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The Controversy Over Permit-Exempt Wells in Washington

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The Controversy Over Permit-Exempt Wells in Washington

Jean O. Melious[†]

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The court's recent cases, and recent legislative efforts, show that water management is a huge issue in this state. There is clearly controversy as to the best way to manage this state's water resources.¹

I. INTRODUCTION: THE *HIRST* "FIX" IS NO FIX

Washington State's capital budget² was held hostage by Republican senators in 2017. Although the State's House of Representatives passed the capital budget with a bipartisan vote, the state Senate—governed by a one-vote Republican majority—refused to pass the budget unless and until the state legislature nullified an unrelated Supreme Court decision.³

The Senate's target was *Whatcom County v. Western Washington Growth Management Hearings Board*,⁴ usually referred to as *Hirst*.⁵ *Hirst* upheld the state's water law doctrine of prior appropriation, or "first in time, first in right,"⁶ and protected instream flows.⁷ In the context of the state's Growth Management Act ("GMA"),⁸ which requires counties to

¹ State, Dep't of Ecology v. Campbell, 146 Wash. 2d 1, 17, 43 P.3d 4 (2002).

² "The capital budget includes appropriations for a broad range of construction and repair projects, involving: state office buildings; colleges and universities; prisons and juvenile rehabilitation facilities; parks and recreational facilities; K-12 schools; affordable housing for low-income persons and people with special needs; water quality, water supply, and flood risk reduction infrastructure; and other capital facilities and programs. For the 2015-17 biennium, new appropriations in the capital budget total \$3.8 billion" WASH. STATE OFFICE OF PROGRAM RESEARCH, WASH. STATE CAPITAL BUDGET 2017 BRIEFING BOOK 2-3 (Jan. 2017).

³ See, e.g., Rachel La Corte, Failing to pass capital budget or fix water rights, legislature adjourns, *Chinook Observer*, (July 21, 2017), <http://www.chinookobserver.com/co/free/20170721/failing-to-pass-capital-budget-or-fix-water-rights-legislature-adjourns> [<https://perma.cc/CHZ5-JNTJ>]; Don Jenkins, Senator: GOP holding firm on Hirst, budget; A Senate Republican says he believes GOP will continue tying the capital budget to a Hirst fix, *Capital Press*, (Dec. 18, 2017), <http://www.capitalpress.com/Water/20171218/senator-gop-holding-firm-on-hirst-budget> [<https://perma.cc/F2Y6-6C23>].

⁴ 186 Wash. 2d 648, 381 P.3d 1 (2016).

⁵ The case originated as an appeal to the state Growth Management Hearings Board ("GMHB") by Futurewise, a statewide smart growth organization, and four Whatcom County residents: Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim. *Growth Mgmt. Hearings Bd., Western Wash. Region, Hirst et al. v. Whatcom Cty.*, Case No. 12-2- 0013 at 9-12 (June 7, 2013). These parties were referred to, collectively, as "Hirst." The agreement by a retired engineer, Eric Hirst, to be named first in the list of petitioners to the GMHB has resulted in the association of his name with the litigation and ensuing political controversy.

⁶ "Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right." WASH. REV. CODE § 90.03.010 (2018).

⁷ Instream flows are "minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values". WASH. REV. CODE § 90.22.010 (2018). Instream flows are water rights with priority dates as of the effective date of the adoption of the rule establishing the instream flow. WASH. REV. CODE § 90.22.030 (2018).

⁸ The Growth Management Act is set forth at Wash. Rev. Code Chapter 36.70A. Although it incorporated water law, *Hirst* is, fundamentally, a Growth Management Act case. See *Hirst*, 186 Wash.

“regulate to ensure land use is not inconsistent with available water resources,”⁹ *Hirst* addressed local government land use permitting for new development that relies on permit-exempt wells.¹⁰ The decision focused on state law provisions requiring an “adequate” water supply before local governments may issue building permits or subdivision approvals for new construction that rely on private, permit-exempt wells.¹¹

In a previous decision addressing water scarcity in Kittitas County, the Washington Supreme Court had determined that the requirement for an “adequate” water supply means that water must be legally available, not just present in the ground.¹² “Legally available” means that the water must not already be allocated to a “senior” water rights holder under Washington State’s prior appropriation system.¹³ Unsurprisingly, the court applied the same interpretation in *Hirst*, holding that applicants for new development relying on permit-exempt wells would have to demonstrate that water is legally available before local governments could issue building permits and subdivision approvals.¹⁴

It was this unexceptional result, firmly founded in state law and supported by precedent, that instigated the Republicans’ refusal to pass the State’s capital budget. Intensive lobbying by the building industry, which opposed potential impacts on new rural construction, and by property rights organizations, which misleadingly contended that water rights are an inherent part of property rights, bolstered the move.¹⁵ Succumbing to this hostage-taking tactic, one of the state legislature’s first acts in 2018 was to pass a *Hirst* “fix.” This “fix” is set forth in Engrossed Substitute Senate Bill 6091 (ESSB 6091).¹⁶

For the first time in Washington state history, ESSB 6091 creates a category of water use that is not subject to the state law of prior appropriation. In many of Washington’s watersheds, the one-time payment of a \$500 fee gives carte blanche to new permit-exempt wells to take water,

2d at 657 (“We granted review of this challenge to the Western Washington Growth Management Hearings Board’s (Board) decision on the validity of Whatcom County’s (County) comprehensive plan and zoning code under the Growth Management Act . . . [and] hold that the County’s comprehensive plan does not satisfy the GMA requirement to protect water availability”).

⁹ *Hirst*, 186 Wash. 2d at 660 (citing Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd., 172 Wash. 2d 144, 178, 256 P.3d 1193 (2011)).

¹⁰ See *infra*, text accompanying notes 30-35 (definition of permit-exempt wells in Washington).

¹¹ *Hirst*, 186 Wash. 2d at 679 (observing that Wash. Rev. Code § 19.27.097(1) states that applicants “for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply”).

¹² *Id.* at 675 (citing Kittitas Cty. v. E. Wash. Growth Mgmt Hearings Bd., 172 Wash. 2d 144, 179-180, 256 P.3d 1193) (2011).

¹³ WASH. REV. CODE § 90.03.010 (2018).

¹⁴ *Hirst*, 186 Wash. 2d at 666.

¹⁵ See *infra*, text accompanying notes 52-54.

¹⁶ S.B. 6091, 65th Leg., Reg. Sess. (Wash. 2018).

even in basins where all available water has been allocated to senior water rights holders.¹⁷ For some basins, ESSB 6091 includes a vague partial mitigation requirement, which envisions the adoption of measures to “offset potential impacts to instream flows”¹⁸ – but does not even purport to address impacts on other senior water rights holders, including farmers. The law thus subordinates senior water rights to new permit-exempt wells in water-deficient areas. The net result will be the proliferation of new permit-exempt wells at the expense of instream flows and other senior water rights.

