

Retired Washington State Senator

## **Karen Fraser's**

### **Speaking Notes**

(Revised to clarify and improve)

on

# **The "Hirst Decision"**

## **The Washington State Supreme Court's Interpretation of Washington State Statutes Pertaining to Growth Management and Water Resources**

Decision Filed: October 6, 2016

No. 91475-3

186 Wn.2d 648; 381 P.3d 1; 2016 Wash. LEXIS 1133

### **Presentation made to the Washington State League of Women Voters Action Workshop**

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#### **OUTLINE**

1. A quick perspective on the controversy
2. Decision data
3. Water legislation v. water litigation --- a perspective
4. Question: What is the Hirst Decision about?
5. Reactions to the Hirst Decision were immediate, both pro and con
6. What IS the Hirst Decision?
7. It's a "new world" for counties planning under GMA and for people who want to drill permit exempt wells in unincorporated areas.
  8. But, is this "new law"?
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  11. What the League of Women Voters can do
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- Another strategy for protecting in-stream flows

The now famous Hirst Decision.

## 1) A quick perspective on the controversy.

One of the most sharply controversial of the many water resources decisions which have been issued by the Washington State Supreme Court.

Water resources policies are always controversial, and Controversy seems to beget controversy.

A potential legislative response to this Decision was heavily debated throughout the 2017 Legislative Sessions. (Often called a “Hirst fix”.)

Finally, as a strategy to put more pressure on reaching a legislative response, the Senate Republicans “doubled down” and said they would not provide the votes to pass the Capital Budget unless a “solution” were reached for Hirst. (The Capital Budget funds about \$4b for major needed construction projects throughout the state.)

When the final legislative session came to an end, a “Hirst fix” bill didn’t pass---and neither did the Capital Budget.

So now, in addition to the many people upset by the Hirst Decision, there are many more people and communities upset that their projects, that were poised to be funded in the Capital Budget, are not going forward, which results in major needs being unmet and rising project costs.

The case was initiated when Mr. Hirst, several others, and Futurewise, appealed Whatcom County actions before the Western Washington Growth Management Hearings Board. They asserted that Whatcom County was not in compliance with its duty under the state’s Growth Management Act to protect water resources in its process for issuing building permits for new buildings in rural areas when such buildings would rely on permit-exempt wells.

Strongly expressing their opposition to this appeal were Whatcom County, other counties, rural property owners, the building and development business sector, and agricultural interests.

The Western Washington Growth Management Board ruled substantially in favor of Mr. Hirst’s and Futurewise’s arguments.

Ultimately, the case was appealed to the State Supreme Court, which pretty much upheld the decision of the Western Washington Growth Management Hearings Board, and thus the assertions of Mr. Hirst and Futurewise.

## 2) Decision data

Decision by the Supreme Court of the State of Washington

Decision Filed: October 6, 2016 (Politics has not been the same since.)

No. 91475-3

186 Wn.2d 648; 381 P.3d 1; 2016 Wash. LEXIS 1133

Decided: 6-3 (Not unanimous)



### **1) What is the Growth Management Act (GMA)?**

*[I was in my first term in the House when this landmark Act passed, after massive legislative negotiations. Some key concepts in it were patterned after Thurston County's voluntary urban growth planning.]*

The GMA requires a majority of counties to engage in growth management planning.

The Act includes:

- Conceptual guidance for local governments for them to designate areas that will become urban and areas that will be planned for rural.
- A nonprioritized list of 13 goals for this planning.  
The list includes a goal to protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

### **2) What is a "permit exempt" well?**

*(This term is often shortened to "exempt well." This shortened terminology gives a serious misimpression of the legal status of such wells.)*

- Exempt wells are drilled to accommodate potable water needs of buildings being built where there are no piped water systems to hook up to---generally rural areas. Generally, they are single family homes, and sometimes small subdivisions.
- The user or users of a permit exempt well are allowed by state law to use up to 5,000 gallons of water a day, with a few exceptions. If multiple homes are part of one development, and jointly using a permit-exempt well, together they are not allowed to exceed the 5,000 per day limit regardless of the number of wells in the development.
- **Here's the most important thing to understand about permit exempt wells.**

