No. 91475-3

Nos. 70796-5-I and 72132-1-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 REALTORS®, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, AND WASHINGTON STATE FARM BUREAU

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

2011 DEC 28 PM 3:47

TABLE OF CONTENTS

Topic — Page Number

Table of Authorities ii

I. Introduction 1

II. Argument 5

A. State Water Law Governs the Implementation of the Nooksack Instream Resources Protection Program. 5

1. Under the GMA, Ecology's role is to assist the County in meeting its GMA obligation, including the protection of instream flows as mandated by the GMA and state water law. 5

2. Instream flows are water rights that do not have to be "applied" or "extended" to junior permit-exempt wells 7

3. The Nooksack Instream Protection Program does not determine that water is "legally available" to junior permit-exempt users who would impair an instream water right. 8

B. The Board's Decision is Consistent with the GMA's Requirements to Protect Surface and Ground Waters and Habitat for Fish and Wildlife 12

1. *Kittitas* held that state water law does not preempt the County from protecting groundwater from detrimental land uses 13

2. The Board correctly applied governing precedent in determining the County's GMA obligations 14

3. The fact that the Legislature did not pass a 1990 bill requiring some permit-exempt groundwater withdrawals to obtain an Ecology permit is irrelevant. 17

4. The Board's decision complies with GMA guidelines 18

C. Neither the Hirst Petitioners Nor the Board Collaterally Attacked the Nooksack Instream Resources Protection Program. 19

III. Conclusion 20

Declaration of Service 21

TABLE OF AUTHORITIES

Cases

Baker v. Morris, 84 Wn.2d 804, 529 P.2d 1091 (1974) 10
Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002) 2, 9
Hubbard v. Dept. of Ecology, 86 Wn. App. 119, 936 P.2d 27 (1997) 8
Kittitas County v. EWGMHB, 172 Wn.2d 144 256 P.3d 1193 (2011) ..... passim
Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 11 P.3d 726 (2000) 6, 7, 10, 16
Rettkowski v. Dep't of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993) 3
Squaxin Island Tribe v. Washington State Dept. of Ecology, 177 Wn. App. 734, 312 P.3d 766 (2013) 2, 8
Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013) 8
Weden v. San Juan County, 135 Wn.2d 678, 958 P.2d 273 (1998) 15
Winans v. W.A.S., Inc., 112 Wn.2d 529, 772 P.2d 1001 (1989) 10

Statutes

Chapter 90.03 RCW 2
Chapter 90.44.040 2
RCW 19.27.097 ..... 5, 18
RCW 58.17.110 ..... 5, 11, 18
RCW 90.03.005 2
RCW 90.03.345 ..... 8, 16
RCW 90.030.010 2
RCW 90.44.030 ..... passim
RCW 90.44.040 ..... 2, 14
RCW 90.44.050 ..... 2, 15
RCW 90.54.020 6

Regulations

Chapter 173-501 WAC 2
WAC 173-501-020 ..... 6, 19
WAC 173-501-070 ..... 8, 9, 10
WAC 365-196-825 ..... 18, 19

I. INTRODUCTION

As the Supreme Court held in *Kittitas County v. Eastern Washington Growth Management Hearings Board* ("*Kittitas*"), "[t]he GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA."[1] Counties "must" "assure that land use is not inconsistent with available water resources"[2] by, among other things, "assur[ing] that water is both factually and legally available"[3] for new groundwater users. The Growth Management Hearings Board's ("Board's") Final Decision and Order ("FDO") emphasizes that "[t]he GMA is replete with requirements to protect ground and surface water and ensure land uses are compatible for fish and wildlife."[4] Courts give "substantial weight" to the interpretation of these GMA requirements by the Board.[5]

In their brief, however, amici curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau (collectively, "Realtors") treat the GMA as a mere appendage to

---

[1] *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 181, 256 P.3d 1193 (2011).
[2] *Kittitas*, 172 Wn.2d at 178.
[3] *Id.* at 180.
[4] AR 1369 (No. 70796-5-I) & AR 1363 (No. 72132-1-I), *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 22. "AR" refers to the Certified Administrative Records with sequential page numbers prepared by the Growth Management Hearings Board. We omit the preceding zeroes. The case number indicates the case record cite.
[5] *Kittitas*, 172 Wn.2d at 156 (2011) (internal citations omitted).

