Providing Water for Agriculture and Sustainable Rural Development While Protecting Instream Flows

The Washington State Supreme Court recently handed down a landmark decision (Hirst v. Whatcom County) that clarifies counties’ existing obligations to ensure that, as they plan for new development in rural areas, there is adequate water available to accommodate the new homes without impacting neighbors’ wells, senior water rights, or instream flows. While this represents a common sense approach, many counties have either not understood or failed to comply with current laws.

By ensuring that Washington’s “first in time” system of water allocation is followed, the Hirst decision protects:

- Home and lot buyers in rural areas, who can be certain of having long-term access to water drawn from their wells.
- Rivers, streams, and their critical wildlife habitat, by protecting instream flows from impairment by unregulated well use.
- Current home owners who rely on wells, by protecting their water supply against impairment by later users.
- Rural economies, by ensuring that farmers and businesses continue to have access to water for irrigation, stock watering, and commercial use.

The Hirst decision reaffirmed laws going back to 1945 which recognize the relationship between ground water and surface water. New wells have the potential to impact both other nearby wells and also nearby streams and rivers that are recharged by groundwater. Because of this relationship, the Department of Ecology adopted an Instream Resources Protection Rule for the Nooksack watershed, that resulted in the closing of many watersheds to new groundwater withdrawals. The rule was intended to “…protect senior water rights, to maintain a healthy ecosystem, and to meet future water resources management objectives.”
However, the rule neglected to address permit-exempt wells, and Whatcom County chose to ignore their impact on senior water rights. Hirst makes it clear that these new water uses are allowable only if they do not impact senior users.

SB 5024, proposed by the Environmental Priorities Coalition, provides practical solutions for rural landowners seeking to build new homes that rely on wells where water is not legally available. The bill allows for rural development to proceed under mitigation plans similar to those that Clallam County and Kittitas County have adopted in recent years. These counties rely on proven mitigation strategies that can be replicated across the state. In order to avoid short term impacts to property owners, the mitigation plans will allow for development to proceed for five years under “mitigation certificates” until water banks, mitigation projects, and other systems can be put in place on the ground.

As the impact of climate change in Washington increases, we are likely to see more droughts and more instances of water users being curtailed. Implementing mitigation for new permit-exempt wells will prevent existing wells from going dry and prevent homeowners and farmers from having their water shut off or “curtailed” during drought conditions. SB 5024 makes sure that the planning and mitigation necessary for rural development continues without impacts on current residents, senior water rights, and instream flows. This legislation, as stated above, avoids short term impacts while allowing the long term planning process to proceed.