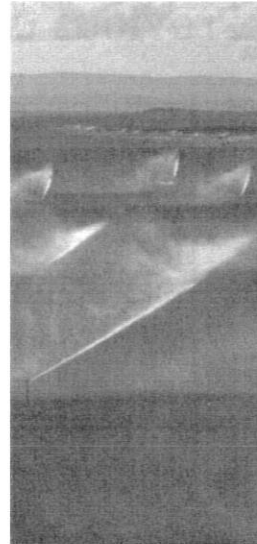


# Water Availability, Land Use, and the *Hirst* Decision

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## Mission

Department of Ecology's  
Water Resources Program

We manage water resources to meet  
the needs of people and the natural  
environment, in partnership with  
Washington's communities



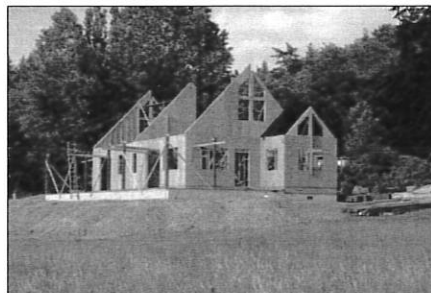
## Previous case law

- Early instream flow rules regulated surface water permitting and groundwater in direct (or significant) hydraulic continuity
- Under *Postema* (2000), the Supreme Court ruled that even *de minimus* impairment could not be permitted
- There is some degree of connection between most all surface and groundwater



## Previous case law (2)

- Since *Postema*, to address lack of water availability for domestic uses, Ecology began setting aside “reservations” or developing water banks
- *Swinomish* (2013) decision invalidated Ecology’s reservation in Skagit Basin



## ***Hirst v. Whatcom County***

- No reservation for domestic uses of water in WRIA 1 (Nooksack) instream flow rule
- The Nooksack instream flow rule
  - Only regulates uses of water that require Ecology permits
  - Does not apply closures or instream flow restrictions to permit exempt uses
- The Supreme Court ruled Whatcom County cannot issue permits for uses that impair minimum flows - saying the GMA obligations exceed the instream flow rule exemptions



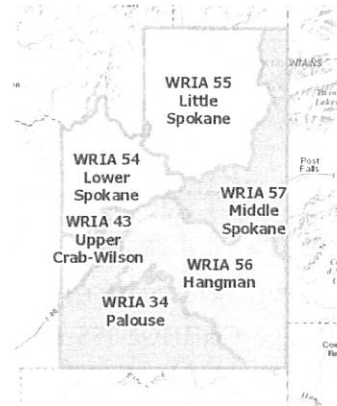
## **Implications in Whatcom County**

- The “no impairment” standard precludes people from building a home on their property in most areas where there is no service from an existing public water system
  - Rainwater collection from rooftop is allowed
- Mitigation banking structures are not in place
- Skagit basin has been under a similar standard for four years with limited success in obtaining water for water banking purposes



## Implications in Spokane County

- Spokane County adopted an interim ordinance in response to the Hirst decision
- In Little Spokane River watershed, applying a “no impairment standard” to instream flows
- Where there are no instream flow rules, no impairment to existing wells is assumed for any well that is at least 500 feet from all other wells



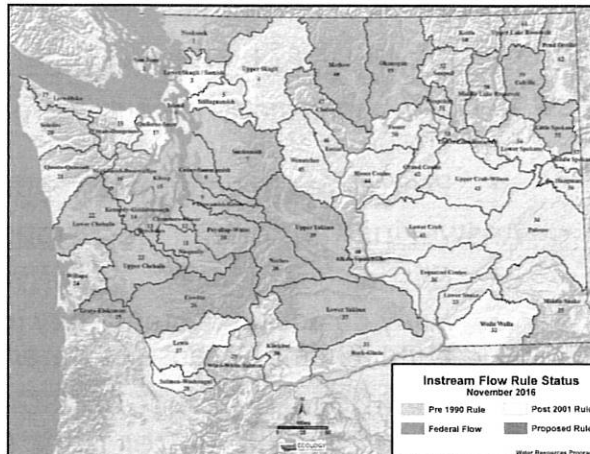
## Implications in Pierce, Okanogan counties

- Pierce County adopted a policy
  - Requires hydrogeological analysis for projects in certain WRIAs
  - County will determine whether legal water is available based on the findings
- Okanogan County adopted an emergency ordinance
  - Requires public hearings by the Hearing Examiner for all land-use decisions that require water
  - Burden of proof on applicant



