wells were allowed. These rules limit withdrawals from waterways in order to maintain adequate amounts of water to protect wildlife, recreation, aesthetics and water quality.

The ruling stems from a 2013 legal challenge from Futurewise and four residents of Whatcom County. The lawsuit argued that Whatcom County couldn't rely on Ecology's instream flow rule in granting building permits or subdivision applications because the new developments were dependent on permit-exempt wells that adversely affected the Nooksack watershed. Under the ruling, counties must now independently determine that a development won't affect water availability.

In Clark County, the Lewis River (which includes the East Fork of the Lewis River and the Kalama River) and the Salmon-Washougal watersheds are both subject to instream flow rules. Both watersheds include reserves to accommodate growth.

"The problem is there are already enough lots in the county to consume the reserves," said Trohimovich. "The county should start to require that people creating new lots show that they are going to use some reserves or they have another good, legal and practical source of water."

Trohimovich points to Ecology documents stating that both watersheds are already heavily used and that much of the water in each "has already been spoken for." He also points to Ecology numbers that show the reserves can serve another 4,859 households. However, he said that growth on the county's developable lots will surpass the reserves.

Clark County Community Planning Director Oliver Orjako said that he was still reviewing the implications of the court ruling and didn't know how many permit-exempt wells the county is relying on to accommodate new growth. In an email, Erica Erland, corporate communications manager for Clark Public Utilities, wrote that the ruling won't affect the utility, saying the utility has more than adequate capacity for future customers.

According to Kristin Johnson-Waggoner, Ecology communications manager, the department doesn't keep data on the number of permit-exempt wells. Ecology numbers do show that the number of wells constructed in Clark County rose from 67 in 2010 to 188 in 2015. However, Ecology anticipates reserves to be adequate in the two watersheds, according to Johnson-Waggoner.

"It will require a revamping for pretty much every county in the state of their comprehensive plan and building permit application process," said Michelle Green, a land-use attorney at the Wenatchee-based Jeffers, Danielson, Sonn and Aylward. She said counties will have to produce a hydrogeology reports to show that a permit-exempt well won't affect water rights or instream rules. She said counties could have problems accommodating new growth if an affected watershed isn't meeting minimum flow levels required by instream rules.

According to Johnson-Waggoner, the Salmon-Washougal hasn't had functioning gauges in 20 years to determine if instream levels are being met, and the Lewis River watershed has had periods where minimum flows weren't met.

“I would imagine it could raise concerns for anyone pulling a building permit in that watershed,” said Howsley.

Sen. Ann Rivers, R-La Center, called the ruling a “blow” to local governments.

“I’m certain we’ll be seeing some legislation that will attempt to address it,” she said.