**THEY ARE NOT EXEMPT FROM STATE WATER RIGHTS LAWS.**

**They are exempt ONLY from the paperwork of applying for a water right permit from the State Department of Ecology.**

***The Hirst Decision is quite clear on this.***

- Surprisingly, however, the amount of water used by permit exempt wells has not generally been calculated by the State Department of Ecology in its issuance of water rights permits generally. These wells are not metered or monitored. Only rough estimates of their average use of water can be made.

This lack of attention to permit-exempt wells is puzzling because the state is prohibited from issuing new water right permits for additional withdrawals if:

- a) Basic "minimum instream flows" in a river or stream cannot be met, or
- b) Water is not "available" because it has already been allocated to others with more senior water rights.

In spite of Ecology being careful about calculating water quantities in their normal process of issuing water rights permits, they somehow never developed a method or routine to assess the growing cumulative withdrawals from permit-exempt wells that impact the same aquifer and nearby streams and rivers.

**3) What are the basic principles of Washington State water resources law? (which apply to permit-exempt wells and all water rights)**

***In Washington, water resources law establishes a PROCESS for acquiring a water right. There are no statutes prioritizing one type of use over another.*** Some other states do prioritize some uses. Idaho is an example. Some states give “domestic use” a priority. But Washington does not. That is one reason why the Supreme Court held that permit-exempt wells for single domestic use take their place in the “first in time, first in right” system, just like all other water uses.

*The basic principles underlying Washington State water rights laws are generally consistent with the major tenets of what’s known as “Western Water Law”. This is a well-established set of principles underlying water rights laws in most western US states, with each state enacting their own modifications.*

***The basic principles are:***

- a) Water is owned by the public, and water rights are a right to USE, not own. They are a type of property right: a property “right to use.” The legal term is that they are a “usufructuary” right.
- b) Water must be used for a “beneficial purpose” and not wasted.
- c) There is a seniority system for water rights. It’s called: **first in time, first in right**. Water rights are legally prioritized in order of the time of first use. The first person to obtain a water right to surface or ground water has a use priority over the next person who obtains a right to the same resource. Thus, for each water source, there is a priority order list of who has rights. In a water-short year, the more recent, lower priority, water right holders must quit using their water completely, to protect the senior users’ rights, which have 100% protection. Water shortages are not shared equally or proportionately.
- d) The water right holder must **“use it or lose it.”** After non-use for a certain number of years, the Water right holder loses their right to the water. This is called **“relinquishment”**. The reasoning behind this principle is that water should not be hoarded. If one person can’t use it, the next person in priority order should be able to. In Washington, five consecutive years of non-use is the rule for “relinquishment.”
- e) Senior rights have legal priority. A water right holder must not impair, or take, the water of a more senior water right holder.
- f) A significant type of water right held by the public in many rivers and streams of the state is called a minimum “instream flow”. These are adopted by the Department of Ecology by rule.

These rights have a priority date just like any other water right. That date is the date they were adopted by rule. So, in many rivers and streams, there are water right holders who are senior to the instream flow right.

#### **4) What is the Capital Budget?**

##### **A. Important context information regarding linking the Capital Budget and a bill to respond to the Hirst Decision:**

- There is NOTHING in the Hirst Decision about the Capital Budget.
- The Capital Budget is “linked” to the Hirst Decision controversy by a voluntary political decision by the Senate Republicans to not provide the votes for the [noncontroversial] Capital Budget, unless a “fix” to the Hirst Decision also passes.
- Normally, the Capital Budget and water bills are completely separate subjects. Each must be considered by the Legislature on its own independent merits, pursuant to the state constitutional requirement of “one subject per bill”.
- There is absolutely NO NECESSITY to link them by reason of our state constitution, state laws, budget procedures, or tradition.
- However, the State Constitution does require that a bill authorizing General Obligation Bonds (which fund much of the Capital Budget) must receive a 60% vote in each Chamber of the Legislature. In the Senate, this is a 30-vote requirement. The November, 2017 election resulted in the Democrats re-taking the Majority in the Senate. However, they only have 25 votes. So, passage of funding of the Capital Budget will require some Senate Republican votes. Thus, the Senate Republicans continue to have the ability to hold up the Capital Budget.

