

## The Hirst Decision

### *The Future of Exempt Wells in Washington State*

On October 6<sup>th</sup>, the Washington State Supreme Court ruled in [Whatcom County v. Western Washington Growth Management Hearings Board](#), better known as the Hirst Decision, that county governments are now required to determine the legal water availability of an undeveloped lot, before a building permit can be issued.

Prior to the Hirst ruling, wells for regular domestic use (under 5000 gallons a day) were exempt from [instream flow rules](#). The new ruling places an unfunded mandate on counties. It requires them to establish a process to determine if a proposed well will have a negative impact on instream flow or a pre-existing water right before issuing a permit. If the county determines there would be a negative impact, a building permit will not be granted. If a proposed well wouldn't draw water from a closed basin, permit issuance is less likely to be effected by this ruling, but the many possible interpretations of this ruling are broad and much is uncertain. The ruling places the future of rural development in a precarious position.

There are questions coming from all sides of this issue. Rural land owners worry about their ability to build on undeveloped property, and what this will do to property values. Counties are concerned about the added workload on already shorthanded staff and the loss in revenue that comes with a depressed housing market. And of course, the building community around the state is worried about all the above and what it could mean for their way of life. Unfortunately, a lot of research, discussion and decision making must take place before we will know the answer to these questions.

These concerns are all justified, but it is important to note there are many ways this ruling could be interpreted and implemented. This should give stakeholders some reason to be optimistic.

A few counties have imposed restrictions on drilling, but most counties are choosing to conduct research before making any changes to how permits are issued. In Whatcom county, a temporary moratorium has been placed on well drilling while the county develops a process for determining legal water availability. Spokane County has placed a moratorium on drilling in a portion of the county. Pierce County has adopted a requirement that a hydrogeological study must be conducted to prove the new well will not affect instream flow or other senior water rights before a permit can be issued.

#### Key Terms

**Instream Flow** – water levels in rivers and streams, determined by Ecology to be optimal for fish habitation.

**Physical Availability** – The actual presence of water in a quantity that meets the needs of the proposed use.

**Legal Availability** – a new water use will not impair an established water use.

**Closed Basin** – A basin determined not to have enough water available for new wells.

**However, in Thurston, Lewis, Mason, Grays Harbor and Pacific counties, the counties have all stated that they are choosing to continue issuing permits as usual until more research can be conducted to determine how to proceed.**

**Currently, OMB is working with elected officials to develop a solution that ensures well permits continue to be issued.** OMB staff have been working closely with the five counties to remain up-to-date on new developments. OMB has also provided a list of best practices to counties for how to satisfy the requirements of the Hirst ruling in a way that will not affect rural development permitting until more research is conducted.

**OMB Best Practices Recommendation to Counties:**

1. Determine which properties and projects within the County are directly impacted by the *Hirst decision*;
2. Complete a County-funded, County-led water study to determine the extent of the problem of groundwater availability associated with the use of exempt wells;
3. Develop strategies to address problems and incorporate revisions to County plans and development regulations based upon study results.

At the state level, OMB is urging counties to [join BIAW in working with legislators to address the ruling](#) during the upcoming 2017 legislative session to provide a long-term statewide solution that will allow counties to issue permits without dramatic increases in permitting and building costs.

The counties are still gathering information on how to deal with the Hirst ruling. If they choose to establish a process for determining negative effects to instream flow and senior water rights, we don't yet know what that would look like, or even necessarily what that will mean for wells. We also don't know what a legislative solution at the state level will look like. It could mean mandatory hydrogeological studies, it could mean metered wells or deciding wells do not impact instream flow, etc.

It is hard to tell what kind of long term impact *Hirst* will have on new development in rural parts of this state, but there are some things we do know. If you or your clients are waiting for the right time to file for a building permit, the information we have gathered indicates that you should proceed with your project as planned. The planning departments in the five counties OMB represents have all indicated they are proceeding with business as usual and will continue to issue permits.

Due to the enormity of the potential implications of this case, the best course of action would be to adopt a legislative solution during the upcoming 2017 legislative session. We ask you to contact your state legislators and urge them to push for a legislative fix that will protect our states' building industry and rural property owners. **We will continue to update this document with the latest information, so stay tuned for more updates from OMB's Government Affairs team**, and please contact OMB Government Affairs Director Joel Baxter if you have any questions or would be willing to testify on this issue at a future public hearing.

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