WAC Chapter 173-501, the Department of Ecology's 1985 Nooksack Instream Resources Protection Program.[6] The Realtors belittle the Board, a state tribunal which, the Realtors scoff, "has neither the authority not the expertise" to address water availability issues under the GMA.[7]

In fact, it is the Realtors who fail to demonstrate mastery of water availability concepts under state law. Both the County's Comprehensive Plan and the Nooksack Instream Resources Protection Program must be consistent with the State Water Code (Chapter 90.03 RCW)[8] and Groundwater Code (Chapter 90.44.040). These state water laws establish a system of "first in time, first in right" priority that applies to permit-exempt wells.[9] As the Court of Appeals wrote in *Squaxin Island Tribe*:

> 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.[10]

---

[6] Chapter 173-501 WAC (Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA 1)).

[7] Realtors' Brief at 2.

[8] "The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided." RCW 90.03.005.

[9] *See* RCW 90.030.010 ("as between appropriations, the first in time shall be the first in right"), RCW 90.44.030 (defining "groundwaters" to include "all waters" beneath the land surface or the bed of a water body), RCW 90.44.040 (all groundwaters are subject to appropriation) and RCW 90.44.050 (specified groundwater withdrawals are exempt <u>only</u> "from the provisions of this section" requiring a permit application) emphasis added.

[10] *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 Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (under RCW 90.44.050, groundwater rights exempt from the permit requirement are "otherwise treated in the same way as other

The FDO is entirely consistent with this holding. The Realtors' argument, in contrast, is premised on the legal fallacy that permit-exempt wells are also exempt from the priority system, allowing junior permit-exempt wells to impair senior water rights. The Realtors further claim that the Nooksack Instream Resources Protection Program carves out an exception to the priority system in Whatcom County, where (according to the Realtors) Ecology has "determined" that water is "legally available" to all junior permit-exempt water users, even when junior water withdrawals will "factually" (physically) impair a senior instream flow water right. This legal fiction, the Realtors contend, binds the Board and limits the County's GMA obligations to protect surface and ground waters and fish habitat. Because the 1985 Instream Resources Protection Program does not and cannot supersede the state law of priority, the Realtors are wrong.

The Realtors do not dispute the Board's findings that:

- "[A]verage minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year[,]"[11]
- "The link between stream flows and groundwater withdrawals in the

---

perfected water rights"); *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226 n.1, 858 P.2d 232 (1993) (finding that RCW 90.44.030 "emphasizes the potential connections between groundwater and surface water, and makes evident the Legislature's intent that groundwater rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of 'first in time, first in right.'"

[11] AR 1371 (No. 70796-5-I) & AR 1386 (No. 72132-1-I), FDO at 24.

shallow Whatcom aquifers is well documented[,]"[12]

- The County itself has found that "a proliferation of rural residential exempt wells" has created "'difficulties for effective water resource management' by drawing down underlying aquifers and reducing groundwater recharge of streams[,]"[13] and
- As stated in the County's own Comprehensive Plan, surface and groundwater "problems and issues have already led to many impacts," including "fisheries depletion and . . . other instream problems; a lack of adequate water storage and delivery systems to meet the requirements of growth and development; concerns with the availability of water to meet existing agricultural and public water supply demands; [and] potential difficulties and additional costs associated with obtaining building permits and subdivision approvals . . ."[14]

If the Realtors' argument were accepted, the Board would be stripped of the authority to consider these facts relating to water resources in Whatcom County. It would have to ignore the depletion of aquifers by permit-exempt water users, unmet instream flows, and fisheries depletion. The legal fiction of water "availability" would prevent the actual

---

[12] *Id.*
[13] *Id.*
[14] AR 1373 (No. 70796-5-I) & AR 1388 (No. 72132-1-I), FDO at 26.

protection of water resources as required by the GMA.

