

Understanding the Whatcom County v. Hirst Decision

What the Ruling Means for Residential
Wells in Washington

By

Peter G. Scott



Outline

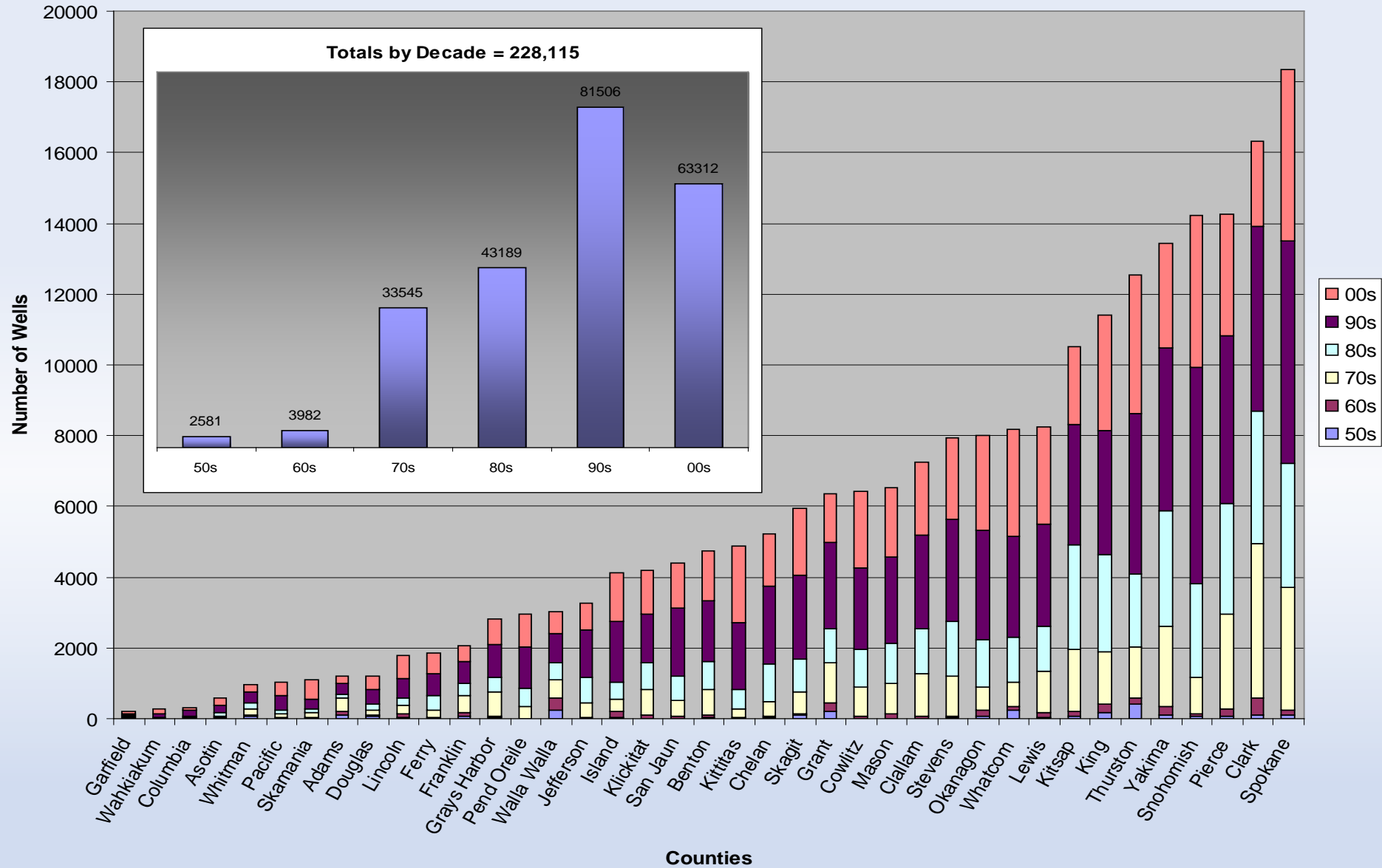
- “Exempt Wells” in Washington
- *Hirst* Decision
- Statewide Response

