

Policy decisions by the court broke Washington's water law

How to fix Washington's water law to help farmers and families

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Key Findings

1. Washington state sits at a crossroads, determining the future balance between fish, cities, residences, resources, industry, and farms. Current court rulings have disproportionately favored fish over the lives of Washington citizens and their access to water.
2. The *Hirst* decision brought Washington's water policy into conflict with the Growth Management Act. Policies designed to decrease bureaucratic red tape for *de minimus* (negligible) impacts on water supply in the form of permit-exempt wells are now unworkable.
3. On the surface, *Hirst v. Whatcom County*, *Foster v. Ecology and City of Yelm*, and *Swinomish v. Ecology* deal with water access in Washington state. However, these rulings are designed to stagnate growth in rural areas and impede development.
4. As *Hirst* supporters obsess over the impacts of permit-exempt wells, Washington's entire water policy is struggling to promote effective, market-driven programs that encourage conservation while allowing access to water for Washington's citizens.
5. The cumulative effect of Washington's permit-exempt wells, during the most water intensive time of the year, amounts to less than one percent.
6. Kittitas County serves as a warning of what can happen to the state as a whole due to prohibitions on permit-exempt wells. A moratorium on permit-exempt wells increased home values in rural areas, decreased undeveloped land values, raised water costs, and redistributed property taxes for all residents.
7. Testimony regarding the *Hirst* decision illustrates the painful consequences of the court's policy decision. One family recently purchased property before the decision was made. The property was destined to be the site of their future home. Instead, the *Hirst* decision devalued their land and prevented any such development, wasting years of the family's savings and crippling them with debt and valueless land.
8. Multiple proposals to fix *Hirst* have been brought forward during the 2017 legislative session and Senate Bill 5239 was the most promising proposal to repair Washington's water code without imposing unbearable costs on taxpayers. Though Senate Bill 5239 failed to clear the House Agriculture and Natural Resource Committee on March 29, 2017, hopefully it will serve as a guide for creating a workable solution for all stakeholders.

Introduction

What if Washington water policy was a nursery rhyme? In Washington state, our water law would play the role of Humpty Dumpty. During the past four years, multiple court cases have made Washington's water law unworkable. In 2016, it experienced its "great fall" with the *Hirst* decision. Hopefully the state legislature in 2017 can "put it back together again."

Some argue Washington's new interpretation is more equitable, favoring salmon in a way that should have been accomplished decades earlier.^{1, 2} Today, however, Washington state sits at a crossroads, determining the future balance between fish, cities, residences, resources, industry, and farms. Current court rulings have disproportionately favored fish over the lives of Washington citizens and their access to water.

Decades of legislation and case law led to the out-of-balance system in which Washington citizens now live. The October 2016 court decision, *Hirst v. Whatcom County* (*Hirst*), is pushing the 2017 Legislature to act.³ Proposals to "fix" *Hirst* are critical to Whatcom County and Washington state's citizens.⁴ An urgent need exists to remedy this situation for thousands of Washingtonians stuck with diminished land values and no home.⁵ Not only do these effects of *Hirst* need to be addressed, but all taxpayers,

communities (especially rural areas), and the state will be hurt by the indirect impacts of this questionable legal decision.

This Legislative Memo examines the legislative and judicial history of Washington's water access, explains the recent October 2016 court decision, *Hirst v. Whatcom County*, illustrates the narrow-minded nature of *Hirst*, examines the consequences of prohibitions on permit-exempt wells, and analyzes proposed solutions to provide citizens with water. We focus specifically on Senate Bill 5239 (Engrossed Second Substitute Senate Bill 5239 as of March 27, 2017).⁶

Washington state has a poor reputation for protecting citizens' access to water

Washington state has earned a bad reputation for an overzealous attempt to protect fish, with excessive in-stream flows litigation and bureaucratic rules that disproportionately favor fish over people.⁷ To provide practical and effective solutions to Washington's water challenges, balance must be reached from the many competing entities.⁸

Washington's Water Policy

Four main policies guide Washington state's water law: Water Flow Policy (1948)⁹, Minimum Water Flows and Levels Act

1 "Legislative Session: A Summary of Water Bills," by Trish Rolfe and Bruce Wishart, Article, Center for Environmental Law and Policy, January 31, 2017, at <http://www.celp.org/2017/01/31/legislative-session-a-summary-of-water-bills/>.

2 "The Hirst Decision: Washington State Supreme Court confirms cities and counties need to consider water availability when planning for growth," Press Release, Futurewise, October 6, 2016, at <http://www.futurewise.org/blog/2016/washington-state-supreme-court-confirms-counties-and-cities-need-to-consider-water-availability-when-planning-for-growth>.