No careful policy analysis of the relative merits of different water uses preceded this political horse-swap. In order to further the putative state goal of obtaining “maximum benefit” from water use,¹⁹ it may well be time to apply such an analysis to the state law of prior appropriation, which allocates water based on seniority rather than merit or public benefit. “First in time, first in right” was explicitly developed to protect the economic interests of the first settlers – often miners and farmers – against claims by latecomers.²⁰ The prior appropriation system unquestionably creates an enormous public subsidy of senior water rights holders through the donation of state-owned water to their economic ventures without any calculation of public benefit or of the comparative economic value of competing water uses.²¹ Modern priorities may no longer value the uses to

¹⁷ ESSB 6091 establishes different requirements for different watersheds in the state, depending on whether or not Ecology has adopted instream flow rules for the basins and the language regarding permit-exempt wells contained in existing instream flow rules. Watersheds are designated as “Water Resource Inventory Areas,” or WRIsAs. *Hirst* addressed WRIA 1, the Nooksack watershed, which is classified in a group of WRIsAs with rules that do not “explicitly regulate permit-exempt groundwater withdrawals.” *Id.* §101(c). Within these watersheds, new permit-exempt wells are allowed to withdraw water without addressing effects on senior water users, even in basins closed to water withdrawals, subject only to the adoption of “recommendations” for potential future mitigation requirements. *See id.* §202, the mitigation requirement, states that localities should identify “evidence-based conservation measures” and “projects to improve watershed health”, and then revise plans to include “recommendations” to “improve watershed health” and support instream flows. *Id.* §202(4)(a). Recommended projects do not have to replace water taken from senior water users, including senior instream flows, and do not even have to address the same basin. *See id.* §202(4)(b) (authorizes “projects not in the same basin or tributary” and “projects that protect or improve instream resources without replacing the consumptive quantity of water”) If the local watershed body cannot adopt such a plan by February 1, 2019, Ecology is supposed to adopt a rule by August 1, 2020. *Id.*, §202(7)(b).

In watersheds for which Ecology has not adopted instream flow rules, new permit-exempt wells have the absolute right to withdraw water, regardless of the effect on senior water rights and without any potential obligation to provide future mitigation. *Id.* at §101(h)(3).

¹⁸*Id.* at § 202(2)-(6).

¹⁹ *Hirst*, 186 Wash. 2d at 671 (quoting Swinomish Indian Tribal Cmty., 178 Wash. 2d at 595).

²⁰ Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 KAN. L. REV. 1263, 1277 (2014).

²¹ WASH. REV. CODE § 90.03.010 (2018).

which the earliest water rights holders put their water, to the exclusion of newer, “junior” water needs.²²

Would such a rational reanalysis lead to the ESSB 6091 exemption from prior appropriation, which privileges new permit-exempt wells above all other water uses? It seems unlikely. There is no strong argument that new permit-exempt wells are more important than all other water uses in the state. As *Hirst* observes, the original purpose of permit-exempt wells – to encourage rural farm homesteads – no longer resonates.²³ In fact, the GMA contradicts this original purpose. The Supreme Court recognized in *Hirst* that allowing the unchecked proliferation of permit-exempt wells in water-stressed areas would “turn[] the GMA goal of directing growth to urban areas upside-down.”²⁴ The “unchecked growth of single domestic dwellings relying on permit-exempt wells in rural areas. . . [is] precisely the ‘uncoordinated and unplanned growth’ that the legislature found [in

²² See, Deborah Curran, *Leaks in the System: Environmental Flows, Aboriginal Rights, and the Modernization Imperative for Water Law in British Columbia*, 50 U. B.C. L. REV. 233, at 248-51 (2017) discussing “three criticisms from water law scholars that are applicable in the BC context”:

The first is that the priority system fixes entitlement to use water at a moment in time and does not provide for adaptation as the availability of water fluctuates and as priorities for water use change in the social and economic context of a watershed. The purposes for which licensees hold the oldest water licences [Canadians issue licences rather than “rights] may no longer be high value uses yet they can trump other ecologically, socially or economically important uses. At minimum, there is no balancing of the importance of different uses over time through adaptation of licence conditions.

The second criticism of the priority system is that it impedes the efficient use of water. As hydrology, technology, and industry standards change, there is no ability or need to modify how or how much water is used under licences as FITFIR [First In Time, First In Right] simply permits more senior (older) licences to take water ahead of junior licences when there is not enough water for all licensees.

The third critique of FITFIR is that a water management regime that relies on inadequate information about real time flow conditions and may require an administrative response when conflicts in water use arise, such as to order junior licensees to cease taking water, provides a false or illusory legal guarantee. Although senior licensees have priority, if there is not enough flow from which water may be taken because of changing hydrology or an inadequate administrative response, the priority of licences is irrelevant.

See also Elizabeth Arnold, *The Battle over Water Rights: In the West, the Oldest Claims Take Precedence*, NAT’L PUB. RADIO (Aug. 28, 2003), <https://www.npr.org/programs/atc/features/2003/aug/water/part3.html> [<https://perma.cc/U7UY-GPXR>] (quoting David Getches, the then Dean of the University of Colorado Law School: “It’s the same justice we think about when somebody wants to crowd in front of us in line. . . It didn’t take into account who may have a more valuable use, or a use for water that society thinks is more or less important, or even damaging”).

²³ *Hirst*, 186 Wash. 2d at 669.

²⁴ *Id.* at 680.

the GMA] to ‘pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.’”²⁵

In fact, elevating the status of permit-exempt wells above all other beneficial water uses does not promote *any* of the purposes of the state’s water law. This article discusses four such purposes: 1) protecting existing water users; 2) protecting the public interest in instream values; 3) protecting tribal rights and tribal fisheries; and 4) adapting to climate change. The Washington Supreme Court has identified the first two purposes as the main reason for the regulation of water use: “to assure protection of existing rights and the public interest.”²⁶ Ensuring tribal rights is an additional imperative in Washington State,²⁷ where western Washington tribes have treaty rights that preserve aboriginal fishing rights.²⁸ Finally, the doctrine of prior appropriation is frequently justified as resting on its ability to accommodate “the West’s physical situation,”²⁹ where arid conditions and water needs far from water sources have required the ability to adapt in times of water scarcity. Climate change will increase these challenges.

As discussed further below, the privileged proliferation of permit-exempt wells in areas of water scarcity will not protect the expectations of

²⁵ *Id.* (quoting WASH. REV. CODE § 36.70A.010 (2018)).

²⁶ State, Dep’t of Ecology v. Campbell, 146 Wash. 2d 1, 17, 43 P.3d 4 (2002).

²⁷ See e.g., Curran, *supra* note 22. The failure to address this imperative has also been recognized as a shortcoming of water law in British Columbia, Canada, across the international border from Washington. Curran identifies four weaknesses in British Columbia’s prior appropriation-based water law system: inflexible priorities for water use values and inability to adapt water licenses [BC’s counterpart of water rights], little recognition of ecological flows, a strained administrative structure, and no acknowledgement of aboriginal interests in water itself or as an incident to recognized aboriginal rights.” *Id.* at 244. These problems are also endemic to Washington’s water law system. The framework of western water law appears to be creating similar strains in most areas of western North America.

²⁸ These rights have been succinctly summarized as follows:

In 1854 and 1855, the United States executed nine treaties with twenty-three tribes and confederations of tribes and bands indigenous to the Columbia Basin and northwestern Washington. Under the treaties, which are identical in all essential elements, the tribal groups ceded approximately sixty-four million acres of land to the United States. As consideration for these cessions, the tribes reserved to themselves small reservations within their traditional territories, the exclusive right of taking fish in the streams and rivers flowing through or bordering these reservations, and the right of taking fish “in common with” non-Indians at off-reservation “usual and accustomed” fishing sites.

Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41 (2006); see also, O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 286-304 (2002) (describing the genesis of the treaties and the case law interpreting the treaties, through 2002). The treaties often are referred to as the “Stevens Treaties” because Isaac Stevens, first governor of Washington Territory, lead the negotiations on behalf of the United States. *Id.* at 288.

²⁹ Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 KAN. L. REV. 1263, 1268 (2014).

water users on the basis of seniority, which is the basis of prior appropriation. It will not protect public values, including habitat, recreation, and aesthetics, which are the reason for establishing instream flows. It threatens the interests of tribes to exercise their treaty rights to fish in usual and accustomed fishing grounds. And it will impede the very difficult adaptations that the state will need to make in order to referee between competing water users when climate change reduces the water supply during the dry months of the year.

II. BACKGROUND: PERMIT-EXEMPT WELLS AND INSTREAM FLOWS

Hirst addressed permit-exempt wells, an anachronistic manifestation of the West's frontier mentality. In order to encourage rural settlement, western states created the concept of permit-exempt wells, which made it easy for rural farmsteads to obtain water rights without having to interact with state bureaucracy.³⁰ This effort has succeeded, perhaps beyond frontier legislatures' wildest dreams; today there likely are more than a million permit-exempt wells in the modern West.³¹

State laws governing permit-exempt wells vary. When Washington State added groundwater to its regulation of water withdrawals in 1945,³² it exempted residential wells that draw less than 5,000 gallons per day from a state permit requirement.³³ The Washington Supreme Court has made it clear that water supplied through permit-exempt wells is an "appropriation" subject to all of the state's water laws except the administrative requirement to obtain a permit.³⁴ As the Court stated in *Hirst*, "[t]here

³⁰ *Hirst*, 186 Wash. 2d 648, 669, 381 P.3d 1 (2016); see also, Rachael Paschal Osborn, *Hydraulic Continuity in Washington Water Law*, 47 IDAHO L. REV. 23, 28, n. 38 (2010):

While the groundwater code was largely promoted by public water suppliers who desired legal certainty for their groundwater withdrawals, it included a key exemption from permitting for small domestic uses. This exemption arose out of U.S. Department of Interior, Bureau of Reclamation planning documents for the Columbia Basin Project, which addressed, among other topics, water supply for rural farmsteads.

³¹ Nathan S. Bracken, *Scalpels v. Hammers: Mitigating Exempt Well Impacts*, 148 J. CONTEMP. WATER RES. & EDUC. 24 (2012). (estimating that there "are now possibly over one million such wells in the region, with tens of thousands more drilled each year").

³² WASH. REV. CODE § 90.54.020(9) (2018) (Recognizing the "natural interrelationships of surface and groundwaters"); WASH. REV. CODE § 90.44.020(2018); see also, Osborn, *supra* note 30 at 26-42 (detailing the development of state legislation and court decisions governing the integrated management of ground and surface waters).

³³ WASH. REV. CODE § 90.44.050 (2018).

³⁴ See, *State, Dep't of Ecology v. Campbell*, 146 Wash. 2d 1, 16, 43 P.3d 4 (2002); *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash. 2d 571, 598, 311 P.3d 6 (2013).

is no question that a permit-exempt well may not infringe on an earlier-established right to water under the doctrine of prior appropriation.”³⁵

Practically speaking, however, permit-exempt wells have operated in a highly privileged space where they have been allowed to proliferate as if they were not part of the legal system of water rights. As long as water is physically available underground, the “right” to take it has been viewed as part of the perks of land ownership. This has happened despite the fact that water rights are based on state water law, a system that was developed and is administered³⁶ separately from the state law of property ownership, and despite the fact that junior permit-exempt wells may draw from water supplies which, legally speaking, have already been apportioned to senior water rights holders.

These senior water holders may be other homeowners or businesses, or they may be farmers whose agricultural irrigation may be affected by new residents’ permit-exempt wells. More controversially, senior water rights holders may be the public, which holds water rights in rivers where the state has adopted instream flow requirements. As the Washington Supreme Court explained in a recent decision:

While appropriative beneficial uses of water frequently remove water from the stream or lake, many other uses require that stream flows be maintained, including fish production, recreation, navigation, and power production. Growing, competing demands for water led to a number of new laws over time, and among these are acts and statutes designed to further the goal of retaining sufficient water in streams and lakes to sustain fish and wildlife, provide recreational and navigational opportunities, preserve scenic and aesthetic values, and ensure water quality.³⁷

To implement state law protecting stream values, the Washington Department of Ecology (Ecology) has adopted instream flow requirements for about half of the state’s watersheds.³⁸ Instream flows are water rights with priority dates as of the effective date of the instream flow rules.³⁹

³⁵ *Hirst.*, 186 Wash. 2d at 684.

³⁶ Washington State Department of Ecology (“Ecology”) is “responsible for managing the water resources of the state, including issuing the right to use water as well as protecting the instream resources for the benefit of the public.” *Water Rights*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights> [<https://perma.cc/X8DT-5A2T>].

³⁷ *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 593.

³⁸ Many of the instream flow rules address watersheds west of the Cascade Mountains, leaving much of the dry eastern area of the state with no instream flow protection. *See, Instream Flow Rule Status*, WASH. DEP’T OF ECOLOGY (Nov. 2016), <https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecyl-cyfsvrxfile/WaterRights/wrwebpdf/wsisf.pdf> [<https://perma.cc/6RPV-AG6V>].

³⁹ *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 593 (holding that “[A] minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level”).

These “minimum flows and levels established by rule are, like other appropriative water rights, subject to the rule of ‘first in time, first in right.’ Minimum flow rights established by rule are treated as other water rights.”⁴⁰ Legally speaking, therefore, instream flow water rights have priority over new, junior water users.

In practice, however, instream flows often have not been protected from new permit-exempt wells. Rather, they have been viewed as reservoirs from which new permit-exempt wells should be allowed to draw.⁴¹ *Hirst* addressed the Nooksack watershed in northwestern Washington, where water over-allocation and dry summer conditions lead Ecology to adopt basin closures and instream flow requirements thirty years ago. Codified in the Washington Administrative Code,⁴² the *Instream Resources Protection Program—Nooksack Water Resource Inventory Area (WRIA)* (“Nooksack Rule”) shares the general purpose of instream flow rules under Washington law, to retain “perennial rivers, streams, and lakes . . . with instream flows and levels necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality.”⁴³

Hirst recognized that, despite the Nooksack Rule’s putative protection of instream flows, new permit-exempt wells proliferated in basins closed to further water withdrawals where minimum instream flow requirements often are not met. As the state Supreme Court summarized:

Hirst presented considerable evidence and the [Growth Management Hearings] Board found substantial evidence of limits on water availability in rural Whatcom County. These water availability limitations were reflected in findings that a large portion of the County is in year-round or seasonally closed watersheds and that most of the water in the Nooksack watershed was already legally appropriated. The Board also found that average minimum instream flows in portions of the Nooksack River “are not met an average of 100 days a year.” Despite

⁴⁰ *Id.* at 594.

