Spring Event!
Understanding the “Hirst” Decision
May 19, 2017
Water Rights 101 (Dan Haller)

- Changes in Spokane County from the “Hirst” Decision (Mike Hermanson)
- Groundwater/Surface Water Interaction and Hydraulic Continuity (Carl Einberger)
- Little Spokane Water Bank Development (Dan Haller)
Introduction to Basic Water Law

What is a Water Right?

A water right is a legal authorization to use
- a reasonable amount of public water
- for specific beneficial purposes

A water right is a use-based (usufructuary) vested, property right.
Water rights are required by law to ensure proper allocation and management of Washington’s water resources. The legislature determined that our state’s waters are a public resource and their use should return the maximum benefit to the public.

Water rights establish priority dates which can be used to protect senior water right holders, in times of shortage.

“I Was Here First!!!”
History

Pre-State (1889) / Territorial (1853)

- Water is a natural resource held in common for the public good.
- Water is not “owned”.
- Individuals can have the right to use it.
“The right to the use of water in any [water body] may be acquired by appropriation, and as between appropriations, the first in time is the first in right.”

Water users were required to post a “notice” of intent to use water on a tree near the diversion and record the notice at the county courthouse.

1891 Laws of Washington
History

Nobody in Charge . . .

“The appropriator’s rights to use the water of this state are open to attack . . . [T]here is no law limiting the amount of water that may be filed on from any stream. On some streams the appropriations now on file call for many times the amount of water in the stream and available for use, and yet, there is no law prohibiting further appropriations, and no officer whose duty it is to eliminate excess appropriations and protect water users against future encroachments upon their rights.”

History

1917 (RCW 90.03)

- “All waters within the state belong to the public, subject to existing rights.” Subsequently, water law was based on the Prior Appropriation Doctrine: “First in time, first in right.”

- Permit system for using surface water.

- Procedures for adjudicating all “vested” water rights prior to the act. The Legislature mandated that the state administer the water resources (e.g. Ecology).
Introducing New Paper
What is an Application?

An application is the expression of the applicant’s intent to develop a project. It’s a dream; a goal; a proposal.

- Basic project information (quantities, location, purpose)
- Priority date tied to date application was filed.
- Fee has historically been very modest, so it was easy for applications for even speculative projects to be filed.
What is a Permit?

A permit to appropriate water is an inchoate (undeveloped or unperfected) right, which is “an incomplete appropriative right in good standing” which “remains in good standing so long as the requirements of law are being fulfilled.”

- “Go build what you wanted”
- Reasonable progress and due diligence
- No relinquishment
- Construction (Beginning, Completion)
- Perfection (Proof of Appropriation)
What is a Certificate?

A certificate to appropriate water is awarded when the water right holder beneficially uses the amount of water permitted, at the location identified, and for the intended purpose.

You’re Done!
(well . . . ?)

- Relinquishment
- Metering
- Changes
Back to the History Lesson
History

1945

Ground Water Code Adopted

- Extended the 1917 surface water code to ground water.
- Created a permit system for all uses of ground water.
- Declaration period for vested uses.
- Some uses exempted from permit process, RCW 90.44.050
History

1945

Ground Water Permit Exemption

- Cumulative Exemptions (all apply) for:
  - Single or group domestic use (5,000 gpd)
  - Industrial purposes (5000 gpd)
  - Irrigation of ½ acre of lawn (acreage limit only)
  - Stockwatering (no quantity limit)

- Only exempt from permitting, not the water code. Prior appropriation still applies.
1970 to Present—Lots of Other Water Right Laws

Statutes passed in the last 40 years added complexity.