3 "Eric Hirst v. Western Washington Growth Management Hearings Board," by Supreme Court of the State of Washington, No. 91475-3, Filed: October 6, 2016 at <http://www.ecy.wa.gov/programs/WR/wrac/images/pdf/91475-3opinion.pdf>.

4 "What's the Solution for residents on exempt wells after the Hirst case?" by Erin Fenner, Article, *Washington State Wire*, January 23, 2017, at <http://washingtonstatewire.com/whats-solution-residents-exempt-wells-hirst-case/>.

5 "Hirst Impacts," by Fix Hirst at <https://fixhirst.com/hirst-impacts/>.

6 "Engrossed Second Substitute Senate Bill 5239: Ensuring that water is available to support development," Washington State Legislature, February 24, 2017, at <http://app.leg.wa.gov/billssummary?BillNumber=5239&Year=2017>.

7 "Whatcom County v. Hirst Decision Requires Counties to Independently Protect Minimum Instream Flows," by Tom Pors, Law Office of Thomas M. Pors, at <http://www.porslaw.com/articles/whatcom-county-v-hirst-decision-requires-counties-to-independently-protect-minimum-instream-flows/>.

8 "Conflicts Associated with Exempt Wells: A Spaghetti Western Water War," by Megan Vinett and Todd Jarvis, Article, Universities Council on Water Resources, *Journal of Contemporary Water Research and Education* Issue 148, Pages 10-16, August 2012, at http://ucowr.org/files/Achieved_Journal_Issues/148/148_3.pdf.

9 "Revised Code of Washington 77.57.020 – Review of permit applications to divert or store water – Water Flow Policy," effective date 1949, Washington State Legislature, at [http://leg.wa.gov/CodeReviser/documents/sessionlaw/1949c112.pdf?cite=1949%20c%20112%20C2%A7%2046](http://leg.wa.gov/CodeReviser/documents/sessionlaw/1949c112.pdf?cite=1949%20c%20112%20C2%A7%2046;).

(1967)¹⁰, Water Resources Act (1971)¹¹, and the Watershed Planning Act (1997)¹². For over 65 years, Washington has maintained, “It is the policy of this state that a flow of water *sufficient* to support game fish and food fish populations be maintained at all times in the streams of this state.”¹³

These four policies work collaboratively to determine water access for Washington citizens, priority of use, and water availability.¹⁴ Starting in 1948, the legislature recognized the need to protect flows for salmon and other aquatic species. Subsequent legislation in 1967 (Minimum Water Flows and Levels Act) and 1971 (Water Resources Act), gave specific guidance for protecting water levels. The State Department of Ecology uses these rules to set flow levels and to regulate any new water use.

The Watershed Planning Act (WPA) expanded Washington’s water policy, setting forth the state’s interest in water, “by protecting existing water rights, by protecting instream flows for fish, and by providing for the economic wellbeing of the state’s citizenry and communities.” Most relevant to our discussion, the WPA allowed Ecology to create 23 water resource management rules establishing instream flows.¹⁵ Instream flows are a water right established by the state to protect the water levels and flows for the

stream and the resources that depend on that flow of water.¹⁶

These rules are used to decrease bureaucratic red tape for *de minimus* (negligible) impacts on water supply in the form of permit-exempt wells.¹⁷ Washington state grants a permit exemption for a single or group domestic well with water use up to 5,000 gallons per day. The purpose of this exemption was to minimize regulatory oversight and paperwork for negligible amounts of water.¹⁸

The *Hirst* decision jeopardized the purpose of the 23 water resource management rules, effectively prohibited permit-exempt well use, and brings Washington’s water policy into conflict with the state’s Growth Management Act.¹⁹

Washington State Supreme Court Cases have created conflicting policies for the state’s Water Law

The *Hirst v. Whatcom County* decision in 2016 is not the only court case contributing to Humpty Dumpty’s fall. Two previous cases nudged Washington state water code to the edge and *Hirst* was the final push. *Swinomish v. Ecology* (2013)²⁰ and *Foster v. Ecology and City of Yelm* (2015)²¹ also complicated Washington’s water policy.

10 “Revised Code of Washington 90.22 – Minimum Water Flows and Levels, Complete Chapter,” effective date 1967, Washington State Legislature, at <http://app.leg.wa.gov/rcw/default.aspx?cite=90.22>.