Consistent with the GMA and state water law, the Board properly determined that the County must protect water resources by ensuring that water is legally available before it approves subdivisions and building permits. Consistent with the GMA and state water law, applicants have the burden to show that a junior permit-exempt groundwater withdrawal will not impair a senior instream water right.[15] The Board, not the Realtors, correctly interprets the GMA's water resource protection requirements.

II. ARGUMENT

A. State Water Law Governs the Implementation of the Nooksack Instream Resources Protection Program.

1. Under the GMA, Ecology's role is to assist the County in meeting its GMA obligation, including the protection of instream flows as mandated by the GMA and state water law.

The Realtors' first argument (Argument A.1, pages 3-6) provides tangential and often irrelevant information regarding Ecology's role in issuing water permits and establishing instream flows. This discussion omits the GMA and fails to mention that Ecology's role under the GMA is to assist the County in meeting GMA obligations to protect water resources and wildlife habitat.[16]

---

[15] AR 1387-89 (No. 70796-5-I) & AR 1402-04 (No. 72132-1-I), FDO at 40-42, *citing, inter alia*, RCW 19.27.097 and RCW 58.17.110.
[16] *Kittitas*, 172 Wn.2d at 180.

The final paragraph in this argument asserts that "the specific provisions of the Ecology regulation determines the extent of legal permitted and permit-exempt water use within each basin."[17] It is important to reiterate that the Ecology regulation in question, the Nooksack Instream Resources Protection Program, "shall be consistent with the provisions of chapter 90.54 RCW."[18] RCW 90.54.020(3)(a) "provides that withdrawals of water which would conflict with the base [instream] flows 'shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.'"[19] No party or amicus, including the Realtors, has argued, much less demonstrated, that overriding considerations of the public interest authorize permit-exempt groundwater users to conflict with senior instream flows.

The Supreme Court has held that "*minimum flows,* once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows."[20] *Postema* cites RCW

---

[17] Realtors' Brief at 6.
[18] WAC 173-501-020.
[19] *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726, 735 (2000) ("*Postema*"). *See also* WAC 173-501-020.
[20] *Postema* at 82, emphasis in original.

90.44.030,[21] which applies prior appropriation principles to all ground waters, whether permitted or not. *Postema*'s holding that a "[a] minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights" thus applies to permit-exempt wells.[22]

Consequently, the Realtors' statement that the Nooksack Instream Resource Protection Program's "specific provisions . . . determine the extent of legal . . . water use in the basin"[23] must be interpreted in the context of governing state law, which protects senior instream flows from impairment by junior permit-exempt groundwater withdrawals.

2. Instream flows are water rights that do not have to be "applied" or "extended" to junior permit-exempt wells.

The Realtors' Argument A.2 (Realtors' Brief at pages 6-7) asserts that the instream flows established by the Nooksack Instream Resource Protection Program "do not apply to permit-exempt groundwater withdrawals."[24] The Realtors then assert that the groundwater subsection "extends the Rule's provisions" only to groundwater permits.[25]

This portrayal of an instream water right as if it were an overlay, which must be specifically "applied to" or "extended to" junior water

---

[21] *Postema* at 82.
[22] *Id.*
[23] Realtors' Brief at 6.
[24] Realtors' Brief at 6.
[25] Realtors' Brief at 6.

withdrawals, mischaracterizes state law. In fact, an instream flow is an independent water right with a priority date as of its effective date:

> The establishment of . . . minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment . . . .[26]

The Water Code states unequivocally that such an appropriation "is superior to any subsequent right hereby authorized to be acquired in or to groundwater."[27] Thus, the claim that the Nooksack Instream Resources Protection Program would need to affirmatively "apply" or "extend" the instream flow water right to junior permit-exempt groundwater users is incorrect. The instream flow "applies" by its definition as a water right under the state law of prior appropriation.[28]

3. The Nooksack Instream Protection Program does not determine that water is "legally available" to junior permit-exempt users who would impair an instream water right.

