

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 06, 2015, 4:42 pm
BY RONALD R. CARPENTER
CLERK

E

No. 91475-3

hph

RECEIVED BY E-MAIL

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and
DAVID STALHEIM, AND FUTUREWISE,
Appellants,

v.

WHATCOM COUNTY AND GROWTH MANAGEMENT HEARINGS
BOARD,
Respondents,
and

WASHINGTON STATE ASSOCIATION OF COUNTIES, SQUAXIN
ISLAND INDIAN TRIBE, CENTER FOR ENVIRONMENTAL LAW
AND POLICY, WASHINGTON REALTORS®, BUILDING
INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON
STATE FARM BUREAU, AND STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Amicus Curiae.

**APPELLANTS' ANSWER TO THE AMICUS CURIAE BRIEFS OF
WASHINGTON REALTORS®, BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, WASHINGTON STATE
FARM BUREAU, AND 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
816 Second Avenue, Suite 200
Seattle, WA 98104
(206)343-0681, Ext. 118
tim@futurewise.org
Attorney for Respondent
Futurewise

 ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

<u>Topic</u>	<u>Page Number</u>
Table of Authorities	ii
I. Introduction.....	1
II. Argument	3
A. Substantial Evidence Supports the Board’s Decision.	3
B. The Board’s Decision is Consistent with the GMA and with State Water Law.....	6
1. The GMA and State Water Law Require Protection of Instream Flows.....	6
2. The Board Considered GMA Regulations.....	7
C. The Board’s Decision Is Consistent with the Nooksack Rule.	8
D. Consistent Application of the State Law of Prior Appropriation to All Basins Within the State Will Provide Counties With a Clear Standard to Guide GMA Compliance.....	10
1. Ecology’s Shifting Interpretations of Basin Rules Do Not Provide Clear or Consistent Guidance.....	10
2. The Realtors’ Interpretation of the Nooksack Rule is Inconsistent with Ecology’s Amicus Brief Interpretation.	11
E. The Board’s Decision Does Not Address or Apply the Water Code’s Impairment Analysis.....	13
F. Counties Will Be Able to Comply with State Law.....	15
G. The Realtors’ Discussion of Public Water Systems Is Irrelevant.	18
H. The Board’s Decision Is Not a Collateral Attack on the Nooksack Rule.	19
III. Conclusion	20
Declaration of Service.....	22

TABLE OF AUTHORITIES

Cases

<i>Dept. of Ecology v. Campbell & Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2001).	2, 6, 12
<i>Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011).....	1, 8, 14, 15
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	3, 7, 19
<i>Rettkowski v. Dep't of Ecology</i> , 122 Wn.2d 219, 858 P.2d 232 (1993).....	7
<i>Squaxin Island Tribe v. Washington State Dept. of Ecology</i> , 177 Wn. App. 734, 312 P.3d 766 (2013).....	6

Statutes

Chapter 90.03 RCW.....	6
Chapter 90.44 RCW.....	6
Chapter 90.54 RCW.....	6
RCW 19.27.097	7, 13, 15
RCW 36.70A.020.....	2
RCW 36.70A.070.....	2, 13
RCW 58.17.110	7, 13, 15
RCW 90.03.005	6
RCW 90.03.290	13
RCW 90.03.345	7
RCW 90.030.010	6
RCW 90.44.030	6, 7
RCW 90.44.040	6
RCW 90.44.050	2, 6
RCW 90.44.130	17
RCW 90.44.180	17
RCW 90.44.250	17
RCW 90.54.020	3
RCW 90.54.030	17
RCW 90.54.130	17

Regulations

Chapter 173-501 WAC	1
WAC 173-501-020.....	8
WAC 173-501-070.....	12
WAC 365-196-715.....	17
WAC 365-196-825.....	7, 8, 17

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), 2014 WL 4809403 16

County Code

WCC 24.11.050 19

I. INTRODUCTION

Three decades ago, the Department of Ecology (“Ecology”) recognized the significant challenge posed by water scarcity in Whatcom County (“County”) when it adopted the Nooksack Rule,¹ closing basins and establishing minimum instream flows throughout the County. Five years later, the State Legislature adopted the Growth Management Act (“GMA”), requiring “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”.²