11 “Revised Code of Washington 90.54 – Water Resources Act of 1971, Complete Chapter,” effective date 1971, Washington State Legislature, at <http://app.leg.wa.gov/rcw/default.aspx?cite=90.54>.

12 “Revised Code of Washington 90.82 – Watershed Planning, Complete Chapter,” effective date 1997, Washington State Legislature, at <http://apps.leg.wa.gov/rcw/default.aspx?cite=90.82>.

13 “Revised Code of Washington 77.57.020 – Review of permit applications to divert or store water – Water Flow Policy,” effective date 1949, Washington State Legislature, at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1949c112.pdf?cite=1949%20c%20112%20C2%A7%2046>.

14 “Finding Rural Domestic Water Solutions While Protecting Instream Resources,” Publication no. 15-11-007, State of Washington Department of Ecology Water Resources Program, August 2016, at <https://fortress.wa.gov/ecy/publications/documents/1511007.pdf>.

15 *Ibid.*

16 “Instream Flows,” State of Washington Department of Ecology, at <http://www.ecy.wa.gov/programs/wr/instream-flows/isfhm.html>.

17 “A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State,” by Jeremy Lieb, Washington Journal of Environmental Law and Policy, 2013, at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1259/3WJELP060.pdf?sequence=1>.

18 “Permit-Exempt Domestic Well Use in Washington State,” Publication No. 15-11-006, State of Washington Department of Ecology, February 2015, at <https://fortress.wa.gov/ecy/publications/documents/1511006.pdf>.

19 “Whatcom County v. Hirst Decision Requires Counties to Independently Protect Minimum Instream Flows,” by Tom Pors, Law Office of Thomas M. Pors, at <http://www.porslaw.com/articles/whatcom-county-v-hirst-decision-requires-counties-to-independently-protect-minimum-instream-flows/>.

20 “Swinomish Indian Tribal Community v. Washington State Department of Ecology,” by Supreme Court of the State of Washington, No. 87672-0, Decided: October 3, 2013, at <http://caselaw.findlaw.com/wa-supreme-court/1647318.html>.

21 “Sara Foster v. Washington State Department of Ecology,” by Supreme Court of the State of Washington, No. 90386-7, Decided: October 8, 2015, at <http://caselaw.findlaw.com/wa-supreme-court/1647318.html>.

On the surface, these three court decisions deal with water access in Washington state. However, the water issues in these rulings disguise the underlying motivation. Pointedly, these rulings are designed to stagnate growth in rural areas and impede development.²² In fact, consequences from *Foster* effectively eliminate the possibility of water banks or markets developing and working in Washington.²³ Water markets would encourage conservation, transfer water to its highest and best benefit, and protect salmon while still allowing for development.

Why would a court decision block such a favorable policy? Because the intent is not to protect fish populations but to impede development by prohibiting access to water for those who can least afford it.

Swinomish Indian Tribal Community v. Ecology

The ruling in *Swinomish Indian Tribal Community v. Ecology* was issued October 3, 2013, limiting Ecology's ability to set water aside for development.²⁴ The Washington state Supreme Court deprived communities from utilizing Overriding Consideration of the Public Interest (OCPI) to ensure water access for Washington's citizens.

OCPI was set forth in RCW 90.54.020(3)(a) and allowed water access for the public good. "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. Lakes and ponds shall be retained substantially in their natural

condition. *Withdrawals* of water which would conflict therewith shall be authorized only in those situations where it is clear that *overriding considerations of the public interest* will be served (emphasis added)."

In the case of *Swinomish v. Ecology*, Ecology established minimum stream flows for the Skagit River Basin on March 15, 2001. Recognizing that the minimum instream flow requirements would effectively stop any new development, Skagit County sued Ecology, challenging the rule in April 2003. In May 2006, as part of a settlement agreement, Ecology agreed to amend the rule utilizing OCPI to establish 27 reserves of water that could be used for domestic, municipal, commercial/industrial, agricultural irrigation, and stock watering. The amount of water in the 27 reservations was less than the amount that would significantly impact fish populations. The Swinomish tribe filed suit in 2008 against Ecology, questioning the validity of the amended rule.

The Washington State Supreme Court sided with the Swinomish tribe in 2013, ruling that Ecology's balancing test of OCPI should not weigh benefits because the language of the statute makes no reference to "benefits." Additionally, the court decided that Ecology's amended rule conflicted with the doctrine of prior appropriation. The court found that because the Skagit Water Basin had received its water right for instream flows in 2001, all further water uses are junior to the rule and OCPI cannot be used to negate that process.