⁴¹ For example, *Swinomish Indian Tribal Cmty.* invalidated an Ecology rule that “reserved” water from the Skagit River system for new permit-exempt wells “despite the fact that, in times of low stream flows, these uses will impair established minimum instream flows necessary for fish, wildlife, recreation, navigation, scenic and aesthetic values.” *Id.* at 576. Ecology argued that it needed to make these reservations to ensure that homes and other development could occur in rural areas in the basin where other noninterruptible sources of water do not exist. The court responded that, “[t]o the extent that Ecology is correct in believing that such development is desirable, we do not believe that the legislature has extended broad authority to Ecology . . . to make this development possible through water reservations that reallocate water presently allocated for minimum stream flows.” *Id.* at 598-99. The Court rejected Ecology’s efforts to give permit-exempt wells a “jump to the head of the line” in priority. *Id.* at 598.

⁴² WASH. ADMIN. CODE, Ch. 173-501.

⁴³ *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648, 662, n. 4, 381 P.3d 1 (2016) (quoting WASH. ADMIN. CODE 173-501-020 (1985)).

the limited water availability, 1,652 permit-exempt well applications have been drilled in otherwise closed basins since 1997 and an additional 637 applications were pending in March 2011. . . [T]he County recognized as early as 1999 that this proliferation of rural, permit-exempt wells was creating "difficulties for effective water resource management."⁴⁴

Although the understanding of the connection between groundwater withdrawals and surface water may have been less sophisticated when the Nooksack Rule was adopted in 1985, the court emphasized that “we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing permits for groundwater appropriation.”⁴⁵ The court held that local governments issuing permits for projects relying on permit-exempt wells must also consider the fact that groundwater withdrawals affect surface water.⁴⁶

Hirst demonstrates the Washington Supreme Court’s backstop role in protecting the public interest in instream flows. The court objected to county regulations that granted “building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a water course below the minimum instream flow.”⁴⁷ The court emphasized that “[w]e have been protective of minimum instream flow rules and have rejected appropriations that interfere with senior instream flows,” citing two recent decisions in which it had overturned Ecology’s efforts to dedicate portions of senior instream flow water rights to junior water users.⁴⁸

The court’s appreciation of the need to protect instream flows is not necessarily shared in rural areas of Washington State, where *Hirst*’s effects were focused. The geography of *Hirst* is one important key to the controversy over the case. Most of Washington’s residents—approximately

⁴⁴ *Id.* at 662-63.

⁴⁵ *Id.* at 666 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 80-81, 88, 11 P.3d 726 (2000)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 657.

⁴⁸ *Id.* at 666 (citing *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wash. 2d 571, 598, 311 P.3d 6 (2013) and *Foster v. Dep’t of Ecology*, 184 Wash. 2d 465, 362 P.3d 959 (2015)). In *Hirst*, as in *Swinomish* and *Foster*, Ecology again sided with the real estate development industry and local governments, arguing in favor of allowing junior water users to impair senior instream flow water rights. In all three cases, the Supreme Court reiterated that instream flows are water rights, deserving the same protection under the prior appropriation as any other water rights. This insistence on implementing the legal water rights system likely has impelled the State Legislature’s decision to grant permit-exempt well users priority over all other uses. Legislative action will effectively prevent the Supreme Court from protecting the public’s interest in instream flows in future cases.

85%--do not obtain water from permit-exempt wells.⁴⁹ *Hirst* did not affect these water users. The roughly 15% of the population that currently has operating permit-exempt wells also were not affected. *Hirst* only applied prospectively to landowners and developers who needed new building permits and subdivision approvals for rural development and were relying on permit-exempt wells.

New permit-exempt wells supply water to homes and businesses in areas of dispersed development outside the service areas of municipal suppliers or public water associations.⁵⁰ Permit-exempt wells, thus, tend to be located in rural and agricultural areas where Republican voters also concentrate. The creation of a legislative battle-line over the *Hirst* decision has electoral benefits for rural Republican legislators whose constituencies increasingly reflect national partisan divides in their opposition to environmental protection.⁵¹ Those who make their living by building and selling new houses, represented by the Building Industry Association of Washington and the state realtors' association, have also been active in court,⁵² in the press, and in the Legislature⁵³ in their opposition. Such activism has been primarily focused on opposing the application of prior appropriation to permit-exempt wells.⁵⁴

Despite their invocation of property rights and fairness, these advocates of new permit-exempt well users in closed basins were, in fact, asserting a privilege to use other people's rights – the rights of senior water users, including senior instream flows. Their successful appropriation of senior water users' rights violates every principle and purpose of state water law, as described below.

⁴⁹ *The Office of Drinking Water (Overview)*, WASH. STATE DEP'T OF HEALTH (last visited April 21, 2018), <https://www.doh.wa.gov/CommunityandEnvironment/Drinking-Water/TheOfficeofDrinkingWater> [<https://perma.cc/BFK4-AXDZ>].

⁵⁰ Permit-exempt wells also provide water for stock watering. WASH. REV. CODE § 90.44.050 (2003). Stock-watering wells are not necessarily related to applications for building permits and subdivisions, and were not directly addressed by the *Hirst* decision.

⁵¹ See, e.g., Vincent Buys & Jim Walsh, *Rural Washington Hardest Hit by Hirst Water Ruling*, SEATTLE TIMES (Jan. 10, 2018).

⁵² See, Brief of Amici Curiae Washington Realtors et al., *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648, (No. 91475-3), 2015 WL 5636889.

⁵³ See, e.g., *The Hirst Decision*, OLYMPIA MASTER BUILDERS (Dec. 16, 2016), http://omb.org/wordpress/wp-content/uploads/2014/09/WellPermittingafterHirst.OMB_.12.16.16.pdf [<https://perma.cc/93V3-2BVA>] (Trade association report encouraging counties to “join BIAW [Building Industry of Washington] in working with the legislature to address the ruling”).

⁵⁴ *Id.*

III. PERMIT-EXEMPT WELLS AND THE PURPOSES OF STATE WATER LAW

A. *Prior Appropriation and the Expectations of Senior Water Rights Holders*

Hirst is commonly, but incorrectly, described as a case that pits people against fish.⁵⁵ In fact, permit-exempt wells affect *all* senior water users, not only the instream flow water rights that support fish and other wildlife. The state Supreme Court specifically addressed this issue during oral argument. Justice Barbara Madsen asked the attorney representing Whatcom County: “Apparently, the County – you can correct me if I’m wrong – doesn’t protect senior water rights, whether they’re instream flow rights or otherwise. from appropriation by exempt well users. Is that true?” Counsel for Whatcom County replied, “So the County’s obligation under the GMA is to protect land uses, excuse me, to regulate land uses to protect water resources, so that inquiry, and that hypothetical, the County does not go out and assess impairment as between two types of water users.” Justice Madsen asked: “And that’s regardless, across the board, whether it’s an instream flow right or not?” The response was: “Correct.”⁵⁶

Across the board, whether affecting an instream flow right or some other senior water rights, permit-exempt wells have been allowed to violate prior appropriation by withdrawing water that has already been appropriated to senior water users. For example, in the Little Spokane River watershed in eastern Washington, 8,900 permit-exempt wells were drilled between 1976 and 2008.⁵⁷ They were drilled after an instream flow rule was adopted, despite the fact that the river does not meet instream flows about 80% of the time.⁵⁸ Instream flows are not, however, the only affected water rights. Surface water rights are frequently ordered to curtail in summer months, thus violating the prior appropriation doctrine by maintaining the water supplies of junior permit exempt wells while senior out-of-stream water rights are curtailed and senior instream flows are not met.⁵⁹

The elevation of junior permit-exempt well users over senior water rights holders clearly violates the “first in time, first in right” principle that

⁵⁵ E.g., Buys & Walsh, *supra* note 51 (Hirst “pits fish against families”).