- 1969 Minimum Flows and Levels (RCW 90.22)
- 1971 SEPA (RCW 43.21C)
- 1971 Water Resources Act (RCW 90.54)
- 1977 Family Farm Act (RCW 90.66)
- 1987 Water Storage (RCW 90.03)
- 1989 Trust Water Rights (RCW 90.42)
- 1992 Water Re-Use (RCW 90.46)
- 1997 Watershed Planning (RCW 90.82)
- 2001 Conservancy Boards (RCW 90.80)
- 2003 Municipal Suppliers (RCW 90.03)
What is an Instream Flow?

An instream flow is a **water right** for the stream and the resources that depend on it. It has a **priority date** like any other water right.

Instream flows established in WAC at stream flow levels that will protect and preserve instream resources and values.
Instream flows do not affect existing (senior) water rights, rather, they protect the river from future withdrawals.

Water rights issued after an instream flow is issued are curtailed (have to stop using water) if an instream flow is not met (usually measured weekly).
Little Spokane River Instream Flow


- Water Use Priorities listed in the program
  - Priority I – Existing water rights
  - Priority II – base flows for preservation of wildlife, fish, scenic, aesthetic, and other environmental values
  - Priority III – Domestic Use
  - Priority IV – non commercial agricultural irrigation
  - Priority V – all other beneficial uses

- Listed as a purpose of management plan and instream flow rule:
  - Declares that holders of new rights (granted after the adoption of this management program) will be limited in their use of water, depending on drought conditions. When natural flow falls below the established base flow level, new right holders will have to stop diversion.
Equally important to RCW

- Supreme Court Decisions interpret the law when it is unclear
- Two important issues – Permit Exempt Wells & Hydraulic Continuity
  - Postema v PCHB (2000)
  - Campbell & Gwinn v Ecology (2002)
  - Kittitas County v EWGMHB (2011)
  - Five Corners Family Farms v Ecology (2011)
  - Swinomish Indian Tribe v Ecology (2013)
  - Foster v Ecology (2015)
  - Hirst v WWGMHB (2016)
In the early 1990’s, Ecology stopped issuing water rights in most basins.

In response, there was a greater reliance on permit-exempt uses.

In response to perceived abuses, litigation over the interpretation of the permit exemption followed.
The Water Code & Permit Exempt Wells

How and when did things change:

- Before 1945 – nothing needed
- After 1945 – need a permit, but not for a small use
- After 1971 – an instream flow WAC can impact my ability to use water but only surface water, or water that “directly impacts” surface water.
- After 2000 (Postema Decision) – essentially all ground water withdrawals impact surface water somewhere.
The Water Code & Permit Exempt Wells

- After 2002 (Campbell & Gwynn) – Multiple wells are not entitled to multiple exemptions for the same project.

- After 2011 (Kittitas)-A County must evaluate whether water is legally available before issuing a building permit, but can work with Ecology to make that determination.

- After 2016 (Hirst)-A County must evaluate legal availability and the GMA/State Building Code requires an evaluation independent of Ecology. New permit exempt wells cannot impair existing senior water rights, including instream flows.
- Water Rights 101
- Changes in Spokane County from the “Hirst” Decision (Mike Hermanson)
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The Hirst Decision

- Before 2011 – Demonstrate water is physically there and suitable to drink
- 2011-2016 – If Ecology tells us water is not legally available we will consider it.
- After 2016:
  - “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 factually and legally available before issuing building permits”
Hirst Decision

- Legally available = no impairment to senior water rights

- Spokane County adopted an interim ordinance to address our responsibility under RCW 19.27.097

“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..”
Interim Ordinance Provisions

- Legal availability depends on location within the County.

- WRIA 55 has an instream flow regulation

- The Spokane Valley Rathdrum Prairie Aquifer/Spokane River has an instream flow regulation (WAC 173-557)

- All other areas do not have an instream flow regulation, but there are senior water rights
Parcels located in WAC 173-557 Rule Area

- Ecology created a water bank along with the Spokane River Instream Flow rule.
- A mitigation certificate issued by the Washington Department of Ecology that satisfies the requirements of WAC 173-557-060(4).
There are no established instream flows in other basins in Spokane County, so the impairment question is focused on adjacent users.