Swinomish v. Ecology challenges the ability of Ecology to use OCPI to serve the public. Under the court's interpretation, base instream flows will always have priority over any public interest.²⁵ This unfairly burdens the Skagit community – development is impeded, housing costs are increased, and industry is restricted. For example, since the ruling Skagit County endured a tax shift due to a \$22

22 "Washington State Lawmakers to Take Aim at High Court's Well Water Ruling," by Mike Richards, Article, *The Lens*, November 8, 2016, at <http://thelens.news/2016/11/08/washington-state-lawmakers-to-take-aim-at-high-courts-well-water-ruling/>.

23 "Foster v. Ecology: Court Decision and Implications," State of Washington Department of Ecology, January 4, 2017, at <http://www.ecy.wa.gov/programs/wr/swro/fostervecolgy.html>.

24 "Swinomish Indian Tribal Community v. Washington State Department of Ecology," by Supreme Court of the State of Washington, No. 87672-0, Decided: October 3, 2013, at <http://caselaw.findlaw.com/wa-supreme-court/1647318.html>.

25 "Water Rights: Washington Supreme Court Refuses to Allow New Diversions to Reduce In-Stream Flows, Puts Developers, Homeowners in a bind," by Daniel Timmons, Newsletter, Marten Law, October 27, 2013, at <http://www.martenlaw.com/newsletter/20131027-new-diversions-reduce-in-stream-flows>.

million loss of property tax collections from the diminished value of 785 affected parcels.²⁶ There will likely be a similar consequence due to the *Hirst* ruling.

Foster v. City of Yelm

Two years later in October 2015, *Foster v. City of Yelm* further restricted Ecology's ability to account for growth in communities constrained by instream flow rules.²⁷ Recognizing that OCPI could no longer be used to weigh benefits for and against the public interest, Ecology used OCPI to authorize water in exchange for ample mitigation. However, the court rejected the proposed mitigation, barring Yelm from meeting the needs of its growing population and holding strictly to the interpretation that mitigation must occur "in-kind, in-place, and in time."

Yelm's application with Ecology proposed both in-kind mitigation and out-of-kind mitigation. In-kind mitigation means water consumed is mitigated for in the same time, same place, and the same amount. Out-of-kind mitigation refers to projects that do not directly substitute water-for-water, like habitat restoration. Not only would the City of Yelm retire existing water rights and reintroduce reclaimed water back into the stream (in-kind), they proposed multiple stream improvements to justify their new municipal water permit (out-of-kind). Ecology approved Yelm's permit application.

Infringing once again on legislative authority, the court ruled that Ecology's authority to approve water permits under OCPI was unlawful because out-of-kind mitigation would unduly burden shoulder seasons (weeks in April and October) that are not covered by the retirement of irrigation rights. Ecology contested that despite the net loss of water resources, there was a net

ecological benefit resulting from the mitigation plan. The court's ruling was based upon an unprecedented definition of 'withdrawal.' The court decided that withdrawals were only temporary.

Justifying the narrowing of OCPI on semantics, the court sacrifices ecological benefit for salmon to unjustly restrict development. Logic is found in Justice Wiggins' dissenting opinion that the majority opinion adopts an "unprecedented definition of the key word 'withdraw' as only temporary, which is contrary to the consistent meaning of the word in the water code."

The unprecedented redefinition was used to justify the majority's ruling that OCPI should only be temporary because it uses the word "withdrawals" instead of "appropriations." As the dissenting opinion stated "This is a surprising holding. In over a century of water law, we have never perceived such a distinction. Nor has the legislature. Nor did the court mention this theory in our recent *Swinomish* opinion, which never mentions the words 'temporary' or 'permanent' [in regards to withdrawals]."

When the "water depletion was small and the value of mitigation high... and the application was supported by multiple sectors and parties," the court unfairly sacrificed potential benefits to both community growth and salmon habitat to further an anti-growth agenda.²⁸ For a year and a half, *Foster* impeded the ability of Washington counties to divert water for development and the problem was exacerbated in October 2016.

Hirst v. Whatcom County

In 2012, Eric Hirst and other plaintiffs filed a petition with the Western Washington Growth Management Hearings Board, claiming that Whatcom County insufficiently protected surface and groundwater resources. The plaintiffs were organized and backed by the central-planning organization,

26 "Koster, Maycumber introduce bill to provide expedited property tax relief to landowners affected by Hirst water decision," by John Sattgast, Press Release, Washington State House Republicans Representative John Koster, March 30, 2017, at <http://johnkoster.houserepublicans.wa.gov/2017/03/30/koster-maycumber-reassessment-bill/>.