##### **B. The Capital Budget is one of the three State Budgets, known as the Construction Budget.**

Virtually every legislator wants it to pass because there are important projects in it for virtually every legislative district. For this biennium, it authorizes about \$4 billion in capital projects throughout the state.

It is used to acquire, maintain, and improve:

- State Buildings--- for each of the all higher education campuses, the Capitol Campus, state institutions including urgently needed safety improvements to Western State Hospital
- K-12 buildings, to match local levies for school construction and help achieve lower class sizes,
- Low income housing
- DNR lands, including efforts to reduce forest fire risk,
- State parks,
- Local government infrastructure, such as sewer and water, drinking water, storm water
- Economic development projects,
- Community development and enrichment projects (social service buildings, theaters, historic resources), and more.

It is a huge creator of jobs and business opportunities., educational opportunities, community improvement opportunities, environmental and recreational projects, which contribute substantially to long term economy and quality of life in our state.

## 5) Reactions to the Hirst Decision were immediate, both pro and con.

### **Strenuous objections were expressed by counties, property owners, the construction business sector, and agricultural interests.**

**Counties** ---felt the Decision suddenly upended their established way of issuing building permits in rural areas that depend on “permit exempt” wells. Felt the court put major new technical and legal requirements on them that they were incapable of handling, which would result in much additional expense, and incurring much potential financial liability.

(In contrast, the Court said: we are just reading the plain language of the law. The process we describe in the Decision should have been followed all along. )

Counties interpreting it in various ways around the state.

Some quit issuing rural area building permits.

**Property owners** ---who suddenly found they could no longer build their new home in a rural area using an “exempt well” and were stunned and outraged at the possibility of losing life savings they were investing in a new home and losing the value of their property.

#### **The building and development real estate business sector**

Alarmed that building would come to an abrupt halt in many rural areas---obviously concerned about losing business opportunities.

**Agricultural interests.** Have comprehensive interests in rural areas.

### **2) On the other hand, there were many people pleased with this decision.**

Principally tribes, environmental advocates, fisheries interests.

In some areas they included senior water rights holders who were concerned that they might become subject to more state regulation in using their water, due to increasing amounts of water being diverted by essentially unregulated, junior permit-exempt wells.

Supporters of the Decision generally expressed relief that, finally, more attention and care would be given to protecting water resources in rural areas, particularly to protecting adopted minimum instream flows for rivers and streams, in order to better protect salmon runs and other fish and wildlife resources.

## 6) What IS the Hirst Decision?

- A. In the broader aspects of the Decision, the Court ruled that counties doing comprehensive planning and zoning under the GMA are required in rural areas to protect the water resources, including water availability AND that these documents MUST define HOW these requirements will be implemented.

The GMA laws require decisions on water availability to be made by individual local governments---from the approval of subdivisions to the approval of building permits.

This is NOT CONSISTENT, however, with the long-standing, general public understanding that it is the State that makes the decisions on water availability.

The Court noted, however, [in fairness?] that the GMA does NOT define:

- a) What the requirements are to plan for the protection of water resources, or
- b) How these requirements are to be met.

- B. **It was the more specific portion of the Decision, however, that created the firestorm.**

An interpretation of a section of the Growth Management Act.

*[I was a new House member when this major legislation was enacted. I remember that this section was quite controversial at the time. After all these years, I still remember the Section number--- 63. ]* It's codified as RCW 19.27.097.

This statutory section requires that there be an assurance of water supply when a building permit is issued. The wording of this section applies to both counties and cities.

