

**Okanogan County Public Informational meeting:
Hirst v Whatcom County Implications in Okanogan County
December 7, 2016**

County Personnel Present:

Perry Huston (running meeting)

Sandy Mackie (attorney representing county)

Albert Lin (deputy prosecutor, cautioning county not to give opinions on specific cases)

Various county staff including Building Department, Public Health Department, Planning Department.

BOCC not present.

Minutes taken by county planning staff.

Note: Citizen notetaker not a water law expert. This is a summary of comments and explanations to the best of our ability. Note taker's questions or explanations in italics.

Audience: Well drillers, realtors, concerned landowners, and others. Most speakers from audience did not identify themselves and all were calm. Most seemed knowledgeable to some degree, enough to ask good questions.

Overview: Per Mr. Mackie, a group of people in Washington State had been trying for many years to get counties, not only the WDOE, to take responsibility for protection of county drinking water supplies. They finally succeeded in a recent case out of Whatcom County, in which it was decided that permit-exempt wells were interfering with a senior water right, the base flow of the Nooksack River - which runs below base flow each year for much of the year. The court ruled that rather than simply relying upon the WDOE to determine whether a watershed is "closed" to new withdrawals, each county must take responsibility for determining whether water is physically and legally available for new development. In Mr. Mackie's opinion, Okanogan County would be sued by at least 3 parties if the county went ahead and pronounced that water was available for any given development proposal without having a process for determining whether or not water is both legally and physically available in response to Hirst.

The county is trying to make the timing as good as possible for citizens. The process will give 21 days for an appeal of the decision of the county Hearing Examiner regarding the availability of water for any building proposal. The appeal must be brought by a senior water right holder who contends that the proposal will interfere with the entity's senior water right. If there is no appeal by such a party with standing, an applicant will know within 30 days whether or not he or she can go ahead with the proposed project. The county think this process will satisfy the new interpretation of Washington water law under Hirst. It is now the County's duty to determine whether or not water is physically and legally available for projects requiring permits.

SUMMARY OF ISSUE - By Huston and Mackie

* **Change in Law:** In the past, counties relied upon DOE to tell them whether or not water was available for development. Since Hirst, a county is under the gun to exert "due diligence." Interpretation of state water law has changed. A county may no longer assume that water is legal-

ly available for a project simply because the WDOE has not “closed” the drainage to new withdrawals.

*** Who is affected?**

The change does NOT affect these people:

1. Those in a water system, already operating off an existing water right.
2. Those already utilizing a certified well under their own water right.
3. Those on community/municipal systems
4. Those using an exempt well that has already been in use. (*Re stock watering, see note at end of this document.*)

Examples: existing mobile home and you want to pull it off for a house
existing house and you are adding an addition

The change DOES affect these people as of today:

1. Those who have a well in the ground that has never been used.
2. Those who do not have a well yet.

***Criteria for new water use**

- *Water must be both physically and legally available.
- *Legal availability means any new water use must not interfere with a senior water right.
- *The primary senior water right of concern at this point is the instream flow of a river (called “base flow” by Mackie.) Mackie - **The basic question: Will a new withdrawal interfere with a senior water right? This is the over-riding test. The spotlight has been thrown upon rivers that routinely run below base flow (a senior water right.)**

***PEA v. GMA**

*It is clear that Hirst applies to counties under the Planning Enabling Act as well as the Growth Management Act. There is no sense in attempting to argue otherwise .

***Legislative “fixes”**

*Considering Wa. State legislative history, it is highly unlikely that legislative action will change this ruling in any significant way. Many attempts over the years to change water law have failed due to the numerous stake-holder groups which have never been able to agree with each other. Mackie: in Oly since 2002 (Campbell Gwinn) there have been water bills every year . You will discover that there are tons of players. Each controls about 5-10 senators. There is almost no chance of moving these bills forward. There are too many people afraid of change. Huston: I have recommended that BOCC not wait for a legislative solution.

*** Site Plan applications** will be the vehicle for hearings for new water rights before the Hearings Examiner.

PROPOSED PROCESS:

***Hearing on proposed process, Resolution 2016-5: 12/19/16.** Until this hearing, nothing can be really certain. The ordinance creates a process, for protection of the public water supply, which is now required of the county by Hirst. BOCC will take input on the process - whether or

not it is a good process, whether to do something different. Huston: no matter what happens on the 19th, we will probably go ahead with the HE hearings. (*Somewhat confusing*)

***Next Steps in Process, if Res 2016-5 is approved as a result of hearing:**

1. All available data will be collected by the county and placed in two notebooks for the Hearing Examiner, one notebook for WRIA 48 one for WRIA 49. We are gathering everything we can find to build a record so the individual land owner does not have to do all that. We have logged wells back to 2007. We are working on logging earlier wells. Will gather up all data and build it into the two records. Will take public input and any info available and will use as a baseline.