When water scarcity has the potential to impose limitations on new water users, the easiest response for counties – and the most advantageous response for the building industry – is to meet any shortfall by dipping into the public’s instream flow water rights. Contrary to this path of least resistance, the Growth Management Hearings Board (“Board”) found that the GMA requires the County to protect instream water resources. Amici curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau (collectively, “Realtors”) and Washington State Association of Counties (“WSAC”) seek to

¹ Ch. 173-501 WAC (Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA 1)).

² *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 180, 256 P.3d 1193, 1210 (2011) (“*Kittitas*”).

overturn the Board's decision.

The Realtors and WSAC argue that Ecology did not extend instream flow water rights to permit-exempt wells in the Nooksack Rule. They do not explain why senior instream flow water rights need to be "extended" to junior permit exempt wells. Their briefs fail to address the fact that state law applies the principle of prior appropriation to permit-exempt wells.³

In fact, in four briefs totaling close to 70 pages filed by the County and its amici, the term "prior appropriation" does not appear once. The County, Ecology, the Realtors, and WSAC all simply ignore the state's governing water law principle of "first in time, first in right."

The Board correctly interpreted the County's GMA obligation to protect senior instream flows. The Nooksack Rule does not immunize permit-exempt wells from the state law of prior appropriation or from the GMA's water resource protection requirements. The Board's decision should be upheld under RCW 36.70A.070(5)(c)(iv) and 36.70A.020(10).

³ "[A]s between appropriations, the first in time shall be the first in right" (90.44.030); permit-exempt wells "shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter" (RCW 90.44.050) (emphasis added); "While . . . RCW 90.44.050 allows . . . acquisition of a groundwater right without [a permit], once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that first in time is the first in right." *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2001) ("*Campbell & Gwinn*").

II. ARGUMENT

A. Substantial Evidence Supports the Board's Decision.

The Realtors and WSAC do not contest the Board's findings, summarized below, that permit-exempt wells deplete instream flows in Whatcom County. They do not argue that the County's Comprehensive Plan will, in fact, ensure the protection of instream resources. Rather, they argue that the Nooksack Rule must be interpreted to prohibit the Board from considering whether instream flows require protection from piecemeal impairment by junior permit-exempt wells.⁴

State law defines instream flows as "necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."⁵ As *Postema* observed, Ecology's intent in adopting basin rules "was and is to protect instream flows."⁶ The Board correctly based its decision on the requirement to protect necessary instream flows.

⁴ Brief of Amici Curiae Realtors et al., Supreme Ct. Case No. 91475-3 (Sept. 4, 2015) ("Realtors' Brief") at 1-2 (Ecology solely governs water resources; the Board has "neither the authority nor the expertise"); Brief of Amicus Curiae WSAC, Supreme Ct. Case No. 91475-3 (Sept. 4, 2015) ("WSAC Brief") at 12-13 (arguing that counties should be able to rely on Ecology's interpretations to the exclusion of the Board's GMA jurisdiction, except when counties do not want to rely on Ecology's interpretations). *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 89, 11 P.3d 726 (2000) ("*Postema*"), stated that "an instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources."

⁵ RCW 90.54.020(3)(a) (emphasis added). See also *Postema*, 142 Wn.2d at 94-95.

⁶ *Postema*, 142 Wn. 2d at 89 (emphasis added).

The Realtors and WSAC do not dispute that instream flows often are not met during Whatcom County's dry season, and that population growth and increased development relying on permit-exempt wells will exacerbate this problem. The Board's GMA interpretation carefully considered the County's water availability problems:

- “[A]verage minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year[;]”⁷
- “The link between stream flows and groundwater withdrawals in the shallow Whatcom aquifers is well documented[;]”⁸
- 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[;]”⁹ 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

⁷ AR 1371 (No. 70796-5-I) & AR 1386 (No. 72132-1-I), FDO at 24. Since there are two overlapping administrative records (AR) in this case, we distinguish between them by indicating the court of appeals case under which the record was filed.