⁵⁶ Oral Argument at 58:02, *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648 (2016) (No. 91475-3), <https://www.tvw.org/watch/?eventID=2015101023>.

⁵⁷ Rachael Osborne, *Blockbuster Court Decision Protects Instream Flows and May Slow Rural Sprawl*, NAIADS (Oct. 6, 2016), <https://naiads.wordpress.com/category/exempt-wells/>. See also SPOKANE COUNTY WATER RESOURCES, WRIA 55 (LITTLE SPOKANE RIVER) GROUND WATER INVENTORY AND MAPPING PROJECT (2009).

⁵⁸ Rachael Osborne, *Blockbuster Court Decision Protects Instream Flows and May Slow Rural Sprawl*, NAIADS (Oct. 6, 2016), <https://naiads.wordpress.com/category/exempt-wells/>. See also SPOKANE COUNTY WATER RESOURCES, WRIA 55 (LITTLE SPOKANE RIVER) GROUND WATER INVENTORY AND MAPPING PROJECT (2009).

⁵⁹ *Id.*

grounds western water law. Far from acknowledging this fact, however, *Hirst* opponents tend to ignore the prior appropriation principle of state water law. For example, a newspaper opinion piece by rural Republican legislators asserted that “many urban dwellers are drawing water from sources to which our constituents no longer have access,” complaining that the “inequity is staggering.”⁶⁰ The authors provided no examples or specifics, but presumably were referring to situations in which senior municipal water rights allow access to closed basins that are no longer available to new, junior water users. Prior appropriation, not *Hirst*, creates any such inequity.

The “inequities” of prior appropriation extend well beyond the water issues relating to new development in rural areas. The discussions below of public values in instream flows and tribal fishery rights raise the most fundamental inequities, the valuation of individual settler rights over public values and tribal rights. However, unless and until the Legislature reevaluates the prior appropriation doctrine’s continuing utility in the modern era, “first in time, first in right” remains the mainstay of the water rights framework. The legislature’s *Hirst* “fix”, which allows permit-exempt wells to “jump to the head of the line,”⁶¹ fails to meet the putative goal of allocating water according to the prior appropriation doctrine’s “first in time, first in right” rule.

B. Instream Flows and Public Values

Hirst is thoroughly grounded in Washington State water law’s historical development from a system that encouraged “maximum diversion of water” to the more modern policies of “[o]btaining maximum benefits, prudent management of the state’s water resources with input of interested entities, preservation of water within streams and lakes as necessary for instream and natural values, and avoidance of wasteful practices.”⁶²

By 1955, concerns over the dewatering of streams led the legislature to declare “the policy of the State to be that sufficient water flow be maintained in streams to support fish populations and authorized rejection of water right applications if these flows would be impaired.”⁶³ In 1969, state law authorized Ecology to “establish minimum water flows . . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears

⁶⁰ Buys & Walsh, *supra* note 51.

⁶¹ *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash. 2d 571, 598, 311 P.3d 6 (2013).

⁶² *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648, 671, 381 P.3d 1 (2016) (quoting *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 595-96).

⁶³ *Id.* at 670 (quoting *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 592).

to be in the public interest.⁶⁴ The Water Resources Act of 1971 (“WRA”) directed Ecology to allocate waters in a way that maximizes the net benefits to the people of the state and to retain “base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”⁶⁵

The Nooksack Rule, the court observed, was the first Ecology rule intended to protect public values.⁶⁶ “[M]inimum flows,” the *Hirst* court emphasized, “are exactly that: flows or levels ‘to protect instream flows necessary for fish and other wildlife, recreation and aesthetic purposes, and water quality.’”⁶⁷ The GMA, passed in 1990, “reinforces the conservation goals and priorities first established in the WRA by requiring local governments to plan for the protection of their local environment,”⁶⁸ including surface and groundwater resources.⁶⁹

As *Hirst* recognized, when permit-exempt wells are allowed to pump groundwater from closed basins and from basins where instream flows are not met, the result will be an “unchecked reduction of minimum flows.”⁷⁰ ESSB 6091 includes vague requirements for the protection of “net ecological benefits,”⁷¹ but it does not ensure that streams will maintain enough water to support public values. Consequently, ESSB 6091’s priority for permit-exempt wells does not safeguard the public’s interest in protecting water resources.

C. Off-Reservation Tribal Fishing Rights

The Squaxin Island Tribe, which describes itself as “descendants of the maritime people who lived along the shores and watersheds of the seven southernmost inlets of Puget Sound,”⁷² joined *Hirst* and *Futurewise* as an amicus curiae. Squaxin Island Tribe’s amicus brief described the tribe’s interest in the case:

Under the Treaty of Medicine Creek, the Tribe holds the right to fish on all runs that pass through its “usual and accustomed” fishing areas

⁶⁴ *Id.* (quoting WASH. REV. CODE § 90.22.010 (2016)).

⁶⁵ *Id.* (quoting WASH. REV. CODE § 90.54.020(3)(a) (2016)).

⁶⁶ *Id.* at 671.

⁶⁷ *Id.* at 669 (quoting *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 592).

⁶⁸ *Id.* at 672.

⁶⁹ *Id.* at 671 (citing WASH. REV. CODE § 36.70A.070(5)(c)(iv) (2016)).

⁷⁰ *Id.* at 677.

⁷¹ S.B. 6091, 65th Leg., Reg. Sess. (Wash. 2018)).

⁷² *Who We Are*, SQUAXIN ISLAND TRIBE (last visited April 24, 2018) <http://squaxin-land.org/government/who-we-are/> [<https://perma.cc/8RZL-2PMQ>].

("U&A"). The Tribe's U&A includes all of Southern Puget Sound south of Tacoma Narrows.⁷³

At stake here is the steady, cumulative dewatering of fish-bearing streams by unregulated permit-exempt wells. The importance of fish to the Tribe cannot be overstated. Many Tribal members and their family devote themselves to salmon fishing. The Tribally-owned seafood company, Salish Seafoods, buys and sells Treaty salmon. The Tribe's culture and economic well-being depends upon sustainable fisheries. The Supreme Court characterized the treaty fishing right as being "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). For the fish themselves, adequate stream flows literally are the "atmosphere they breathe," for without sufficient water for spawning, rearing and migration, there will be no salmon.⁷⁴

The Treaty of Medicine Creek was the first of a series of treaties that Isaac Stevens, Governor of Washington Territory, negotiated on Congress' behalf during 1854-1855 as the means to acquire vast Indian lands.⁷⁵ Stevens negotiated with geographically-dispersed tribes and bands in northwestern Washington and the Columbia Basin,⁷⁶ but the terms of the treaties were similar. Each treaty included a provision substantially the

⁷³ See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (holding that the court's objective was "to determine every issue of law and fact presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing, which for so long have plagued all the citizens of this area, and still do."); see also Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 42, 60 (2006/2007) (stating that Judge Boldt's ruling "provides detailed demographic and historical information about each of the plaintiff tribes, including a description of each tribe's customary fishing grounds, an account of each tribe's treaty relationship with the federal government, and a description of each tribe's political organization and procedures for regulating treaty fishing").