The Realtors' Argument A.3 addresses WAC 173-501-070(2), contending that it "applies to groundwater use."[29] Ecology's amicus brief, in contrast, states that this provision only "provides an exemption from the

---

[26] RCW 90.03.345 (emphasis added); *see also Swinomish Indian Tribal Community v. Washington State Dept. of Ecology*, 178 Wn.2d 571, 584-86, 311 P.3d 6 (2013).
[27] RCW 90.44.030, *Hubbard v. Dept. of Ecology*, 86 Wn. App. 119, 124-25, 936 P.2d 27 (1997) (minimum flow established by rule treated as an appropriation with priority over subsequent water rights appropriators).
[28] *Squaxin Island Tribe*, 177 Wn. App. at 737 fn. 3.
[29] Realtors' Brief at 7.

Rule for surface water use, and does not supersede the groundwater exemptions under RCW 90.44.050 . . . ."[30] The plain language of WAC 173-501-070(2) supports Ecology's interpretation of this provision. WAC 173-501-070(2) provides in full that:

> (2) 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) exempts "diversions," which are the appropriation of surface waters,[31] and refers to the source of those appropriations as "Whatcom Creek" and "all other streams." It does not mention "withdrawals," which are the appropriation of ground waters.[32] Its only use of the term "appropriation" is to close Whatcom Creek to future appropriations. This subsection does not exempt permit-exempt groundwater withdrawals from the Nooksack Instream Protection

---

[30] Ecology Amicus Brief at 16-17.
[31] *Campbell & Gwinn*, 146 Wn.2d at 16.
[32] *Id.*

Program.[33]

Further, as *Postema* holds, "[n]or can there be any serious thought that Ecology intended groundwater withdrawals be allowed to deplete surface streams; Ecology's aim has been to protect instream flows as required by statute."[34] The Realtors' claim that WAC 173-501-070(2) constitutes a declaration of the "legal availability" of water for groundwater use is inconsistent both with the protection of instream flows and with Ecology's determination that the Nooksack Instream Resources Protection Program (including WAC 173-501-070(2)) "only governs water uses proposed through the water right permitting system, and not permit- exempt groundwater withdrawals."[35]

Nor does the Realtors' discussion of "legal availability" address the Board's unchallenged factual finding, which quotes Ecology's summary of water availability in the Nooksack Basin: "'Most water in the Nooksack watershed is already legally spoken for.'"[36] The Realtors merely

---

[33] Our agreement with Ecology only extends to the agency's interpretation of this provision as not applying to the groundwater exemptions. As described in our Answer to Ecology's Amicus Brief, we do not agree with Ecology that permit-exempt wells are exempt from prior appropriation.

[34] *Postema* at 88, citing *Winans v. W.A.S., Inc.*, 112 Wn.2d 529, 540, 772 P.2d 1001 (1989) (regulations must be consistent with statutes under which they are promulgated); *Baker v. Morris*, 84 Wn.2d 804, 809-10, 529 P.2d 1091 (1974) (agency exceeds its rule-making authority to the extent it modifies or amends precise requirements of statute).

[35] Ecology Brief at 14.

[36] AR 1371 (No. 70796-5-I) & AR 1386 (No. 72132-1-I), FDO at 24, quoting Dept. of Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1 (AR 421).

assert that the Nooksack Instream Resources Protection Program embodies a determination that "water is legally available for a permit-exempt groundwater well serving a new single-family house."[37] If this were truly the case, the Program would allow junior permit-exempt water users to take the last drop of water from a senior instream flow. The fiction of "legal availability" for junior wells would trump the factual consequences of water withdrawals that impair senior instream flows.