⁸ *Id.*

⁹ *Id.*

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 .

...”¹⁰

The Board’s decision appropriately considered this unchallenged evidence, which the Realtors and WSAC fail to address.

Instream flow protection is not a frivolous luxury that should be ignored when new permit-exempt well users want water. In Whatcom County, instream flows are necessary for the protection of “[t]hree Puget Sound species found in WRIA 1 – chinook, bull trout, and steelhead – [which] are listed as ‘threatened’ under the Federal Endangered Species Act.”¹¹ Two of the chinook populations “are genetically unique and . . . are considered to be essential to recovering Puget Sound Chinook.”¹²

Without water, salmon cannot survive. Without Whatcom County’s chinook populations, Puget Sound chinook may not survive. Protection of these necessary stream flows is not optional, and it should not depend on whether Ecology’s most recent interpretation of a basin rule argues for or against instream flow protection.

¹⁰ AR 1373 (No. 70796-5-I) & AR 1388 (No. 72132-1-I), FDO at 26.

¹¹ AR 480 (No. 70796-5-I) & AR 495 (No. 72132-1-I), (*WRIA 1 State of the Watershed Report*, 2010 at 11).

¹² *Id.*

B. The Board's Decision is Consistent with the GMA and with State Water Law.

1. The GMA and State Water Law Require Protection of Instream Flows.

The Realtors and WSAC are correct that the measures to protect water resources in the County's Comprehensive Plan must be consistent with state water law.¹³ This includes the State Water Code (Chapter 90.03 RCW)¹⁴ and Groundwater Code (Chapter 90.44 RCW), as well as the State Water Resources Act of 1971 (Chapter 90.54 RCW). The Board's decision is consistent with the GMA and with all of these state water statutes.

State water laws establish a system of "first in time, first in right" priority that applies to permit-exempt wells, just as to other uses of water.¹⁵ As the Court of Appeals stated 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 90.44.030.¹⁶

¹³ Realtors' Brief at 10, WSAC Brief at 2.

¹⁴ "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.

¹⁵ 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 only "from the provisions of this section" requiring a permit application) (emphasis added).

¹⁶ *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 *Campbell & Gwinn*, 146 Wn.2d at 9 (under RCW 90.44.050, groundwater rights that are exempt from the permit requirement are "otherwise treated in the same way as other perfected water rights"); *Rettkowski v. Dep't*

While never addressing prior appropriation squarely, the Realtors assert that *Postema* allows permit-exempt wells to impair instream flows.¹⁷ In fact, *Postema* holds precisely the opposite: minimum flows “are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater.”¹⁸ To support this conclusion, *Postema* cites statutory provisions that apply the overarching principle of prior appropriation to all groundwaters, including permit-exempt wells.

Consistent with the GMA and state water law, the Board properly determined that applicants have the burden to show that a junior permit-exempt groundwater withdrawal will not impair a senior instream water right.¹⁹

2. The Board Considered GMA Regulations.

Contrary to the Realtors’ contention, the Board considered GMA regulations. As the Board observed, WAC 365-196-825 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

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.’”

¹⁷ Realtors’ Brief at 15-16 (arguing that, under *Postema*, the non-impairment requirement “simply does not apply to permit-exempt wells”).

¹⁸ *Postema* at 82, emphasis in original (*citing* RCW 90.03.345 and RCW 90.44.030).

¹⁹ 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.

to produce enough data to make such a determination, addressing both water quality and water quantity issues.²⁰

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 will not impair senior instream flows.²¹ The Board's interpretation of this provision is entitled to substantial weight.²²

WAC 365-196-825 further states that "local regulations should be consistent" with instream flow rules that limit the availability of water. As discussed further in the following section, the Board's decision is consistent with the Nooksack Rule.