27 "Sara Foster v. Washington State Department of Ecology," by Supreme Court of the State of Washington, No. 90386-7, Decided: October 8, 2015, at <http://caselaw.findlaw.com/wa-supreme-court/1647318.html>.

28 "Sara Foster v. Washington State Department of Ecology," by Supreme Court of the State of Washington, No. 90386-7, Decided: October 8, 2015, at <http://caselaw.findlaw.com/wa-supreme-court/1647318.html>.

Futurewise.²⁹ The Board ruled in partial favor of Hirst, claiming that the County failed to comply with GMA's requirement to protect surface water and groundwater resources. But the Board did not invalidate the County's ordinance, as Hirst had requested.

Both parties appealed, and the Court of Appeals reversed the Board's decision in April 2014. The Court of Appeals found in favor of Whatcom County and concluded that the Board was in error when interpreting the GMA and the related county ordinance. The decision was appealed to the Washington State Supreme Court.³⁰

Hirst v. Whatcom County was decided on October 6, 2016 by the Washington State Supreme Court and reversed the Court of Appeals' ruling.³¹ The ruling is best summarized by the dissenting opinion "The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells." In the five months since the ruling, this has been the result in many Washington counties. The repercussions will continue to hurt not only developers and the affected property owners but all taxpayers.

Confusion and angst caused by the court's ruling is being felt across Washington as the majority's opinion sets the Growth Management Act (GMA) in conflict with the Watershed Planning Act. Now, Washington counties cannot rely on the Department of Ecology's water availability rules and the decision "imposes impossible burdens on landowners." These "impossible burdens" require landowners to prove that water is both factually and legally available before drilling a permit-exempt well. Costs range from \$15,000 to even \$300,000 to conduct the required hydrogeological studies.

The majority's interpretation of the GMA conflicts with the plain language of the building permit code which reads "Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the Department of Ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. (RCW 19.27.097)"

Logical and practical interpretations of this statute would conclude that the Watershed Planning Act was "another form sufficient to verify the existence of an adequate water supply." However, the *Hirst* decision overturns this conclusion, prohibiting Whatcom County's reliance on Ecology's water availability determinations. The dissenting opinion notes, "The majority's holding amounts to a policy decision that GMA counties should not issue building permits that rely on permit-exempt groundwater withdrawals. This is not a policy decision we [the court] are at liberty to make."

Why the concern? Testimony regarding the *Hirst* decision illustrates the painful consequences of the court's policy decision. One family recently purchased property before the decision was made. The property was destined to be the site of their future home. Instead, the *Hirst* decision devalued their land and prevented any such development, wasting years of the family's savings and crippling them with debt and valueless land. Not only are property owners affected but the construction industry has seen a loss of jobs in these areas sustained by rural development.³² Hundreds of families are suffering from the impacts of this unprecedented and questionable decision.

29 "Hirst Decision by Supreme Court unleashes wrath of "Futurewise" upon property owners by taking their water," by Glen Morgan, We the Governed, October 20, 2016, at <https://www.wethegoverned.com/hirst-decision-by-supreme-court-unleashes-wrath-of-futurewise-upon-property-owners-by-taking-their-water/>.

30 "Eric Hirst v. Western Washington Growth Management Hearings Board," by Supreme Court of the State of Washington, No. 91475-3, Filed: October 6, 2016 at <http://www.ecy.wa.gov/programs/WR/wrac/images/pdf/91475-3opinion.pdf>.

31 Ibid.

32 "House Agriculture & Natural Resources Committee Public Hearing SB 5010 and E2SSB 5239," Hearing, Washington State Legislature House of Representatives, March 28, 2017 at <https://www.tvw.org/watch/?eventID=2017031332>.

Courts are ineffective at creating collaborative and valuable protection of water

Water conflict is highly contentious and changes will be met with political resistance because this is a personal issue. People need water.³³ Conflict resolution research concludes that court rulings are the worst approach to promoting effective and collaborative change.³⁴ *Swinomish v. Ecology*, *Foster v. City of Yelm*, and *Hirst v. Whatcom County* illustrate this problem.

Court decisions often fail to consider interests of all stakeholders. In fact, “traditional legal systems are unable to cope with change... [that is] why water conflicts may be well-suited to conflict resolution through collaboration.”³⁵ Collaborative governance to reach a durable agreement is a better option but would need input from all stakeholders. Recent court decisions illustrate that, “unilateral approaches that do not solicit or incorporate input from all interested parties may hinder cooperation and limit the effectiveness of a mitigation approach.”³⁶

This is Washington’s current situation – court decisions that advance one agenda against all other needs, eradicating other mitigation approaches that would protect water for the benefit of all Washington citizens and interests.