⁷⁴ Amicus Brief of Squaxin Island Tribe, *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648 (2016) (No. 91475-3), 2015 WL 5636891.

⁷⁵ See *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) (stating that there were eleven Stevens treaties, listing six treaties that were associated with plaintiff tribes). See also Charles D. Bernholz & Robert Weiner, *The Palmer and Stevens "Usual and Accustomed Places" Treaties in the Opinions of the Courts*, 25 GOV'T INFO. Q. 778,782, fn. 10 and accompanying text (2008) (Listing ten treaties, only one of which did not involve fishing rights). See also Stephen A. Walker & Keri-Ann C. Baker, *The Confederated Salish and Kootenai Tribes Fight for Quantified Federal Water Rights in Montana: A Contentious History*, 105 J. AM. WATER WORKS ASS'N 12, (2013) (discussing one treaty known as the Flathead or Hellgate Treaty, which addressed aboriginal lands in what is now western Montana, portions of Idaho, Wyoming, and British Columbia).

⁷⁶ See Wash. Dep't of Fish & Wildlife, *Tribal Ceded Areas in Washington State: Washington Department of Fish and Wildlife Interpretation* (April 2017), https://wdfw.wa.gov/hunting/tribal/wa_tribal_ceded_land.pdf [<https://perma.cc/VUV5-FASK>]. See also Wash. Dep't of Fish & Wildlife, *Tribal Hunting and Co-Management; Treaty History and Interpretation* (last visited April 23, 2018), https://wdfw.wa.gov/hunting/tribal/treaty_history.html [<https://perma.cc/TQ9R-G7H6>].

same as that in the Medicine Creek treaty: “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory. . . .”⁷⁷

Settlers upheld the right promised by the Stevens Treaties until it was no longer convenient or profitable to do so.⁷⁸ Within a few decades, a “free for all”⁷⁹ based on racism and self-interest obliterated respect for tribal fishing rights as well as the concept of treating tribes as sovereign nations. In a particularly dispiriting example, in *State v. Towessnute*,⁸⁰ the Washington Supreme Court upheld state regulatory authority to strip tribal treaty rights to fish in racist and derogatory terms. “The premise of Indian sovereignty we reject,” the court proclaimed.⁸¹ “At no time did our ancestors, in getting title to this continent, ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. . . .”⁸² The court justified this ruling by describing tribes as inferior peoples, whose land was justifiably forfeit to the demands of a superior civilization:

The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region he was to be allotted a more confined area with permanent subsistence . . .

These arrangements were but the announcement of our benevolence, which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy, and whom we have so often permitted to squander vast areas of fertile land before our eyes.⁸³

⁷⁷ *United States v. Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974).

⁷⁸ See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 433 (Spring, 1998) (Authors point out how the ‘right of taking fish’ secured by the tribes proved to be relatively uncontroversial in the first three decades following the signing of the Stevens Treaties. . . . The resource was abundant, and there was little significant non-Indian fishing, largely because of low market demand for salmon. . . . due to inadequate preservation techniques and slow transportation facilities). See also *id.* at 434 (“By the late 1880s, technological developments, such as the canning process, induced non-Indians to begin fishing in great numbers. The ensuing competition, termed the ‘time of the free-for-all,’ deprived the tribes of effective access to the resource they had bargained to keep in the treaties”).

⁷⁹ *Id.*

⁸⁰ *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916).

⁸¹ *Id.* at 807.

⁸² *Id.*

⁸³ *Id.*

In response, tribes continued fishing, despite intimidation and the threat of arrest by state game wardens, while continuing to challenge state regulations in court.⁸⁴ By the 1960s, the fishery “free for all” had generated “Fish Wars,” where state police and game wardens lobbed tear gas, swung clubs, arrested tribal members, and cut the fishing nets of tribal members exercising their rights during “fish-ins.”⁸⁵

As the violence against tribal members reached its peak in 1970, the federal government, on behalf of numerous Washington tribes with treaty rights, filed a lawsuit attempting to establish that the Stevens Treaties entitled tribes to one-half of the salmon harvests from traditional fishing grounds. District Court Judge George Boldt’s decision in *United States v. Washington* upheld this interpretation, finding that tribes had the right to exercise their fishing rights outside their reservations, in their traditional fishing grounds, and holding that tribes and the state must work as co-managers of the fisheries.⁸⁶

Fishing rights have little meaning without fish, and fish habitat necessarily includes water. Consequently, modern tribal governments, which have developed sophisticated natural resource management capabilities, have emerged as protectors of Washington’s rivers. Based on these capabilities, their roles as co-managers of the fisheries, and their concerns for the future of the places to which they are tied by law and culture, many tribes are acutely aware of stressors on the surface and groundwaters.⁸⁷

Squaxin Island Tribe for example, was concerned about the impacts of permit-exempt wells on the Johns Creek watershed, within the Tribe’s traditional fishing grounds.⁸⁸ The Tribe insisted on the development of information on permit-exempt well withdrawals because of the tendency for

⁸⁴ FAY B. COHEN, TREATIES ON TRIAL; THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 59-60 (1989).

⁸⁵ *Id.* at 67-82. *See also*, *Washington State Bill Would Help Clear Fish Wars Convictions*, INDIAN COUNTRY TODAY (Jan. 17, 2014), <https://indiancountrymedianetwork.com/news/environment/washington-state-bill-would-help-clear-fish-wars-convictions/> [<https://perma.cc/8MEC-GY52>] (quoting the sponsor of House Bill 2080 in the Washington State Legislature to have criminal convictions from the Fish Wars overturned: “We as a state have a very dark past, and we need to own up to our mistakes”).

⁸⁶ Blumm & Swift, *supra* note 78, at 455; *See United States v. Washington*, 384 F. Supp. at 401-03.

⁸⁷ Rachael P. Osborn, *Native American Winters Doctrine and Stevens Treaty Water Rights: Recognition, Quantification, Management*, 2 AM. INDIAN L.J. 76, 113 (2013) (noting three unique attributes that put tribes in a position to protect and defend the waters of the American west: tribal sovereignty, the special trust relationship between the United States and Indian Tribes, and tribal proprietary interests in land, water, and wildlife resources) (citing William H. Rodgers, *Tribal Government Roles in Environmental Federalism*, 21 NAT. RES. AND ENV’T 3 (2007)).

⁸⁸ *New Research Shows Broader Implication of Exempt Wells*, NORTHWEST TREATY TRIBES, (June 20, 2017), <https://nwtreatytribes.org/new-research-shows-broader-implication-exempt-wells/> [<https://perma.cc/R7KJ-9M92>].

existing Ecology data to create unfounded and misleading assertions about the amount of water that permit-exempt wells withdraw.⁸⁹ Contrary to the assumptions made by using the statewide average numbers, a groundwater model developed over seven years showed that permit-exempt wells were responsible for fifty percent of water withdrawals in Johns Creek, which has failed to meet state instream flow requirements every year for the past ten years. The Tribe further found that Ecology may have underestimated the number of exempt wells in the watershed by a third.⁹⁰ Although permit-exempt wells operate largely under-the-radar across the state, tribal concerns and capabilities help to demonstrate the real effects of wells.