C. The Board's Decision Is Consistent with the Nooksack Rule.

WSAC correctly observes that "Hirst and the Board insist that Whatcom County align its local GMA plan and regulations with the portion of the Nooksack Rule that establishes instream flows".²³ The Nooksack Rule, by its own terms, requires the retention of instream flows. That is its purpose.²⁴ The Board's decision implements that purpose and is

²⁰ AR 1389 (70796-5-I) & AR 1404 (72132-1-I) fn. 156, FDO at 42 fn. 156.

²¹ AR 1389 (70796-5-I) & AR 1404 (72132-1-I), FDO at 42.

²² *Kittitas*, 172 Wn.2d at 156 (internal citations omitted).

²³ WSAC Brief at 3.

²⁴ WAC 173-501-020.

consistent with the Nooksack Rule.²⁵

The Realtors argue that the Board's decision is inconsistent with the Realtors' amicus brief interpretation of the Nooksack Rule,²⁶ while WSAC argues that the Board's decision is inconsistent with Ecology's amicus brief interpretation.²⁷ As we establish in our answer to Ecology's amicus brief, the Board's decision was based on the administrative record, including evidence regarding Ecology's interpretation of the Nooksack Rule contained in its published guidance.²⁸ It is also consistent with Ecology's interpretation of similar rules, discussed in the amicus brief submitted by the Squaxin Island Tribe. The outlier is Ecology's amicus brief interpretation of the Nooksack Rule, which claims that the Rule's purpose is to immunize junior permit-exempt wells from senior instream flows. The Board's decision, not the Realtors' or Ecology's amicus brief interpretations of the Nooksack Rule, complies with state law.

²⁵ Hirst's Answer to the Amicus Curiae Brief of WSAC, Ct. of Apps., Div. I, Case No. 70796-5-I (Dec. 24, 2014) at 7-12 further explains why WSAC's interpretation of the Nooksack Rule is incorrect, and is incorporated by reference.

²⁶ Realtors' Brief at 7-9. As discussed below, the Realtors' interpretation is inconsistent with Ecology's interpretation.

²⁷ WSAC Brief at 12-14 (counties should be allowed to rely on Ecology's interpretations, except when they do not want to).

²⁸ Hirst Appellants' Answer to the Amicus Curiae Brief of Ecology, Supreme Ct. Case No. 91475-3 (Oct. 6, 2015) ("Hirst Appellants' Answer to Ecology") at 15-18. This discussion also addressed the Realtors' contention that the Board erred by considering an Ecology letter to Snohomish County. *See also* Supplemental Brief of Appellants, Supreme Ct. Case No. 91475-3 (Aug. 7, 2015) at 13-15.

D. Consistent Application of the State Law of Prior Appropriation to All Basins Within the State Will Provide Counties With a Clear Standard to Guide GMA Compliance.

1. Ecology's Shifting Interpretations of Basin Rules Do Not Provide Clear or Consistent Guidance.

WSAC claims that the Board's decision complicates compliance with the GMA.²⁹ For purposes of clarity, WSAC argues, counties must be able to rely on Ecology's interpretations of instream flow rules.³⁰ In fact, consistent application of the state law of prior appropriation to every basin in the state will eliminate the confusion that is the current consequence of Ecology's inconsistent interpretations.

As discussed in our answer to Ecology's amicus brief, Ecology interpreted the Nooksack Rule differently in its amicus brief than in Ecology's published guidance on the Nooksack Rule,³¹ which was part of the administrative record before the Board; differently from a letter to Snohomish County that Ecology provided to the County during the administrative process, and which was also part of the administrative record;³² and differently from similar rules in other basins.³³ Counties' obligations to protect water resources under the GMA will perpetually be

²⁹ WSAC Brief at 10-12.

³⁰ *Id.* at 13 (counties must be allowed to rely on an agency with expertise, unless they choose not to).

³¹ *See* Hirst Appellants' Answer to Ecology at 15-17.

³² *Id.* at 17.

³³ *Id.* at 17-18.

subject to uncertainty if state water law is made subsidiary to Ecology's most recent interpretation of a particular rule for a particular basin.