Focusing on permit-exempt wells is narrow-minded and ineffective at protecting Washington’s water

Special interest groups and the Washington State Supreme Court fixate on the validity of the *Hirst* ruling, arguing it has achieved long awaited protection for instream flows and senior water rights. This is not correct.

33 “Conflicts Associated with Exempt Wells: A Spaghetti Western Water War,” by Megan Vinett and Todd Jarvis, Article, Universities Council on Water Resources, Journal of Contemporary Water Research and Education Issue 148, Pages 10-16, August 2012, at http://ucowr.org/files/Achieved_Journal_Issues/148/148_3.pdf.

34 Ibid.

35 Ibid.

36 Ibid.

As *Hirst* supporters obsess over the impacts of permit-exempt wells, Washington’s entire water policy is struggling to promote effective, market-driven programs that encourage conservation while allowing access to water for Washington’s citizens.

Permit-exempt wells were designed to decrease bureaucratic red tape and excessive workloads for a *de minimus* (minimal) amount of water.³⁷ Studies indicate permit-exempt well users consume significantly less than the 5,000 gallon per day limit.³⁸ Additionally, some credit is due to the argument that many wells spread over a larger area have less of an impact than one single municipal well on an aquifer.³⁹

The cumulative effect of Washington’s permit-exempt wells on the total water supply of the state during the most water intensive time of the year, irrigation season, amounts to less than one percent.⁴⁰ The state’s total domestic population served by permit-exempt wells was about 904,000 people. To put that in perspective, the remainder of Washington’s population (about 6 million people) consumes 4.6 percent of Washington’s water annually.⁴¹

Arguments may weakly justify the *Hirst* decision because certain counties, more favorable for development, are disproportionately burdened by permit-exempt wells. Between 2008 and 2014, 17,200 permit-exempt wells were approved, ranging from 17 wells in Garfield County and 1,238 in Okanogan County. The Department of Ecology estimates that consumption by these

37 “A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State,” by Jeremy Lieb, Washington Journal of Environmental Law and Policy, 2013, at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1259/3WJELP060.pdf?sequence=1>.

38 “Permit-Exempt Domestic Well Use in Washington State,” Publication No. 15-11-006, State of Washington Department of Ecology, February 2015, at <https://fortress.wa.gov/ecy/publications/documents/1511006.pdf>.

39 “Scalpels v. Hammers: Mitigating Exempt Well Impacts,” by Nathan Bracken, Universities Council on Water Resources Journal of Contemporary Water Research and Education, Issue 148, Pages 24-32, August 2012, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1936-704X.2012.03110.x.pdf>.

40 “Permit-Exempt Domestic Well Use in Washington State,” Publication No. 15-11-006, State of Washington Department of Ecology, February 2015, at <https://fortress.wa.gov/ecy/publications/documents/1511006.pdf>.

41 Ibid.

wells ranges from 0.1 percent in Grant and Franklin counties to nearly 26 percent in San Juan County.⁴²

Set against the impact of only 0.9 percent of total consumption, are the economic consequences to individual families and communities. Media sources across Washington covered the heartbreaking tragedy faced by many citizens. Victims of *Hirst* were in the process of building homes or had purchased property for future building opportunities, only to be trapped with now worthless land that cannot be developed.⁴³ One proposal supported a transitional period that would allow these “lucky” few already in the process to finish building their homes.⁴⁴

What of those families who wanted to one-day move to the country? Are they to be burdened with skyrocketing home values in now low supply, high demand rural regions? Is it fair to burden existing property owners with a disproportionate tax because of limited rural development constrained not only by GMA, but an unprecedented policy decision by the court? All of these reasons should move the policy proposals beyond remedial solutions for only those families currently stuck in the middle.

Kittitas County serves as a warning of what can happen to the entire state due to prohibitions on permit-exempt wells. Starting in the 1990's, concern grew over the high number of new homes utilizing permit-exempt wells. Attempting to minimize regulatory paperwork, developers planned subdivisions utilizing permit-exempt wells to bypass water right applications. The exploited loophole took advantage of a system designed to decrease

bureaucratic workloads for inconsequential amounts of water.⁴⁵

The bad choices of a few led to a moratorium on the well exemption in 2009 for the upper half of the county. In 2011, the Washington state supreme court ruled in favor of the new regulations in Kittitas because the county's subdivision regulations could not permit, “applications that effectively evade compliance with water permitting requirements.”⁴⁶

The resulting moratorium in the County illustrates what could happen in Washington state under the *Hirst* decision. It is important to note that the existing water bank which allows Kittitas to continue limited rural development through water right transfers would be unlikely to occur due to the court's ruling in *Foster*.