[Important note: Technically, the Hirst Decision applies only to Whatcom County, because it is the only county that was a direct party to the case. However, in reality, it affects every county and city wherever there are adopted minimum instream flows and there are basins closed to new water rights permits. It primarily affects counties because generally, cities have "piped" water systems service, so someone building within an incorporated area usually would not need to drill a permit-exempt well.]

Each applicant for a building permit necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building.

The section lists 3 forms of evidence of an "adequate" water supply: two are clear, one is quite General. Evidence may be in the form of:

- 1) A water right permit from the Department of Ecology, (*very clear*)
- 2) A letter from an approved water purveyor stating the ability to provide adequate water supply, (*very clear*)
- 3) OR --- AND THIS IS THE KEY ISSUE---WHAT THE CASE IS ALL ABOUT

**\*\* "another form [of evidence] sufficient to verify the existence of an adequate water supply."**

IN THE BOX ABOVE IS THE STANDARD OF EVIDENCE FOR PERMIT EXEMPT WELLS

### Key points in the decision:

- 1) Proof, evidence is needed to meet the standard of “another form [of evidence] sufficient to verify the existence of an adequate water supply”
- 2) The fundamental principles of water law apply equally to “permit-exempt wells” as to standard water rights permits:
  - First in time, first in right
  - Use it or lose it
  - Cannot impair any senior water rights
  - Instream flows established by Department of Ecology rule ARE water rights that are senior to subsequent permit-exempt well users.
- 3) The GMA requires that the county ITSELF exercise its own independent statutory responsibility to make a determination about the physical availability and legal availability of water. It’s part of their duty under GMA to protect water availability, particularly in water-short areas. This includes assuring that the cumulative effect of one or more new wells doesn’t impede minimum instream flows, or other persons’ senior water rights. The state has adopted 28 instream flows adopted.  
Cannot delegate this decision to Ecology. Can’t just assume water is available.  
 WHAT WHATCOM CO WAS DOING was relying on maps and data from Ecology, and “assuming” water was physically and legally available based on them.

The Decision contains a lot of discussion regarding this, including the following:

NOTE: With regard to the practice of the county relying on Department of Ecology information, the Court noted that it’s possible that Ecology’s information about hydraulic continuity between groundwater and surface water in specific locations might be out of date, given technical advancements.

NOTE: Most rivers and streams in WA are in water-short basins, where the state has issued more water rights than there is water available.

NOTE: The practice of counties delegating to Ecology allowed water law to be circumvented, and allowed an unchecked reduction of minimum instream flows, particularly in water-short basins.

NOTE: One permit-exempt well for one house might not seem like much water, but the cumulative effect can be considerable if many wells are drilled, or multiple houses are hooked up to one permit exempt well.

- 4) Counties must make these decisions individually for each building permit or subdivision application,
- 5) Permit applicants must provide proof of physical and legal water availability to the county.
- 6) Thus, we are seeing a highly significant connection or “clash” between land use development and water availability.

This Decision was a jolt to Whatcom County and other counties because most had interpreted this GMA language quite differently.

Also a jolt to building permit applicants and the building industry.

Reason for the political firestorm.

## 7) It's a "new world" for counties planning under GMA and for people who want to drill permit exempt wells in unincorporated areas.

## 8) BUT, is this new law?

*The Court said this is NOT "new law".*

In reaching their decision, the Court said *they relied on*:

- The plain meaning of the words of the statute.
- The overall intent and requirements of the GMA as a whole.
- The general operation of well- established water resource common law and statutory principles. These include that the availability of water is dependent upon a priority system and that county decisions are not immune to these. Thus, if a county knows that the evidence is that senior water rights, including instream flows set by rule, will be impaired by an additional withdrawal of water, even for domestic use, they must deny the local building permit.
- State Supreme Court decisions interpreting and enforcing them.
- General rules for statutory interpretation.