2. Will have “Omnibus hearings” before the HE starting the latter part of Jan. (According to Huston) Will use site applications as the vehicle to put water availability in front of HE for a decision. At the hearing, the applicant will put site specific info in to HE, who will put it together with data gathered by county. Perry - We are gathering info that is already there, looking at it with a different eye. Trying to create a process to show the decision was defensible and make it as painless for the landowner as possible.

3. Applicant has the burden of proof that new water right would not interfere with senior right. (Using site specific info in addition to county-gathered info in notebook for WRIA.)

4. Appeal - Any appeal of the HE’s decision must be brought within 21 days. Once decision is made, clock starts ticking. Appellant must have standing: A holder of a senior water right may appeal, saying the new water right will affect appellant’s senior water right.

5. Materials being gathered for WRIA notebooks by county

*Certified Well Logs submitted by well driller. These are on DOE web site.

*Maps of all aquifers

*Lists of closed basins

*Investigating reach by reach to see which reaches have water available and which do not. (*May refer to only WRIA 48?*)

*Any other info available - see below reference by Chester of Okanogan Drilling to the “white paper” produced by the well drillers’ association as well as info on cutting trees being a plus for saving water on a landowner’s property.

* Mackie - Materials being put together in Jan will allow HE to determine whether you drilled into the wrong aquifer - maybe there is another reserve you could tap into (*this was very unclear to me.*)

*Huston: Mid-Jan hearings: To gather up all the relevant information from all studies. Graphs of precip, flow gauges, Hi-low days, days below baseline instream flow.

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MACKIE OBSERVATION: It appears that there is a lot of territory that is not hydraulically connected to the river in question (*in the Okanogan Basin, I believe. For example, Wauconda area.*) If well is connected (*in continuity with the river*), you have to have an alternative source of water or it will interfere with the instream flow.

QUESTIONS and ANSWERS:

Availability - If up to 2 cfs in a given area and someone applies for a permit - does proximity to streams come into play? Does proximity affect whether or not you would judge as available?

Answer: It could. If you are drilling into a shallow aquifer, would need to go down through that into another aquifer. The baseline data is the type of thing we will gather. So landowner doesn't need to do it.

Well driller comment: Withdrawal from aquifer can be of benefit to river:

Chester - Okanogan Drilling. They say there is 2 cfs available (in Methow) That is a Dept of Ec'y number. The 5,000 gal per day is what you are allowed to take and it comes out of that amt (2cfs) Washington Well Drillers' Ass'n says that if you drill a well, whether it is hydrologically connected, you are only going to use about 200 gal/day; about 100+ of that will go back into the river. But if you go deeper than that and the river fluctuates and my well goes dry My well went 280 ft deep. So now I am taking 200 gal a day from another aquifer, and it is going back into the river from which I didn't take it, so it is a benefit. We have a position paper, or white paper, that says if you drill a well, it can be of benefit to the stream.

Perry: This is the type of info that needs to be brought up in the omnibus hearing. Should be able to do this by end of January. A record of what each permit exempt well does.

Mackie says they have a copy of this "white paper" in the materials.

Comment: Mackie - An exempt well can provide up to 5,000 gal per day. Your water right is the amount of domestic water you use for beneficial use per day. Also, you can't give water to your neighbor.

Cutting Trees can benefit the stream:

Gentleman (*Chester again?*) : if you cut down a large tree, that could save up to 150 gallons of water per day.

Mackie: That data is in our data bank also. So if someone cuts down trees to build a house, his situation may be different from someone building in shrub-steppe (*as determined by Hearing Examiner, presumably.*)

PH - Whatever, you still have to show available water.

Mackie - Campbell-Gwinn type situation: If there is a series of land divisions, all made as part of a common scheme but undeveloped, that whole area would be entitled to a single exempt well, per Campbell-Gwinn. There are lots in OK Cty today that may or may not be able to get a well.

Question: - Determination of legal and physical ability is what? What are other tests for legal ability?

The base record is everything we know about a certain area. Burden of proof - this is upon person seeking the permit. Any appellant to a decision by HE to give them a permit has to have

standing - that you are interring with my water right. Mackie - The HE will have data. We may get into 2 well drillers testifying as to whether one well will affect another one.

Qu: (by “Director”) (?) - “Perry, what are you doing to create a record?”

Huston: Graphs, comparative analysis, gathering wether data, already have exempt wells mapped thru '07. Have a request to DOE for wells before that. Will put all closed basins in a map. Trying to create a snapshot.

Qu - If I have land for sale and it doesn't have a well on it, I'm at an increased risk? Perry confirms. Risk to buyer goes way up.

Consequence - lower land prices?

Mackie - over time, will get a pattern of where water is available or not. Market will respond. There has always been a push for water banks. If we start identifying places, the market will respond by getting water from water banks. Spokane and other counties are starting to put water banks together.