Data generated from the moratorium proves the point that an existing house with a permit-exempt well will increase in value.⁴⁷ Undeveloped properties that no longer have access to water will decrease in value. Estimates predict that the removal of the moratorium on permit-exempt wells would decrease median home sales in non-city upper Kittitas by 27 percent. Undeveloped land in this same region would actually increase in value by 32 percent if the moratorium was removed.⁴⁸

Impacts on home values are not the only effect on Kittitas County. The County is also challenged by the redistribution of the property tax burden and high water prices.

42 Ibid.

43 “With Thousands Seeking to Build Rural Homes, Will Legislature Cut Off Water for Fish?” by Adiel Kaplan, *Investigate West with Crosscut*, February 13, 2017 at <http://invw.org/2017/02/13/hirst-decision-fish-vs-homes/>.

44 “Senate 5024 – Concerning groundwater supply availability in areas with ground and surface water interaction,” 2017 Washington State Legislature, Heard January 24, 2017, at <http://app.leg.wa.gov/bills/summary?BillNumber=5024&Year=2017>.

45 “A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State,” by Jeremy Lieb, *Washington Journal of Environmental Law and Policy*, 2013, at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1259/3WJELP060.pdf?sequence=1>.

46 Ibid.

47 “Scalpels v. Hammers: Mitigating Exempt Well Impacts,” by Nathan Bracken, *Universities Council on Water Resources Journal of Contemporary Water Research and Education*, Issue 148, Pages 24-32, August 2012, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1936-704X.2012.03110.x/pdf>.

48 “Estimating the Value of Water from Property Sales in an Aired High Environmental Amenity Region: A Difference-in-Difference in Approach,” by Machael Brady and Pitchayaporn Tantihkarnchana, Paper, School of Economic Sciences Washington State University, May 27, 2015, at <http://ageconsearch.umn.edu/handle/205658>.

One study found that previously permit-exempt water had gross selling prices of \$5,900-11,000 per residential unit. This is much higher than the price of agricultural-to-urban water transfers in other regions. Research also found that prohibitions on permit-exempt wells will impact property tax burdens for citizens in the effected region. Public services will have to be paid by a stagnant rural population who have experienced drastic changes in property values. Tax redistribution is a burden to all citizens.⁴⁹ No study estimates the economic benefit for counties allowing for rural development with permit-exempt wells.

In 2008, Idaho estimated that if permit-exempt wells were banned it would have to process more than ten times the current annual work load of 400 non-exempt water right applications.⁵⁰ Washington cannot afford this added cost to taxpayers, especially when there is no measurable environmental benefit.

Several propositions exist with no perfect repair

Solutions to the *Hirst* decision were proposed before the start of the 2017 legislative session. The legislature faces the challenge of weighing special interests against the good of the entire state and its families. Allowing Washington's water code to function and moving beyond the unprecedented policy decisions of the court is of utmost importance. The hammer approach taken by the court and special interest groups is only aggravating the rural urban divide and distancing Washington from a fair and effective solution to our water policy.⁵¹

Though Senate Bill 5239 failed to clear the House Agriculture and Natural Resource Committee on March 29, 2017, it was the

only bill that repaired Washington's water code without imposing unbearable costs on taxpayers.⁵² SB 5239 clarified Ecology's authority to establish instream flows under the Watershed Act and permits counties to use those rules to allow for permit-exempt wells. SB 5239 amended RCW 36.70A.070 to read, "In providing for the protection of the quantity of groundwater used for public water supplies under this subsection, a county or city may rely on or refer to applicable water resources management rules adopted by the department of ecology."

The most recent version of Engrossed Second Substitute Senate Bill 5239 allowed counties to protect previously adopted instream flow rules through mitigation and recognized that many water mitigation strategies exist. The amendment to RCW 90.03.247 said, "Mitigation need not be limited to measures that require water to be replaced, and may include other or different measures designed to mitigate the impact of the use of water without requiring the replacement of water." This is a partial fix to the problems created by *Foster*.⁵³

SB 5239 was passed by the Senate over a more costly and invasive proposal, Senate Bill 5024, which required mitigation and a transitional timeframe for individuals affected by *Hirst*.⁵⁴ This should come as a relief to taxpayers. Though fair in the short-term to those families affected by *Hirst*, SB 5024 created very few winners at a high cost in the long-run.