Apparently recognizing this insurmountable flaw in their argument, the Realtors attempt to sweep it under the rug in a footnote. Absurdly, the Realtors claim that *Kittitas* supports the allocation of water to junior users in violation of a senior instream water right, even when water is not "factually" available.[38] The cited discussion in *Kittitas* does not support this conclusion. Rather, it addresses a county's claim that, under a GMA provision codified at RCW 58.17.110, the county was only required to determine that water is "factually available underground," without consideration of legal availability.[39] In ruling against this interpretation of the GMA, the Supreme Court stated:

> The parties dispute whether the requirement of RCW 58.17.110 that counties assure appropriate provisions are made for potable water supplies means only that counties must assure that water is

[37] Realtors' Brief at 8.
[38] Realtors' Brief at 8-9, fn. 3.
[39] *Kittitas* at 179-180.

> factually available underground or that water is both factually and legally available."[40]

The Court concluded that water must be factually and legally available.[41] *Kittitas* does not support the Realtors' suggestion that the Nooksack Instream Flow Protection Program's putative fiat of "legal availability" would require the County to issue permits, even when water is not "factually" available.

Kittitas emphasizes that "overuse of the well permit exemption" could "come at a great cost to the existing water rights of nearby property owners."[42] A senior instream flow is, of course, a neighbor with an existing water right. *Kittitas* does not stand for the proposition that the GMA allows the County to ignore the "factual" impairment of instream flows based on a fiction of "legal availability."

B. The Board's Decision is Consistent with the GMA's Requirements to Protect Surface and Ground Waters and Habitat for Fish and Wildlife.

The Board correctly found that the County's restriction on permit-exempt wells for subdivisions "falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals."[43] The Realtors do not argue that the County's regulations

---

[40] *Kittitas* at 180-81.
[41] *Kittitas* at 180-81.
[42] *Kittitas* at 180.
[43] AR 1387 (No. 70796-5-I) & AR 1402 (No. 72132-1-I), FDO at 40.

do, in fact, protect instream flows from impairment by groundwater withdrawals. Nor could they, because the undisputed evidence in the record overwhelmingly supports the Board's conclusion that water resources are not protected by the County's regulations.[44]

Rather, the Realtors assert that the Nooksack Instream Resources Protection Program specifically authorizes impairment of the senior instream water right by junior water users. In their Argument IV.B (pp. 9-10), the Realtors extend this argument to subsume the GMA. According to the Realtors, the Nooksack Instream Resources Protection Program prohibits the County from complying with its GMA obligation to adopt regulations protecting senior instream flows from impairment by junior permit-exempt water users. Thus, under the Realtors' reading of the law, the GMA's mandate to protect surface and ground waters is effectively preempted by the 1985 Instream Resources Protection Program. As discussed below, all components of the Realtors' argument are wrong.

1. *Kittitas* held that state water law does not preempt the County from protecting groundwater from detrimental land uses.

[44] *See, e.g.*, AR 1371 (No. 70796-5-I) & AR 1386 (No. 72132-1-I), FDO at 24 (permit-exempt wells draw down closed aquifers and reduce groundwater recharge of streams); AR 1263 (No. 70796-5-I) & AR 1803 (No. 72132-1-I), R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80 (270% increase in exempt wells between 1986 and 2011, with 77% of the increase in parts of WRIA closed to water appropriation for part or all of the year).

The Realtors' first argument in this section (Realtors' Brief at pages 10-12) addresses *Kittitas*, which upheld the Board's decision that a county's subdivision regulation violated the GMA by failing to protect water resources.[45] Kittitas County had unsuccessfully argued that it was "preempted from adopting regulations related to the protection of groundwater resources, authority it suggests rests entirely with Ecology."[46] In particular, the county cited RCW 90.44.040, which establishes that all groundwaters "'belong to the public and are subject to appropriation for beneficial use under the terms of this chapter and *not otherwise*.'"[47]

Kittitas County claimed that any determination affecting groundwaters under the GMA would be inconsistent with this state law requirement. The Supreme Court rejected this effort to negate the GMA's water resource requirements, however, stating that the cited provision only prevents counties "from separately *appropriating* groundwaters," not from "protecting public waters from detrimental land uses."[48] The Nooksack Instream Resources Protection Program similarly does not preempt the County from complying with the GMA.