2. The Realtors' Interpretation of the Nooksack Rule is Inconsistent with Ecology's Amicus Brief Interpretation.

The Realtors' interpretation of the effect of the Nooksack Rule on permit-exempt wells is different from Ecology's amicus brief interpretation. This conflict further demonstrates that instream flow rule interpretation alone – unguided by prior appropriation or by the state law requirement of instream flow protection – will continue to confuse counties about their GMA obligations.

Ecology states that “[t]he express language of the Rule pertains only to whether water rights can be established under the permitting system administered by Ecology.”³⁴ Ecology has never stated that the Rule contains a determination that water is legally available for permit-exempt wells.

The Realtors, in contrast, contend that, “in the Nooksack Rule Ecology has already determined that, except in the area of Whatcom Creek, water is legally available for a permit-exempt groundwater well serving a new single-family house”.³⁵ Furthermore, the Realtors misread

³⁴ Ecology Brief at 14-15.

³⁵ Realtors' Brief at 9.

WAC 173-501-070(2),³⁶ the Nooksack Rule provision that they claim establishes the legal availability of water for permit-exempt wells, regardless of their effect on instream flows. WAC 173-501-070(2) in fact addresses “diversions,” which are the appropriation of surface waters,³⁷ 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.³⁸ 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 Rule.

Ecology extrapolates from the Rule’s “emphasis on the permitting system” to “*indicate[]* that Ecology did not *intend* for this Rule to govern permit-exempt groundwater use.”³⁹ The Realtors’ conclusion that the Rule does govern permit-exempt wells is based on an argument that “it follows

³⁶ WAC 173-501-070(2) provides:

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.

³⁷ *Campbell & Gwinn*, 146 Wn.2d at 16.

³⁸ *Id.*

³⁹ Ecology amicus brief at 15.

logically” that an “exemption” from stream closure for a specific use “embodies” a determination that water is legally available.⁴⁰

Counties will find no certainty in the accumulation of assumptions, presumptions, indications, and negative inferences that characterize the interpretations proffered by Ecology and the Realtors in their amicus briefs. The Board’s decision provides clarity and consistency with state law, and should be upheld.

E. The Board’s Decision Does Not Address or Apply the Water Code’s Impairment Analysis.

The Realtors and WSAC unsuccessfully attempt to characterize the Board’s decision as imposing RCW 90.03.290’s four-part test, applicable to water rights permits, to permit-exempt wells.⁴¹ This argument is a red herring. The Board’s decision was firmly grounded in the GMA.

The Board’s analysis of the requirement to ensure that water is legally available is based on *Kittitas* and the GMA, not RCW 90.03.290. Following a discussion of RCW 36.70A.070(1), RCW 36.70A.070(5)(c)(iv), RCW 58.17.110 and RCW 19.27.097,⁴² all of which are GMA provisions, the Board reasoned as follows:

⁴⁰ Realtors’ Brief at 8.

⁴¹ Realtors’ Brief at 12; WSAC Brief at 2 (“Hirst and the Board . . . would have counties disregard state law that specifically exempts permit-exempt wells from impairment analysis”).

⁴² AR 1368-69 (No. 70796-5-I) & AR 1383-84 (No. 72132-1-I), (FDO at 21-22).

In considering the above statutes relating to water quantity and quality, the Supreme Court in *Kittitas County* held that local governments are required to ascertain that there will be adequate potable water supply before building permits and subdivision applications may be approved. That involved, according to the Court, ensuring the County's land use plan and regulations were not inconsistent with water availability.

Several relevant statutes indicate that the County must regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.⁴³

The FDO is quoted at length because the Board's own words defeat the argument that the Board illegally imposed water code requirements on permit-exempt well users. The GMA itself requires a determination that water is legally available, as explained by *Kittitas*, and the Board based its decision on GMA provisions.

The Realtors further contend that the State Legislature's inaction on a 1990 bill that would have required some permit-exempt water uses to obtain an Ecology permit, subject to the four-part impairment test, somehow relates to the Board's decision.⁴⁴ There is no connection to the

⁴³ AR 1369 (No. 70796-5-I) & AR 1384 (No. 72132-1-I), FDO at 22 (emphasis in original), quoting *Kittitas*, 172 Wn.2d at 178-79 (emphasis in original).