⁸⁹ The Tribe referenced “the assumed statewide average of one percent, which includes large agricultural operations on the east side of the state.” *Id.* The “one percent” figure is based on a 2015 Ecology report that estimated the number of permit-exempt wells in the state based on Ecology well data, estimated the amount of water use based on 2005 USGS water use estimates “and many assumptions,” and then estimated water use as a statewide average. TOM CULHANE & DAVE NAZY, WASH. DEP’T. OF ECOLOGY, PERMIT-EXEMPT DOMESTIC WELL USE IN WASHINGTON STATE iii (2015).

There are numerous issues to note about this methodology. Perhaps the most significant is the calculation of a “statewide average” to describe permit-exempt water use. The report itself explicitly acknowledges that it does not address the issue of permit-exempt well effects in specific watersheds:

It is critical to view our study’s consumptive use estimates in the context of method limitations. From a water management perspective, scenarios of greatest concern involve: (1) relatively small watersheds where many permit-exempt domestic wells are drilled in aquifers highly connected to small streams, (2) a considerable amount of outdoor watering, and/or (3) surface water depletion in endangered aquatic species habitat. Consumptive water use in areas with high concentrations of permit-exempt domestic wells was not specifically addressed during this study.” *Id.* (emphasis added).

Averages have a well-known ability to obfuscate, rather than enlighten. If a millionaire and a pauper are in the same room, their average income is \$500,000. At 37 inches, Washington’s statewide average rainfall (*Seattle*, U.S. CLIMATE DATA (last visited April 24, 2018), <https://www.usclimatedata.com/climate/washington/united-states/3217>) is more than enough to support almost all farm crops without irrigation. *See, e.g., Corn: Water Requirements*, EXTENSION (March 20, 2008), <http://articles.extension.org/pages/14080/corn-water-requirements> [<https://perma.cc/8KQJ-FKNK>]; *Graperyard Water Management*, WINE-GRAPE-GROWING (last visited April 24, 2018), http://www.wine-grape-growing.com/wine_grape_growing/grapevine_water_management/vineyard_water_requirements.htm [<https://perma.cc/TQV8-52QQ>].

Nonetheless, the “one percent” figure has become such a central component of the anti-*Hirst* rhetoric that a Building Industry Association spokesperson blithely proclaimed that “[a]ccording to Ecology, less than 1 percent of the water drawn in Whatcom County comes from wells.” Linda Twitchell, *What the State Moratorium on New Water Wells Means to You, and How to Fix It*, BELLINGHAM HERALD (Aug. 17, 2017), <http://www.bellinghamherald.com/opinion/op-ed/article167668412.html> [<https://perma.cc/8T4K-RRF3>]. No such Ecology estimate has been made for Whatcom County, but the absence of actual data does not stop the dissemination, and mischaracterization, of a statistic of limited value when battle lines are drawn over water.

⁹⁰ Data on septic systems indicated that Ecology’s well logs were incomplete, potentially resulting in the under-counting of permit-exempt wells. E-Mail from Erica Marbet, Squaxin Island Tribe, to Jean O. Melious (Jan. 3, 2018) (on file with author).

In Whatcom County, where the *Hirst* case originated, the Lummi Nation has also tracked permit-exempt wells, noting in 2012:

Since 1986, exempt wells in WRIA 1 have increased 270 percent from an estimated 3,294 wells to an estimated 12,195 wells. Approximately 77% of that increase has been in basins either seasonally closed or closed year-round to water withdrawal. From 1986 to 2009, flows in the Nooksack River failed to meet instream flow rule requirements 72% of the time during the July-September flow period.⁹¹

Nooksack flows are essential to the continued existence of severely curtailed salmon stocks in the watershed. The watershed supports nine Pacific salmonid species, including early Chinook Salmon populations that hold great cultural, subsistence, and economic importance to the Lummi Nation and Nooksack Tribe, which have reservations and traditional fishing grounds in Whatcom County. Two Chinook populations are listed as threatened under the Endangered Species Act and are considered critical for the recovery of Puget Sound Chinook. The current populations of these stocks are 0.8% and 1.8% of historical levels.⁹² The continued proliferation of permit exempt wells in the watershed will contribute to the loss of instream flows that these stocks need to avoid extinction.

As Lummi Nation chairman Timothy Ballew II observed, *Hirst* is good law because it comports both with state water law and with the treaties that Tribes made with Washington State.⁹³ Allowing the continued proliferation of permit-exempt wells in watersheds such as the Nooksack, where habitat conditions are already constrained, fails to provide certainty that existing rights to water will be preserved and that streams will continue to flow so that fish can thrive in them.⁹⁴

D. Climate Change

Water in Washington State is already over-allocated in many areas, and climate change will continue to increase the need to address conflict when water is insufficient for all users. One virtue of prior appropriation should be its adaptability to “the physical situation of most of the West - its climate, hydrology, and topography.”⁹⁵ As water resources become scarcer and competition over water intensifies, prior appropriation should

⁹¹ NORTHWEST INDIAN FISHERIES COMM’N, STATE OF OUR WATERSHED 2012, THE LUMMI NATION – WRIA 1, MOUNTAINS TO THE SEA 75, 80 (2012) (Citation omitted).

⁹² JEZRA BEAULIEU & OLIVER GRAH, NOOKSACK RIVER WATERSHED GLACIER MONITORING SUMMARY REPORT 2015 6 (2015).

⁹³ Timothy Ballew II, *Implement Hirst Decision to Allocate State’s Water Rights Cautiously and Fairly*, SEATTLE TIMES (Aug. 6, 2017).

⁹⁴ *Id.*

⁹⁵ Griggs, *supra* note 20, at 1268.

address scarcity by allocating water according to seniority. After all, the entire basis for a “first in time, first in right” system is “the idea that at some point the water in a stream or lake will be insufficient to satisfy all potential users, and that the rights of those who have already appropriated water to a beneficial use will be superior to any later appropriators.”⁹⁶

Washington State prepared an *Integrated Climate Response Strategy* in 2012.⁹⁷ The Strategy summarizes the many water-related challenges that climate change will bring to the state:

- The quantity and quality of water available for communities, irrigation, fish, hydropower generation, recreation, and other uses will be affected by declining snowpack, changes in seasonal streamflow, and increases in summer demand for water.
- Fish, wildlife, natural systems will face increased stress. Climate change will more likely damage and destroy certain types of habitats, increase threats to certain species such as cold-water fish, alter natural patterns such as animal migrations or flower blooms, and alter the presence of pests and invasive species.
- Washington’s farms and forests will be threatened by increased disease, pests, weeds, and fire, along with reduced summer water supplies.⁹⁸

Rising temperatures and increasing winter runoff will result in reductions in the amount of water naturally stored in snowpack and glaciers. Declining late-summer stream flows will result in reduced water quality and warmer summer water temperatures, while increasing demand for water will lead to more intense competition for scarce water resources.⁹⁹ All of these factors argue strongly for additional protection for instream flows and better planning for mitigation of water use in areas of increasing water scarcity. The unlimited proliferation of permit-exempt wells in areas of water scarcity will only exacerbate adverse impacts on instream values and will result in additional competition among water users.