## 9) Some proposed "Hirst fix" bills in 2017

- Allow counties to rely on Ecology data bases and maps
- Establish mitigation programs by counties or Ecology for cumulative impacts
- Prohibit mitigation programs for fish and wildlife from requiring that water be replaced. [BACKGROUND: Most environmental groups and tribes are seeking to have "water-for-water", "in time and place" mitigation as the highest priority, and only do "other" "out-of-kind" mitigation when this highest priority is not feasible.]
- Expand the use of the trust water rights program and water banking programs to mitigate.
- Require monetary payments, with funds going toward acquiring water rights and other mitigation measures.
- Require Ecology to assist counties with mitigation, data, and mapping.
- Create a Water Mitigation Assistance Account.

One idea is to create a very large "Streamflow, Enhancement and Restoration Program" that would fund mitigation for permit-exempt wells plus much more work to restore streams and rivers. It is modeled somewhat after the Columbia River Program.

The concept is a 10-year \$200 million program with watershed-based committees developing restoration plans and the Ecology Director approving the plans and allocating funding.

- Exempt currently active construction projects from all Hirst Decision requirements.
- Allow “evidence” to include the use of water well reports
- Delay implementation of the Decision.
- De-prioritize minimum instream flows. Give them a lower priority relative to water rights for potable water supply, water for agriculture and irrigation, and water for commercial and industrial purposes.
- Put a fee on building permits involving permit exempt wells, to be remitted to Ecology to support data collection.
- Eliminate measures in the GMA requiring the rural element of comprehensive plans to protect the rural character of rural areas.
- Allow the use of permit exempt wells without restriction for rural development outside urban growth areas under GMA.
- Create a legislative task force to study.

## 10) Where are we now, legislatively?

- 1) Negotiations are continuing toward achieving a legislative response. Progress reports are a mix of optimistic and pessimistic. Some say the sides are “digging in”. Others are “hopeful”.
- 2) If an agreement is reached, there could be a short special session to enact a “Hirst fix” and the Capital Budget. OR, legislative action could occur early in the 2018 session which begins in early January.
- 3) Change in Majority in Senate. 60% vote needed for bond bill. The Capital Budget is funded in great part by state General Obligation Bonds. They are authorized in a bill that is separate from the Capital Budget bill. The State Constitution requires a 60% majority vote in each legislative chamber in order to authorize the bonds. This amounts to 30 votes in the 49-member Senate. The new Democratic Majority in the Senate consists of a bare majority of 25 votes. Thus, in order to achieve a 60% majority vote for the bonds, some Senate Republicans will need to vote for it, which will necessitate some agreement between both Caucuses.
- 4) Angst continues to build among:
  - Local governments, state agencies, school districts, universities, nonprofit organizations, citizen organizations, who are experiencing a variety of problems:
    - Concern that construction costs will go up in order to complete halted or delayed projects, due to inflation and disruption with contractors.
    - many highly capable public employees who work on capital projects have been laid off, due to lack of funding.
  - Counties, rural property owners, and building interests who fear loss of property values, investments, rural economies, and ability to build.

- Environmental and tribal interests---worried that court ordered protections could get watered down or vanish---depending on what the Legislature does.
- People concerned with capital projects. High priority, well prepared projects are being held up over this water issue they didn't know anything about and thought they had not involvement with. This linking of the Capital Budget with the Hirst Decision "Came out of the blue!" from their perspectives.

## 11) What the League of Women Voters can do.

### Advocate for:

- Responsible, adequately funded, implementation of water policy,
- Well planned, coordinated, and implemented growth management.
- Cooperation between state, counties, and tribes on water policy
- More financial resources for counties
- More financial support for the Water Resources Division of the Department of Ecology

### Support Justice MADSEN's admonition in her Concurring Opinion:

She emphasizes the duty of the State, tribes, and local governments, who each have independent statutory duties to ensure water availability, to work together to ensure there is available water before issuing building permits, rather than letting their burden fall onto individual permit applicants.