Qu: How does water bank function? Person irrigating apples at 2 acre feet of water - grower decides he will drip irrigate and will put the 1 acre foot he is no longer using into a water trust . It may be able to be transferred to domestic water. Some of major water users may look for excess water to put into trust, and we will be looking for other mechanisms.

Qu: - Harmony Heights and Silver Spur - only pumping around 3 gal/min.

PH - Silver Spur will be a mixed bag. Part is on a water right, a water system. Others that are not and have not been putting water to beneficial use will need to go through this process. Mackie - and are they in continuity?

Qu: Do fish come into play? (Michael Notaro) Mackie - maybe yes, maybe no. People who are directly involved in those issues are being told....WDFW and others involved. (*not understood.*)

Qu: Are Tribes involved ? PH - Trying to get everyone involved. Mackie - Tribe has own process. Tribes vs state on water (?) - remember Columbia River treaty is being re-negotiated. That will affect us. Also, BOCC just signed new intergovernmental agreement with the tribe. Tribal folks have the option of approaching either the Tribe or the County for permitting process.

Applying for Permits:

PH - someone can come in now if they want. I'll take the permit application, but they will have to dig up the information if they do not wait for county to do it. Realistically, we will not have the info we need until January. Mackie - Goal is to have HE with all the info available in Feb.

Kathy Goldberg: - will you expand the hours of the HE? How will we get through this?

PH - At staff level, we are trying to get some economy of scale. If we have several permits in the same area, maybe we can run these through on the same day. If we need to, might be able to expand HE's hours. If you start shoving through too much at the same time...only so much capacity. We will try to do what we can.

KG - (a realtor) and I have some transactions that are being held up now. Trying to get a feel for... might they extend until April?

PH - If I get 10,000 apps, no. If I get 8?? I am handling 15-20 calls per day now. Some are in the middle of transactions. All I can do is explain the process.

Qu: - Do you have to be physically present? PH: No rule on that. Agent could come in. If you put together your best info and don't want to be here, it's ok.

Well driller - (Chester, I believe) to put into perspective - there was a study. The city of Seattle uses more water in 2 days than the whole state does (*the rest of the state?*). I guess this is the problem the environmentalists and court have put us in. I think of all the wells in Aeneas, Tunk, etc - no impact on anyone. Is there going to be a map that says you are in the backcountry.... (*did not understand.*)

Mackie - You will come in on a case by case basis, and tell us whether this area is in continuity or not. People like you will have to say I've drilled wells here, they are connected or not...etc. The HE will use this data to say it's not connected, etc. That will be case by case as we get started.

If you have a certificated water right from Ec'y, the county will accept that.

Whistle (well driller) - If you are in a basin... (*did not understand*)

PH - If you go to the hearing and no one objects, maybe it will work out. If all senior users come in and object, we may have a problem. A senior holder can file something to Ec'y now - an impairment claim. That's Ec'y. But if it's a specific well, that's the county. (*unclear.*)

Qu - Someone wants to put in a trailer. How do they deal with this? No site analysis or building permit - do they have to hire the well driller or someone to go in with them? Mackie - the rules do not exempt mobile homes or those who don't know better. Septic tank, building permit, or plat - before permit can be issued, water has to be shown available.

Qu: Property transactions - Any way for prospective builder or seller to access this (?) PH - We are using site analysis as the vehicle to get this before the HE.

Answer to question by Marcy Stamper (reporter) - Mackie - When put to beneficial use, you vest the rules at that time. It is not a taking. Anyone who builds is subject to building requirements at the time you start building. State of Wa at one point said that if you owned a lot you could drill - court said no. All of the rules apply. No vested right to an old rule.

Qu - How would someone proceed who had a residence for domestic use, but it burned in the fire. How would they memorialize? - PH - If you had an exempt well, you were using for domestic...it is ok. Mackie - do not wait for more than 4 1/2 years to file a site plan. If you file and get the determination, and then you can claim something prevented me from developing later on (*hardship.*) Act now to document you were using it. There is a danger of abandonment. The process would be a site analysis form. Site Analysis is the vehicle to put it before the HE.

PH - What I will do, as administrator of code until I'm told "no" - I'm not enforcing if you lost home in fire. If you have a well that you have put to domestic use and are not putting it to a new domestic use...it is ok. That is DOMESTIC use. If you used well for domestic use. If you have a only travel trailer with a bath house.... that is ok as far a I am concerned.

(One last question I did not understand.)

Beneficial Use in re Stock watering: County is still waiting for confirmation that this all deals only with domestic use (drinking water) only and not stock watering (single domestic use and stock watering is priority #1 under the Methow Basin rule) Someone commented that it is simply "beneficial use" that counts, and that both Irrigation and stock watering are beneficial. County hopes for an answer soon on this.