⁹⁶ *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash. 2d 571, 591, 311 P.3d 6 (2013).

⁹⁷ WASH. STATE DEP'T. OF ECOLOGY, PREPARING FOR A CHANGING CLIMATE; WASHINGTON STATE'S INTEGRATED CLIMATE RESPONSE STRATEGY (2012). The state has no implementation plan or defined monitoring and evaluation framework for this strategy document. Dani Ziff, *Climate Change Adaptation by Washington State Agencies: Implementation and Performance 21* (2017) (unpublished M.M.A thesis, University of Washington) https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/40228/Ziff_washington_0250O_17357.pdf?sequence=1&isAllowed=y [<https://perma.cc/JT7F-7X4T>]. The strategy is most useful as a summary of the reasons that Washington state needs to adapt to climate change and a compendium of efforts that would constitute a rational response by the state.

⁹⁸ WASH. STATE DEP'T OF ECOLOGY, *supra* note 97 at 4.

⁹⁹ *Id.* at 103.

Climate change will have devastating effects on Whatcom County's Nooksack River watershed, which *Hirst* addressed. Glaciers in the nearby peaks of the North Cascade Mountains feed the river, dominating the timing and magnitude of streamflow. Scientists have documented extensive glacial volume and area loss over the course of the twentieth century, leading to the substantial loss of glacier-melt water to streamflow during the low-flow summer season.¹⁰⁰ Summer base flows have already decreased and stream temperatures have increased, reducing fish survival.¹⁰¹ All nine of the Nooksack River's salmonid species will be adversely affected by reduced summer flows and increased temperatures.¹⁰²

Rural landowners who rely on permit-exempt wells use the most water during the period of reduced summer flows when they are watering their lawns and plantings,¹⁰³ and this will only increase as temperatures grow warmer and summers become dryer. Around 85-90% of the water used for outdoor watering is "consumed," or not returned to groundwater.¹⁰⁴ The proliferation of permit-exempt wells in areas such as the Nooksack watershed, where endangered salmon species are already suffering from insufficient flows, drain water from rivers that are already comprised by increased temperatures and decreased water supply. This will exacerbate the effects of climate change.

IV. CONCLUSION

Hirst recognized that Washington is no longer a frontier state. Rapid population growth has imposed new strains on the state's over-appropriated water, and climate change threatens significant, and rapid, harm to water resources. Declining salmon runs diminish tribes' cultural, spiritual, and legal reliance on their traditional fishing grounds. Simply put, the State

¹⁰⁰ Oliver Grah & Jezra Beaulieu, *The Effect of Climate Change on Glacier Ablation and Baseflow Support in the Nooksack River Basin and Implications on Pacific Salmonid Species Protection and Recovery*, 120 CLIMATIC CHANGE 657, 658 (2013).

¹⁰¹ *Id.*

¹⁰² *Id.* at 666-67.

¹⁰³ See Christina Bandaragoda et al., WRIA 1 JOINT BOARDS, LOWER NOOKSACK WATER BUDGET 354-355 (2012) Figure 7 shows substantially increased withdrawals by all sources, including residential, in the summer; Figure 9 shows large increases in groundwater use by non-farm users during the summer months. Interestingly, the study assigns residential users a 50% return flow rate during the summer, despite the fact that the authors estimate that a 15% figure would be more accurate.

¹⁰⁴ *Id.* at 259, 266 (Return flows from lawn and garden irrigation are estimated at about 15%, which means that 85% does not return to the hydrologic system. The estimate of return flows does not, of course, reflect actual measurement, because rural water use and return flow are not measured in Whatcom County. Rather, it is based on a 1996 study that evaluated estimates of urban lawn water use and return flows in Colorado) (reference to Ramchad Oad & Michael DiSpigno, *Consumptive Use and Return Flows in Urban Lawn Water Use* (1996) (concluding that the 15% water return figure was appropriate for use on Colorado's Front Range, although actual return flows depend on "soil type, turf grass quality, and people's watering habits")).

needs to do better, and the *Hirst* court pointed out that the State has the tools to do so.

Washington State's Growth Management Act provides the tools needed to begin the inevitable process of implementing a twenty-first century water resource management system, rather than clinging to its current nineteenth century system. The Washington Supreme Court recognized that this task presents a challenge, but emphasized that "the scope of this responsibility does not support a dilution of the Act's purpose."¹⁰⁵ Local government land use planning and state water law need to operate as a "single harmonious body of law," with "government at all levels--municipalities, counties, regional authorities, special purpose districts, and state agencies—[engaging] in coordinated planning and cooperative implementation."¹⁰⁶

Washington State showed leadership and foresight almost thirty years ago when it adopted a Growth Management Act that recognized the need to protect water resources at all levels of government. This year's ill-conceived *Hirst* "fix," in contrast, rejects the valuable tools that state law provides to integrate water resource protection at all levels of government. Privileging permit-exempt wells above all other users, the path of least resistance that the legislature chose to take during the current legislative session, will address none of the fundamental purposes of water law. The State has failed to protect the public interest in water resources, including tribal resources, at a time when we most need enlightened state action to help adapt to the reality of rising temperatures, melting glaciers, and dying salmon.

Hirst spotlighted the reluctance of local governments, water lawyers, and Ecology to accept the fact that land use and water use are interrelated. The *Hirst* "fix," ESS 6091, reneges on the State's GMA commitment to protect water resources through the integration of land planning with water rights and water availability. This retreat from ecological reality reflects poorly on a state that presents itself as a model of sustainability. In particular, ESSB 6091, with its sole purpose of expediting new water withdrawals in water-deprived basins, will harm salmon runs that rely on instream flow protection for their critical habitat.¹⁰⁷ Any real "fix" of water law

¹⁰⁵ *Whatcom Cty. v. Hirst*, 186 Wash. 2d 648, 683, 381 P.3d 1 (2016).

¹⁰⁶ *Id.* (quoting Wash. Admin. Code § 365-196-700(2)).

¹⁰⁷ The most recent evaluation of the status of Puget Sound chinook, listed as "threatened" under the Endangered Species Act, states that "Over the last five years, the PS [Puget Sound] Chinook salmon ESU [Evolutionarily Significant Unit] has made little progress toward meeting the recovery criteria and current trends in abundance are negative." NAT'L MARINE FISHERIES SERV., 5-YEAR REVIEW: SUMMARY & EVALUATION OF PUGET SOUND CHINOOK, HOOD CANAL SUMMER CHUM PUGET SOUND STEELHEAD 20 (2011). Yet ESSB 6091 allows permit-exempt wells to withdraw water in closed basins of the Nooksack River and its tributaries that have been designated as critical habitat

must emphasize the public values of water, tribal values, and the need to plan for climate change. The politically-motivated erasure of the undeniable interconnection between land use and water resource protection is a step in the wrong direction.

under the Endangered Species Act. 50 C.F.R. § 226.212(i)(1). The “primary constituent elements essential for the conservation of the ESUs” include water quantity sufficient to support freshwater spawning and rearing sites 50 C.F.R. § 226.212(c)(1-2). ESSB 6091 did not address the reasons that the Legislature believed that withdrawal of water for new permit-exempt wells is more important to the public interest than protecting critical habitat for threatened salmon species.