49 "Economic Effects of Removing the Permit Exemption for Domestic Wells," by Shane Johnston, Abstract, University of Washington, NGWA Groundwater Summit, May 5, 2014, at <https://ngwa.confex.com/ngwa/2014gws/webprogram/Paper9707.html>.

50 "Scalpels v. Hammers: Mitigating Exempt Well Impacts," by Nathan Bracken, Universities Council on Water Resources Journal of Contemporary Water Research and Education, Issue 148, Pages 24-32, August 2012, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1936-704X.2012.03110.x/pdf>.

51 Ibid.

52 "Engrossed Second Substitute Senate Bill 5239: Ensuring that water is available to support development," Washington State Legislature, February 24, 2017, at <http://app.leg.wa.gov/bills/summary?BillNumber=5239&Year=2017>.

53 Ibid.

54 "Scalpels v. Hammers: Mitigating Exempt Well Impacts," by Nathan Bracken, Universities Council on Water Resources Journal of Contemporary Water Research and Education, Issue 148, Pages 24-32, August 2012, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1936-704X.2012.03110.x/pdf>.

More *Hirst* fix proposals appeared as striker amendments to SB 5239.^{55, 56} Under the guise of a “fairer” fix to *Hirst*, Ecology is pushing to expand their budget, by lobbying for metering and additional bureaucratic oversight of permit-exempt wells. Ecology’s proposal, brought forward by the two proposed amendments, would still burden rural property owners with high costs in the form of application fees and would implement metering for lots larger than half an acre. This is still an expensive option for families wanting to build a home in the country.⁵⁷ This should be concerning for taxpayers as the metering approach could cost Washington \$700 per well or \$2,408,000 per year (based off processing estimates from New Mexico).⁵⁸

Solutions to resolve the repercussions of the *Hirst* decision have been promised by the state legislature. Recent commentary from the House Agriculture and Natural Resource Committee Chairman, Representative Brian Blake said, “I think that bill [E2SSB 5239] is an important bill for our legislature to deal with and we’ll be trying to bring folks together to negotiate a consensus bill on that topic in the weeks to come. Look for more action on that bill at a later date.” Hopefully, the legislature will use the practical and unencumbered form of E2SSB 5239, without pushing for the unfair burdens proposed in the striker agreements.

Due to the recent challenges with SB 5239, two Republican representatives proposed House Bill 2195 as a means for property owners to save millions of dollars in tax

payments. HB 2195 expedites property tax relief for landowners affected by any federal or state appellate court which diminish property values because of water supply rulings. Though not the hoped for ‘fix’ for *Hirst*, this bill could offer some relief to the many affected by the decision. The bill is awaiting a hearing in the House Finance Committee.⁵⁹

Conclusion

The 2017 Washington state legislature has the opportunity to do what all the king’s horses and all the king’s men could not - put Humpty Dumpty back together. Senate Bill 5239 will reduce the divide between stakeholders and allow further workable solutions to come to fruition. One of those future policy opportunities could be water markets, a system that would need a complete reworking of Washington state water policy and input from all stakeholders, but would be more equitable and better for the environment.

Yet, if partisan politics play out to unfairly burden the rural community with excessive regulations and oversight created by the courts, then Washington’s water system will remain broken and families and taxpayers will bear the burden.

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construed as an attempt to
aid or hinder the passage of
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55 “E2SSB 5239-S2.E AMH AGNR H2508.2,” sponsored by Representative Springer, Washington State Legislature House Committee on Agriculture and Natural Resources at <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=coxWxRTxwko&att=false>.

56 “E2SSB 5239-S2.E AMH AGNR H2509.3,” sponsored by Representative Stanford, Washington State Legislature House Committee on Agriculture and Natural Resources at <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=MplLnHRWReU&att=false>

57 “Fixing the Hirst problem,” by Representative Jim Walsh, *The Daily News*, March 21, 2017, at http://tdn.com/news/opinion/fixing-the-hirst-problem/article_d533894d-f440-564b-be5a-e2929f35cb1a.html.

58 “Scalpels v. Hammers: Mitigating Exempt Well Impacts,” by Nathan Bracken, *Universities Council on Water Resources Journal of Contemporary Water Research and Education*, Issue 148, Pages 24-32, August 2012, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1936-704X.2012.03110.x/pdf>.

59 “Koster, Maycumber introduce bill to provide expedited property tax relief to landowners affected by Hirst water decision,” by John Sattgast, Press Release, Washington State House Republicans Representative John Koster, March 30, 2017, at <http://johnkoster.houseRepublicans.wa.gov/2017/03/30/koster-maycumber-reassessment-bill/>.