Public Notice Regarding Hirst Decision

An October 6, 2016 Washington State Supreme Court decision (Whatcom County v. Hirst) has resulted in significant changes in the County's requirements for water availability determinations before granting of building permits. This includes those that rely on permit-exempt wells which, in the past, did not require formal water right permitting through the Washington Department of Ecology. This public notice is intended to clarify these new requirements.

RCW 19.27.097 requires building permit applicants to demonstrate an adequate potable water supply for the intended use of the building.

> *RCW 19.27.097. Building permit application—Evidence of adequate water supply—Applicability—Exemption.*
>
> *(1) 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…*

Prior to the recent Court decision, this was interpreted to mean that an applicant must demonstrate the factual (physical) availability of water. Spokane County complied with RCW 19.27.097 by requiring submission of a well log, a 4-hour pump test, a bacteriological test, and a nitrate test before a building permit is issued.

The interpretation of RCW 19.27.097 has changed based on the recent Court ruling, which stated:

> *"The Growth Management Act (GMA– RCW 36.70A) requires counties to ensure an adequate water supply before granting a building permit or subdivision application… and requires counties to assure that water is both <u>factually</u> and <u>legally</u> available before issuing building permits"*

The State of Washington uses the prior appropriation doctrine ("first in time, first in right") as the basis for state water law. This means that a senior water right holder cannot be impaired by a junior user with a later date of authorized water use. The recent Court decision clarified that this now applies to permit-exempt wells, in addition to permitted water rights:

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

Prior to this Court decision, an exempt well in most parts of the state, including Spokane County, have not been subject to strict determinations of legal water availability.

There is no explicit definition of water right impairment in the water code (RCW 90.03) or groundwater statute (RCW 90.44), but impairment has been generally interpreted through rule, policy, and case law on water rights to mean that use of a junior water right which prevents a senior water right holder from being able to exercise their right without significant modifications to wells or other facilities.

Legal availability and impairment tests apply not only to effects on individual senior water right holders, but also to river flows that have been established in Washington Administrative Code (WAC), often referred to as *instream flows*. While most water rights are held by individual persons or organizations, Washington State has also reserved water rights for many river systems, including some within Spokane County, through establishment of minimum *instream flows* or complete closures to any impacts on instream flows, through the 1967 Minimum Water Flows and Levels Act, RCW 90.22 and subsequent rule making.

To summarize, as a direct result of the recent Court decision, Spokane County is now required to determine whether an application for a building permit incorporating a permit-exempt well or other water source will impair senior water right holders, including established instream flows and closures.

Legal Water Availability in the Little Spokane River Watershed

Since January 6, 1976, the Little Spokane River watershed has had an instream flow rule in place. In most years there are periods where instream flows are not met at several stream gages as instream flow control points. Water use established after January 6, 1976 is junior to the instream flow and can impair the instream flow water right.

As a result of the Hirst Decision, building permit applicants must demonstrate that they have legal and factual access to water, meaning they will not impair existing senior water rights, including instream flows in the Little Spokane River. Studies have indicated that groundwater and surface water in the Little Spokane River watershed are generally 'hydraulically connected." Given the mandate, this limits the County's ability to approve new building permit applications that will utilize a private well within watershed.

Spokane County is in the process of setting up a water bank for the Little Spokane River watershed. A water bank would allow a building permit applicant to purchase a water right that is senior to the Little Spokane River Instream Flow Rule.

Until mitigation credits become available through the water bank, an applicant for a building permit relying on an exempt well will need to provide evidence that the new well will not impair senior water right holders, including established instream flows. This will likely require hiring a hydrogeologist licensed in the Washington State to conduct an evaluation.

Legal Water Availability in Areas Without an Instream Flow Rule

In order to obtain a building permit approval, an applicant for a building permit relying on a permit-exempt well will need to provide an evaluation from a hydrogeologist licensed in Washington State that demonstrates the withdrawal of the water from the new well would not impair senior water right holders.

The recent court decision addressed water basins flow rule specifically stating:

> *"Counties may not rely on Ecology's inaction in failing to close a basin as a determination that water is presumptively available for appropriation. Such inaction fails to provide any assurance that a new permit-exempt well will not infringe on senior water rights…and thus fails to satisfy the obligation the GMA places on Counties to ensure that water is legally available before issuing a building permit."*

Spokane County will accept counter complete applications until the effective date of the Hirst Decision, which legal counsel has advised is 20 days after the decision is filed, unless there is a motion to reconsider. Those applications will be subject to the water availability requirements currently in place now. After October 25th, applicants will be required to demonstrate legal availability of water in addition to factual availability, as required by the Hirst Decision.