The impairment standard for localized impacts (RCW 90.44.070; WAC 173-150) notes that additional withdrawals may be allowed so long as the induced pumping interference drawdowns on adjacent senior users with qualifying withdrawal facilities are limited to “reasonable or feasible pumping lift.”

Spokane County used an induced drawdown of 10 ft resulting from a new withdrawal to establish if there will be an impairment to an existing senior user.
500 ft. setback requirement

- Hydrogeologic analysis determined that in a confined aquifer if a new withdrawal is established 500 ft. from the existing one then less than 10 ft. of drawdown is expected.

- Spokane County took this approach so that the burden to demonstrate no impairment to existing senior users is not placed on the applicant.
3 Tier Approach

- Tier 1 – 500 ft. lateral separation between the new withdrawal and existing adjacent users.

- Tier 2 – Aquifer dependent lateral separation between the new withdrawal and existing adjacent users.
  - Sand and gravel aquifer – 100 feet
  - Clay and silt aquifer – 200 feet
  - Bedrock (i.e. granitic) aquifer – 200 feet
  - Basalt aquifer – 500 feet

- Tier 3 – A hydrogeological report prepared by Licensed Hydrogeologist or Professional Engineer that concludes that the new withdrawal will not induce greater than 10 feet of additional drawdown in adjacent wells.
Parcels in WRIA 55

- A water right permit or certificate that legally authorizes year around, uninterruptible domestic water use in the proposed project location; or

- Demonstration of existing domestic water or group use exempt from permitting requirements of RCW 90.44.050 on the same parcel identified on the building permit application, and the following criteria are met:
  - Water use must be associated with a structure recognized by the Spokane County Assessor as a permanent structure
  - Water use must be for domestic purposes.

- There are no new water rights being issued. How do I get a building permit?
  - The Washington Legislature changes the law, or
  - Mitigate the impact from new building with existing water right – Water Bank
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Hydraulic Continuity

- How does my well here
- Impact stream flow here
- Remember - The Supreme Court said it doesn’t matter how big the impact is
If the snow is gone and it hasn’t rained for a month where does the water in the stream come from?

Springs flowing from the Spokane Valley Rathdrum Prairie Aquifer into the Little Spokane River.
What is Hydraulic Continuity?

“...the interconnection between groundwater (aquifers) and surface water sources.”
What is Hydraulic Continuity?

“…the interconnection between groundwater (aquifers) and surface water sources.”
Tools to Evaluate Hydraulic Continuity

- Collection of water level data from wells, hydraulic properties, streamflow measurements
- Groundwater flow analysis through numerical modeling simulations
RCW 90.44.030
Chapter not to affect surface water rights.
“...any underground water is part of or tributary to the source of any stream or lake“

RCW 90.54.020(9)
Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and ground-waters

Postema v. PCHB (2000)
Groundwater permits may be denied based on impacts on instream flows. Direct measurement of impacts is not necessary to demonstrate impairment. Modeled impacts can be used.

GMA requires consideration of exempt well impacts on instream flows
When is Hydraulic Continuity Important?

- New Appropriations
- Surface to Groundwater transfers
- Impairment analysis
- Mitigation requirements
- Exempt well availability determinations
Impairment to Other Groundwater Users

- Qualifying withdrawal facilities constitute a “reasonable development of the aquifer” (i.e. properly constructed wells not ‘sipping from the top’ of an aquifer) (WAC 173-150-030)
- Reasonable or feasible pumping lift (WAC 173-150-040) – County ordinance allows 10 ft of additional drawdown
What is Mitigation Suitability?

“Mitigation means measures that offset adverse effects on a water source to eliminate impairment and/or detriment of the public interest”

- Use of the Water Banking through the Trust Water Right Program
  - Consumptive Use
  - Mitigating impacts to instream (address Hirst)
  - Local impairment
- Water Rights 101
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- **Little Spokane Water Bank Development (Dan Haller)**
What is a Water Bank?