⁴⁴ Realtors' Brief at 11-13.

Board's decision, however, which does not require permit-exempt users to obtain an Ecology water right permit. Nor does the Board impose the four-part water right test. It requires Whatcom County to ensure that water is legally and physically available before the County issues building and subdivision approvals, as required by the provisions of the GMA that the Legislature ultimately adopted.⁴⁵

The Realtors clearly disagree with *Kittitas*' determination that the GMA requires counties to determine that water is both legally and physically available.⁴⁶ They attempt to work around – or effectively overturn – this decision by conflating the GMA water availability obligation with the four-part test for water permits.⁴⁷ The Board's decision was based on the GMA and should be upheld.

F. Counties Will Be Able to Comply with State Law.

WSAC argues that counties will not be capable of complying with the GMA. It asserts that counties will not have the necessary resources or expertise,⁴⁸ and argues that complying with state law will expose counties to lawsuits from property owners.⁴⁹ These arguments are not credible.

⁴⁵ RCW 58.17.110 and RCW 19.27.097.

⁴⁶ *Kittitas*, 172 Wn.2d at 180.

⁴⁷ The Realtors even go so far as to suggest that the County is legally required to provide water to permit-exempt wells when water is not “factually available underground.” Realtors' Brief at 8-9, fn. 4.

⁴⁸ WSAC Brief at 11-12.

⁴⁹ WSAC Brief at 10.

Compliance with the GMA is neither impossible nor unprecedented. Kittitas County has adopted a comprehensive plan and implementing regulations that comply with the GMA. The key provisions include a requirement that new ground water users within the Yakima Basin will have to demonstrate that they have a legal right to use their water source. They will have to mitigate their impacts on the Yakima River and, eventually, its tributaries. Comprehensive plan policies will require consideration of water capacity in settling rural densities.⁵⁰ 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).”⁵¹

Like Kittitas County, Whatcom County can adopt a GMA-compliant approach to protecting its water resources. When it does so, the County will have no legal liability for its water availability determinations because they will be based on actual water availability, not some variable “interpretation” that is based on a legal fiction.

Furthermore, Ecology has authority, resources and technical capabilities to “assist” counties in GMA compliance as contemplated by

⁵⁰ *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 footnotes omitted.

⁵¹ *Id.* at 18 of 23, 2014 WL 4809403, 11.

Kittitas. Ecology must (“shall”) “[d]evelop alternate courses of action to solve existing and foreseeable problems of water and related resource.”⁵² To achieve this, Ecology may investigate to determine the location, extent, depth, volume, and flow of all groundwaters within the state and may require reports from each groundwater appropriator as to the amount of public groundwater being withdrawn.⁵³ When it has determined that groundwater supplies are insufficient, it may limit withdrawals to ensure safe sustaining yields.⁵⁴ It has the authority to “recommend land use management policy modifications it finds appropriate for the further protection of ground and surface water resources in this state . . . [to] local governments . . .”⁵⁵

Under WAC 365-196-825, Ecology could promulgate guidelines “on what constitutes an adequate water supply” under the GMA, rather than claiming that its amicus brief arguments constitute legally-binding interpretations.

Cooperation between Ecology and counties should not be limited to tacit agreement that the effects of permit-exempt wells on instream flows should be ignored. Counties, with Ecology’s assistance, can comply

⁵² RCW 90.54.030.

⁵³ RCW 90.44.250.

⁵⁴ RCW 90.44.180 and RCW 90.44.130.

⁵⁵ RCW 90.54.130. *See also* WAC 365-196-715.

with the GMA.

G. The Realtors' Discussion of Public Water Systems Is Irrelevant.

The Realtors claim that the Board does not understand what constitutes a public water system.⁵⁶ Not only is this argument incorrect, but it is irrelevant, because it references Comprehensive Plan measures that the County amended in 2014. Therefore, the referenced Comprehensive Plan policy, 2DD-2.D.7, no longer exists in the form quoted by the Realtors.