2. The Board correctly applied governing precedent in determining the County's GMA obligations.

---

[45] *Kittitas* at 177-178.
[46] *Kittitas* at 178.
[47] *Kittitas* at 178, quoting RCW 90.44.040 (emphasis in original).
[48] *Kittitas* at 178.

This section (Realtors' Brief at pages 12-16) consists of a grab-bag of arguments which, individually and cumulatively, fail to advance the Realtors' case.

The first argument asserts that "a development regulation requiring a single-family building permit applicant to demonstrate that a permit-exempt well would not impair minimum instream flows" would "nullify the permit exemption in RCW 90.44.050."[49] This argument is a non sequitur. Nothing in RCW 90.44.050, which merely defines groundwater rights that can be established without an Ecology permit, purports to allow permit-exempt wells to impair minimum instream flows. Conversely, nothing in the Board's ruling requires permit-exempt groundwater users to apply to Ecology for a permit, in conflict with RCW 90.44.050. There is no conflict with state law, and therefore no "unconstitutional" prohibition of what state law permits.[50]

The Realtors then attempt to distinguish *Postema* on the spurious theory that *Postema* held that the non-impairment requirement "simply does not apply to exempt wells."[51] As discussed above, *Postema*'s holding

---

[49] Realtors' Brief at 12.

[50] *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273, 280 (1998) "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."

[51] Realtors' Brief at 14.

that minimum flows "are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater"[52] cites RCW 90.03.345 and RCW 90.44.030,[53] which apply the overarching principle of prior appropriation to all groundwaters, including permit-exempt wells.

Postema emphasizes that "an instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources."[54] The Supreme Court specifically rejected the contention that the existence of permit-exempt uses demonstrates that a "de minimis" effect on groundwater is unimportant. This is the context for the court's statement that "legislative exemptions from the permitting system do not determine what 'impairment' means."[55] As *Postema* shows, the fact that a junior water use does not require an Ecology permit does not establish that it is "de minimis" and, therefore, cannot impair a senior instream flow.

Finally, the Realtors assail the Board's consideration of a letter that Ecology provided to Whatcom County during the pendency of the County's Comprehensive Plan revision. Ecology told the County that the letter contained "information that may be of interest and/or helpful to

---

[52] *Postema* at 82, emphasis in original.
[53] *Postema* at 82.
[54] *Postema* at 90.
[55] *Postema* at 90, emphasis added.

you."[56] The letter was written to Snohomish County, and Ecology obviously believed that it provided useful information on state water law that would help Whatcom County meet its GMA obligations.

The Realtors incorrectly assert that there are no "applicable legal principles" that are the same in Whatcom and Snohomish Counties. This contention that Ecology invents state water law anew every time it adopts an instream flow rule is contrary to law. The Board was absolutely correct that "the applicable legal principles are the same"; statewide, as the Board recognized, a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body must not cause further adverse impact on instream flows.[57]

3. The fact that the Legislature did not pass a 1990 bill requiring some permit-exempt groundwater withdrawals to obtain an Ecology permit is irrelevant.

The Realtors contend, on pages 16-17 of their brief, that the State Legislature's inaction on a 1990 bill that would have required some permit-exempt water uses to obtain an Ecology permit somehow relates to the Board's decision. There is no connection. The cited legislative history

---

[56] AR 1388 (No. 70796-5-I) & AR 1403 (No. 72132-1-I record), FDO at 41, referencing AR 456 (No. 70796-5-I), Ex. C-678 Ecology, Maia Bellon letter to Clay White, Snohomish County PDS (Dec. 19, 2011) at 7. See also AR 809 (No. 70796-5-I), Ex. R-082 at 4 Kasey Ignac, Ecology, email to Whatcom County PDS.

[57] AR 1389 (No. 70796-5-I) & AR 1403 (No. 72132-1-I) FDO at 41 fn. 154; Realtors' Brief at 15.

describes a proposed bill that would have changed the mechanism for obtaining a water right, requiring an Ecology permit in some instances where a permit is not required. The Realtors incomprehensibly assert that this legislative history conflicts with Board's decision.