Water banks redistribute water right authority between sellers and buyers.

Supply

Sellers: Water right holders

Projects: Retime available water

Banking Functions

- Certifies validity of water rights
- Business rules for bank
- Establishes pricing
- Marketing
- Regulatory interaction

Demand

Buyers:
- Mitigation for new uses
- Reliability for existing uses
Water Banks in Washington
Water Banking Fundamentals

- Traditional Water Right Transfers (one-to-one relationship)
  - A single permitted or certificated water right holder transfers the right to a new single user for non-exempt uses
  - The transfer to new location and use must be approved by Ecology based on a review of potential impairment, physical and legal water availability, public interest, and beneficial use
Water Banking Fundamentals (one-to-many)

- Water Right Transfers to Water Bank
  - Mitigate impacts on instream flows by new exempt well users
  - Bank users receive a Mitigation Certificate legally linking their exempt use to a water right held in trust by Ecology in perpetuity
  - Exempt-well water bank users do not directly receive a water right
Water Banking Fundamentals

Example Water Right
Consumptive Use

Water Right
Transfer

Instream
Flow

Water Balance
Current

Water Credit
Held in Trust

Domestic Wells
Consumptive Use

Instream
Flow

Water Balance
after transfer to trust

Instream
Flow

Water Balance
after domestic wells

Water Right
Transfer

Mitigation
Certificates
Per Trust Agreement
Spokane County Water Bank Implementation

Potential Water Right Acquisition

Preliminary Due Diligence

County Negotiates Purchase & Sale Agreement

Water Right Transfer Tasks
- County Conducts:
  - Formal Due Diligence
  - File Change Application
  - Public Notice
  - Trust Report of Examination
  - SEPA
  - Escrow / Closing

Trust Water Agreement Tasks
- County Conducts Following with Ecology:
  - Trust Water Agreement
  - Suitability Map Negotiation
  - Bank Metrics
  - Bank Accounting

County Code Adoption
- Establish Packages to Sell
- Water Use Monitoring Procedures
- Covenant Requirements
- Well Construction Standards
- Enforcement Criteria
- Fees
- Other Bank Operations Criteria

Outreach and Training
- Develop Internal and External Forms/ Materials
- Develop Outreach Material
- Update Website
- Staff Training
What is the Trust Water Agreement?

- Establishes **how** the water in trust will be managed
- Establishes **area** where new uses will be offset with water in trust - Suitability map agreement with Ecology
- Establishes bank **metrics** (amount of water debited for new uses)
  - Indoor use per house
  - Outdoor use per square foot of lawn/garden
- **Accounting** of the bank credits and debits
- **Compliance** and reporting roles
- Bank “evolution” clauses: assignment, portability, modification
Upcoming County Code Adoption

- Who is the target customer for the bank?
  - Minimum public health and safety for exempt uses?
  - Full authority for exempt uses?
  - Exempt and permitted uses?

- Who will the bank sell mitigation credits to?
  - Building permit applicants only?
  - Future building permit applicants with ‘sunset’ clause?
  - Existing property owners?

- How many packages will the County offer?
  - Indoor only, Indoor and outdoor, Multiple indoor and outdoor?

- How much will mitigation certificates cost?

- How will County monitor, enforce, and report bank performance?

- Will well construction requirements be required?
Draft Timeline for Implementation

- 2014: Received grant, began exploring voluntary bank
- 2016: Interim closure in response to Hirst
- January 2017: First Purchase and Sale Agreement on water right to seed water bank
- May to Late Fall 2017: Permitting and county code adoption for water bank
- Late Fall 2017: Goal to begin issuing mitigation certificates for areas covered by first water bank
- 2017-2019: Additional water rights acquired in other tributaries to expand bank