END OF REMARKS ON HIRST DECISION INTERPRETATIONS  
OF GMA AND STATE WATER LAWS

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## 12) PS: An ESSENTIAL Post-Script

*Another strategy for protecting in-stream flows and aquifers*

### IMPORTANT LEGAL KNOWLEDGE

**\*Federally based water rights have a higher legal priority than do state based water rights.**

**\*Thus, protecting federally based water rights is a significant strategy for protecting stream flows and aquifers.**

## **What the Hirst Decision Does and Does Not Do**

- The Hirst Decision is SOLELY: An interpretation of STATE statutes on water rights and GMA.
- The Hirst Decision does NOT:
  - 1) Address the fact that FEDERAL water rights and FEDERALLY PROTECTED TRIBAL WATER RIGHTS are senior in priority over STATE based water rights.
  - 2) Address the fundamentally important RELATIONSHIP BETWEEN STATE AND FEDERAL/TRIBAL water rights.

## **The importance of federal/tribal water rights to instream flows**

Protection of federal water rights and federally protected tribal water rights constitutes a major opportunity to protect and achieve adequate instream flows.

This is because Federal water rights, including the federal government's trustee role to protect tribal treaty water rights, have legal priority over state issued water rights. This is embedded in the US Constitution, the Supreme Law of the Land. Our Washington State Constitution specifically recognizes the US Constitution as the Supreme Law of the Land.

For the most part, federal water rights are "reserved" rights, which are NOT QUANTIFIED, in contrast to state-issued rights which ARE QUANTIFIED.

Examples of types of federally based water rights that have priority over state-issued water rights:

- Navigation
- Protection of tribal treaty rights related to water.  
This includes sufficient water to sustain tribal fishing rights. Calculating the amount of this water frequently includes evaluating the biological needs of fish.  
Treaty rights generally include tribal agricultural activity and needs of Reservation lands and communities.
- Environmental protection such as Endangered Species Act (which can have substantial impacts on need for adequate quantity and quality of water in rivers and streams), water quality, toxic and hazardous waste, and more.  
(Most environmental laws are enacted pursuant to the Commerce Clause of the US Constitution.)

- Reserved water rights for the needs of federal lands, such as National Forests, military bases, National Parks, National Wildlife Refuges, National Monuments etc.

## **Historical lack of coordination between state and federally based water rights**

**Fact 1:** Unfortunately, throughout much of Washington State’s history, insufficient attention has been given to coordinating between reserved federal water rights (unquantified) and state-issued rights (quantified). The fact that federally based rights are generally not quantified likely contributed to this oversight.

**Fact 2:** There have always been huge economic and political pressures on the Department of Ecology to grant water rights permits---and as quickly as possible.

Combined, these facts have resulted in the following:

- In most basins of the state, more state water rights have been issued than there is actual water.  
This is called “overappropriation”.
- It is very likely that the state has “erred” by “inadvertently” issuing state water right permits for water that legally is “federally reserved” or “tribal treaty protected” water.

A way to diagram on paper the relationship between federal and state rights is to visualize:

- *The quantity of federal rights starting at the river bottom and going up.*
- *The quantity of state rights starting at the top of the water level and going down, with each quantified water right siphoning off another layer of water.*

On a diagram, it is usually difficult, without a lot of complex information, to draw a clear line where priority federal rights stop and state rights should start. This is because federally based rights are generally not quantified.

Should a clash between state and federal water rights occur, where there are serious allegations that federal and treaty water rights have been harmed or “taken”, if taken to court, the federally based rights will usually “win” and the state based rights “lose.”

Some approaches to resolving a clash of this type:

- 1) Negotiate a creative solution
- 2) Follow state law of “first in time, first in right”, and cut off the lower priority state water right holders completely, starting from the bottom of the priority list, until adequate stream flows are achieved.
- 3) Litigate in federal court, which will usually rule in favor of those relying on the federal reserved and tribal protected rights.
- 4) Clarify the quantities of federal reserved rights in river basins.

Assuring sufficient flows for fish and wildlife easily can become a clash between federal and state water rights.

## **What the League of Women Voters can do**

Work to protect both state based in-stream flows AND federal reserved rights in order to help preserve in-stream needs for fish and wildlife, and to help protect water requirements of tribes, national environmental protection and recreation areas, and other important needs.

END OF POSTSCRIPT

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