The Realtors' are wrong. The Board's decision does not require permit-exempt users to get an Ecology water right permit. It requires Whatcom County to ensure that water is legally available before the County issues building and subdivision approvals, as required by the provision of the GMA that the Legislature ultimately adopted.[58]

4. The Board's decision complies with GMA guidelines.

The Board considered WAC 365-196-825 in reaching its decision. As the Board observed, this guideline provides:

> Each applicant for a building permit of a building needing potable water shall provide evidence of an adequate water supply for the intended use of the building. Local regulations should be designed to produce enough data to make such a determination, addressing both water quality and water quantity issues.[59]

This guideline was one factor in the Board's determination that Whatcom County's regulations violated the GMA, because the County does not require applicants to provide evidence that permit-exempt wells

[58] RCW 58.17.110 and RCW 19.27.097.
[59] AR 1389 (70796-5-I) & AR 1404 (72132-1-I) fn. 156, FDO at 42 fn. 156.

will not impair senior instream flows.[60] The Board's interpretation of this provision is entitled to substantial weight.[61]

WAC 365-196-825 further states that "local regulations should be consistent" with instream flow rules limiting the availability of water. For all the reasons set forth in this brief, the Board's decision is consistent with the Nooksack Instream Resources Protection Program and its governing state law.

C. Neither the Hirst Petitioners Nor the Board Collaterally Attacked the Nooksack Instream Resources Protection Program.

The purpose of the Nooksack Instream Resources Protection Program is to protect "[t]he quality of the natural environment" by retaining "perennial rivers, streams, and lakes in the Nooksack water resource inventory area with instream flows and levels necessary to provide for preservation of wildlife, fish . . . and other environmental values, and . . . water quality."[62] The Hirst Petitioners' position and the Board's decision are consistent with the Nooksack Instream Resources Protection Program, because they are intended to ensure that the County's land use planning under the GMA helps to protect wildlife, fish, and water quality by coordinating development with water availability.

---

[60] AR 1389 (70796-5-I) & AR 1404 (72132-1-I), FDO at 42.
[61] *Kittitas,* 172 Wn.2d at 156, 256 P.3d at 1199 (2011) (internal citations omitted).
[62] WAC 173-501-020.

The County's appeal asserted that the Nooksack Instream Resources Protection Program does not operate to prevent impairment of instream resources by junior permit-exempt water users, and that the GMA's protective requirements are subsumed into "Ecology's interpretation" of the Nooksack Program. The County asserted the Nooksack Instream Resources Protection Program as a shield from its GMA obligation to protect water resources; the Hirst Petitioners did not attack the Program, which promotes water resource protection.

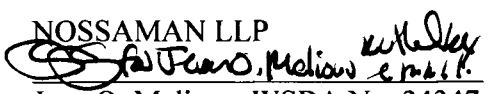
We do not agree with the Realtors' argument that Nooksack Instream Resources Protection Program exempts Whatcom County from the overarching state law of prior appropriation. Nor does a careful reading of the rule support their argument. Our objection is based on our interpretation of governing law, not on a collateral attack on a rule intended to protect the environment – just as the Hirst Petitioners' case seeks to protect the environment pursuant to the GMA.

III. CONCLUSION

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

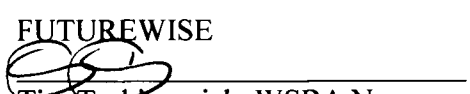
Respectfully submitted on this 24th day of December, 2014.

NOSSAMAN LLP



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

FUTUREWISE



Tim Trohimovich, WSBA No. 22367, Attorney for Futurewise

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 the Washington Realtors et al.

Washington State Court of Appeals
Division I
One Union Square
600 University St
Seattle, WA 98101-1176
One Original and One Copy each for Case No. 70796-5-I and Case No. 72132-1-I.

	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

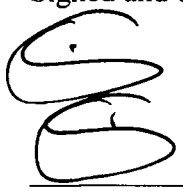
Ms. Alethea Hart
Snohomish County Prosecutor's Office
3000 Rockefeller Ave
Everett, WA, 98201-4046

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