## Implications for the rest of the state

Pre-1990 rules do not have reservations of water for future domestic use\*



\* Note: Methow Basin (WRIA 48) was amended to add a reservation for domestic uses

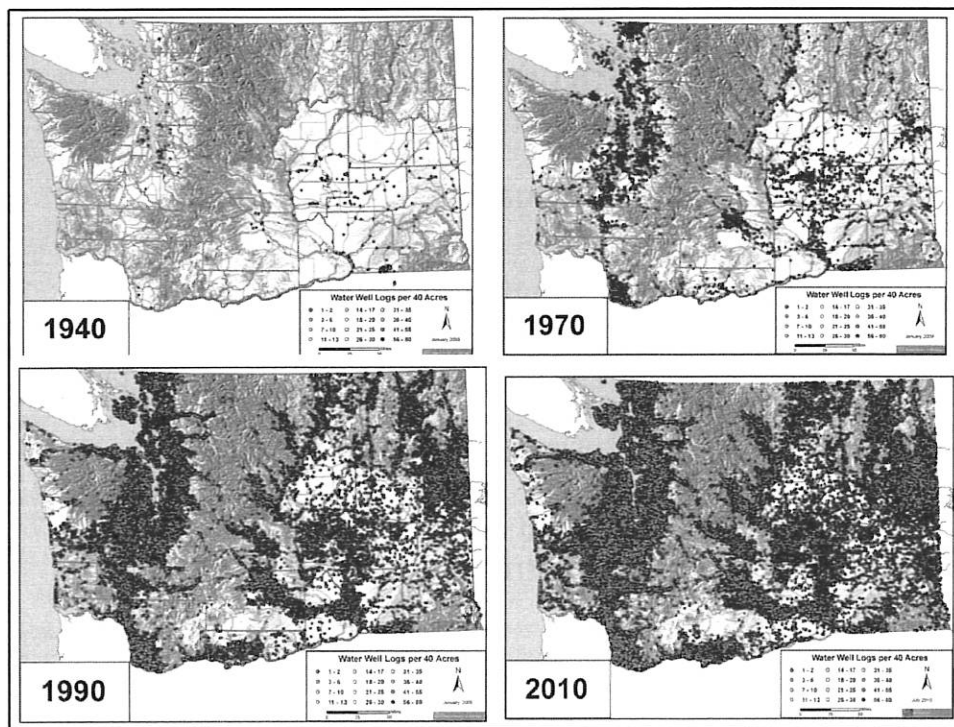
## Impact to landowners in other counties

- Each county is evaluating the decision
- Key questions:
  - When do counties need to make changes to land use regulations?
    - Will counties face appeals on permitting and land use decisions?
    - Property owners face either restrictions or uncertainty
  - How does the ruling apply in basins where there are no adopted instream flow rules?



## Ecology's response

- Providing technical assistance
  - Maps/information about instream flow and closure status
  - Procedures to determine continuity with streams
- Answering landowner questions
  - Getting dozens of landowner visits/calls per day
  - Many do not understand they may not be able to build a home because of water limits
- Will significantly affect our staff resources available to make water right decisions elsewhere



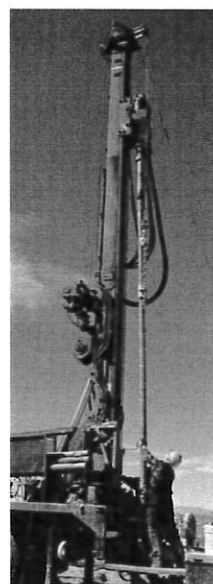
## What is the impact to streams?

- Domestic well use is about one percent of total consumptive water use in Washington
  - Very little consumptive use from indoor water use
- Roughly 85 percent of state's homes are served by public water systems



## Path forward

- Ecology will continue to support counties as they work toward implementing Hirst
  - Water banking or other creative solutions
- Water unavailability will be common throughout regulated areas; places with water available will be the exception
  - Evaluating data
  - Providing info to counties



## Path forward (2)

- Rural water supply solutions workgroup and report
  - Two years of discussion
  - Variety of water resource interests provided many ideas and feedback on others' ideas
  - Continued split between interests on how to provide flexibility for rural water supply
- Legislative engagement is needed to reconcile and balance competing interests for limited resource; Ecology will continue to participate in the dialog



## Some considerations and questions

- We have seen success in Kittitas and Dungeness basins with water banking solutions; it's been much more difficult in Skagit
  - How broadly will water banks provide solutions?
  - Under the Foster decision, water banking success will now be more challenging
  - What conditions are necessary for success?
  - How portable and sustainable are different models?
  - What is the level of impact vs. level of effort?





**Thank you**

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