After the amendment, the Board's Second Order on Compliance found that "the County stated that while it did take legislative action, it is not claiming it is or is not in compliance with GMA."⁵⁷ The Board found that the County's minor amendments of the Comprehensive Plan failed to "meet the GMA requirement to impose measures governing land use and development to protect rural character by protecting water quality and quantity throughout Whatcom County's Rural Area."⁵⁸

The Realtors' argue that "the Board apparently assumed" "that ownership distinguishes a 'public' water system from a 'private' water

⁵⁶ Realtors' Brief at 16-17.

⁵⁷ AR 1956 (No. 72132-1-I), *Hirst v. Whatcom County*, GMHB Case No. 12-2-0013, Second Order on Compliance (April 15, 2014), at 6.

⁵⁸ *Id.*

system.⁵⁹ But the Board did not make that assumption and the error of Policy 2DD-2.D.7 is not that it does not apply to privately owned wells, but that it does not apply to permit-exempt wells.⁶⁰ This is because WCC 24.11.050, adopted by reference by Policy 2DD-2.D.7, does not require evidence that water is legally available for ground water sources using 5,000 gallons per day or less.⁶¹

H. The Board's Decision Is Not a Collateral Attack on the Nooksack Rule.

The Board's decision upholds, rather than attacks, the Nooksack Rule. As *Postema* points out at 142 Wn.2d at 81, emphasis added:

[I]n 1971, as part of the Water Resources Act, establishment of base flows in rivers and streams was mandated by RCW 90.54.020(3)(a), which provides in part: "The quality of the natural environment shall be protected and, where possible, enhanced as follows: . . . 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."

The Nooksack Rule was based on Ecology's determination that instream flows are "necessary" for the mandatory purpose of protection.

Both Ecology's amicus brief interpretation of the Nooksack Rule

(supported by the County and WSAC) and the Realtors' amicus brief

⁵⁹ Realtors' Brief at 17.

⁶⁰ AR 1388-89 (No. 70796-5-I) & AR 1403-04 (No. 72132-1-I), FDO at 41-42.

⁶¹ AR 748 (No. 70796-5-I) 7 AR 763 (No. 72132-1-I), WCC (Whatcom County Code) 24.11.050.

interpretation collaterally attack the Nooksack Rule, by asserting that the retention of instream flows is not “necessary.”

Under the amicus brief interpretations of Ecology and the Realtors, instream flows established by the Nooksack Rule do not need to be retained. Both interpretations claim that permit-exempt wells in hydraulic continuity may withdraw water from closed basins and unmet instream flows. If there is no requirement to retain these flows, they must never have been “necessary” to begin with.

Ecology’s and the Realtors’ interpretations, not the Board’s decision, collaterally attack the very foundation of the Nooksack Rule. Hirst, like the Board in its carefully-considered decision, seeks to implement the GMA by ensuring protection of water resources, including the instream flows that Ecology, in adopting the Nooksack Rule, determined to be “necessary” to protect the environment.

III. CONCLUSION

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

Respectfully submitted on this 6th day of October, 2015.

NOSSAMAN LLP 	FUTUREWISE 
Jean O. Melious, WSBA No. 34347 Attorney for Appellants/Respondents Hirst <i>et al.</i>	Tim Trohimovich, WSBA No. 22367 Attorney for Appellant/Respondent 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 October 6, 2015, I caused the following documents to be served on the following parties in the manner indicated: Hirst and Futurewise Appellants' Answer to the Amicus Curiae Briefs of Washington Realtors®, Building Industry Association of Washington, Washington State Farm Bureau, and Washington State Association of Counties in Case No. 91475-3.

Washington State Supreme Court
 415 12th Ave SW
 Olympia, WA 98501-2314
 Mailing: PO Box 40929
 Olympia, WA 98504-0929

Ms. Dionne Padilla-Huddleston
 Office of Attorney General
 Licensing & Administrative Law
 Division
 800 5th Avenue
 Seattle, WA 98104
 (206) 389-2127
 Attorneys for the Growth
 Management Hearings Board

- | | |
|-------------------------------------|--|
| <input type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By E-Mail:
Supreme@courts.wa.gov |

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By E-Mail (by agreement):
dionnep@atg.wa.gov ;
amyp4@atg.wa.gov |

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

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: kfrakes@co.whatcom.wa.us

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

<input type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email (by agreement): jmelious@nossaman.com

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
Attorneys for Whatcom County

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: jpd@vnf.com ; tak@vnf.com ; dmg@vnf.com

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

<input type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	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

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: Alan.Reichman@atg.wa.gov

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

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: rdpaschal@earthlink.net

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

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: dmandassoc@comcast.net

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

<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: bill@clarke-law.net

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

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: mack@tmw-law.com |

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

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: ahart@snoco.org |

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

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: jweiss@wacounties.org |

Mr. Kevin Lyon
Ms. Sharon Haensly
Squaxin Island Legal Department
3711 S.E. Old Olympic Hwy.
Shelton, WA 98584

- Attorneys for Squaxin Island Tribe
- | | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: klyon@squaxin.us ; shaensly@squaxin.us |

Dan J. Von Seggern
Center for Environmental Law & Policy
911 Western Ave. Suite 305
Seattle, WA 98104

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: dvonseggern@celp.org |

- | | |
|--------------------------|--|
| <input type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input type="checkbox"/> | By Email: |

Signed and certified on this 6th day of October, 2015,

A handwritten signature in black ink, consisting of several loops and a final horizontal stroke.

Tim Trohimovich

OFFICE RECEPTIONIST, CLERK

To: Tim Trohimovich
Cc: dionnep@atg.wa.gov; amyp4@atg.wa.gov; Karen Frakes; jpd@vnf.com; tak@vnf.com; dmg@vnf.com; 'Jean Melious (jmelious@nossaman.com)'; AMarriner@cob.org; Alan.Reichman@atg.wa.gov; 'Rachael Osborn'; dlmandassoc@comcast.net; bill@clarke-law.net; mack@tmw-law.com; ahart@snoco.org; jweiss@wacounties.org; klyon@squaxin.us; Sharon Haensly; dvonseggern@celp.org
Subject: RE: Answers to Amicus Briefs in Case No. 91475-3 Hirst et al. v. Whatcom County

Received on 10-06-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tim Trohimovich [mailto:Tim@futurewise.org]
Sent: Tuesday, October 06, 2015 4:41 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: dionnep@atg.wa.gov; amyp4@atg.wa.gov; Karen Frakes <kfrakes@co.whatcom.wa.us>; jpd@vnf.com; tak@vnf.com; dmg@vnf.com; 'Jean Melious (jmelious@nossaman.com)' <jmelious@nossaman.com>; AMarriner@cob.org; Alan.Reichman@atg.wa.gov; 'Rachael Osborn' <rdpaschal@earthlink.net>; dlmandassoc@comcast.net; bill@clarke-law.net; mack@tmw-law.com; ahart@snoco.org; jweiss@wacounties.org; klyon@squaxin.us; Sharon Haensly <shaensly@squaxin.us>; dvonseggern@celp.org
Subject: Answers to Amicus Briefs in Case No. 91475-3 Hirst et al. v. Whatcom County

Dear Sirs and Madams:

Enclosed please find for filing:

1. The Hirst and Futurewise Appellants' Answer to the Amicus Curiae Brief of State of Washington, Department of Ecology in Case No. 91475-3 *Hirst et al. v. Whatcom County*.
2. The Hirst and Futurewise Appellants' Answer to the Amicus Curiae Briefs of Washington Realtors®, Building Industry Association of Washington, Washington State Farm Bureau, and Washington State Association of Counties in Case No. 91475-3 *Hirst et al. v. Whatcom County*.

We are also serving them as indicated in the Certificates of Service. Please contact me if you need anything else.

Tim Trohimovich, AICP
Futurewise | Director of Planning & Law
816 Second Avenue, Suite 200 | Seattle, Washington 98104
p. 206.343.0681 Ext. 118
Email: tim@futurewise.org