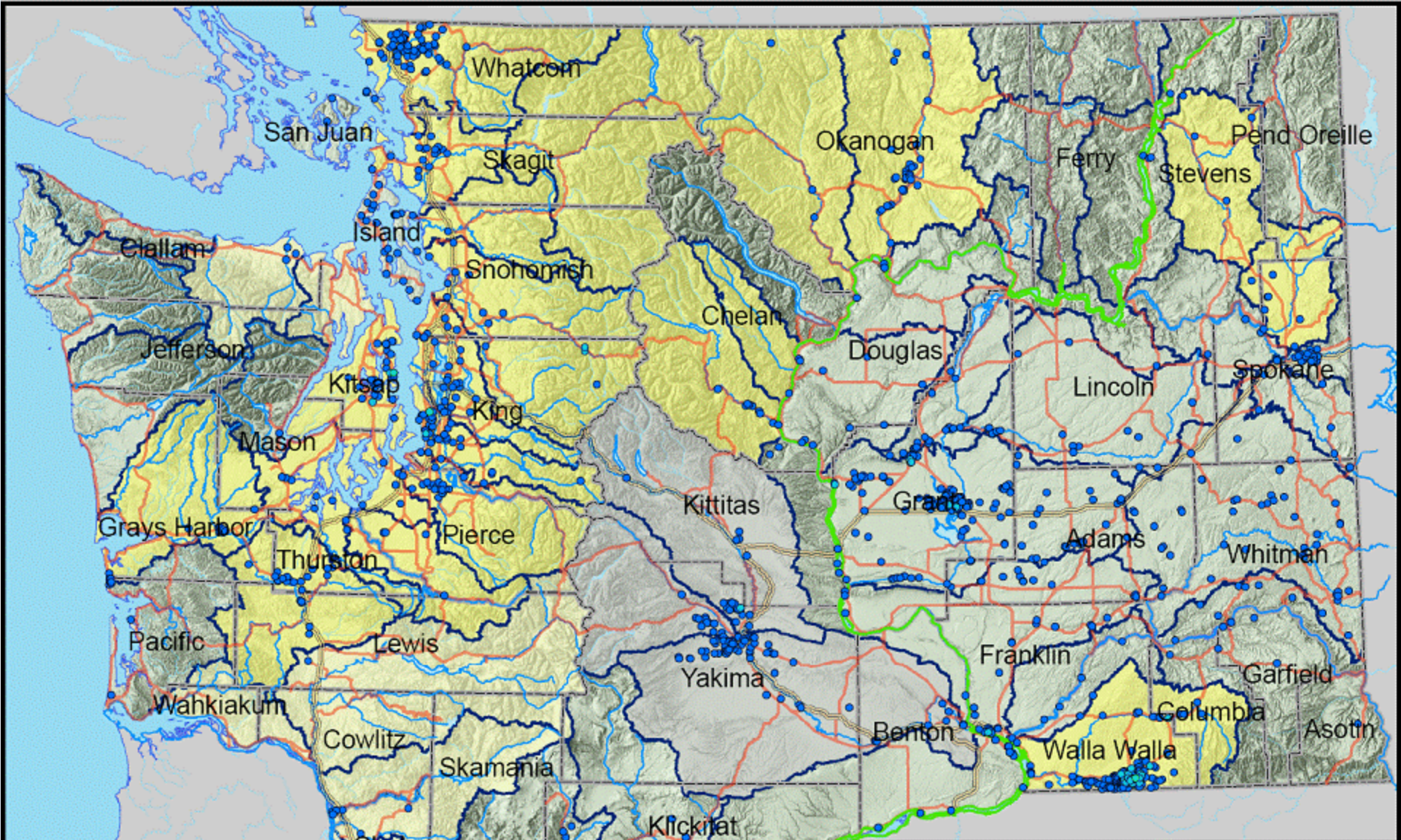


Setting the Stage

- What is a permit exempt well?
 - A legal provision allowing for small appropriations of groundwater outside of the established permitting process.
 - In the words of Idaho Rep. Raybould, “an exempt well is two votes.”
- What is the problem?
 - Disconnect between administration of water rights and land use decisions.
 - Proliferation of exempt wells to support residential development.
 - Possible impact on senior rights.

Washington Water Wells





1950

Water Well Logs per 40 acres

● 1 - 2	● 14 - 17	● 31 - 35
● 3 - 6	● 18 - 20	● 36 - 40
● 7 - 10	● 21 - 25	● 41 - 55
● 11 - 13	● 26 - 30	● 56 - 77

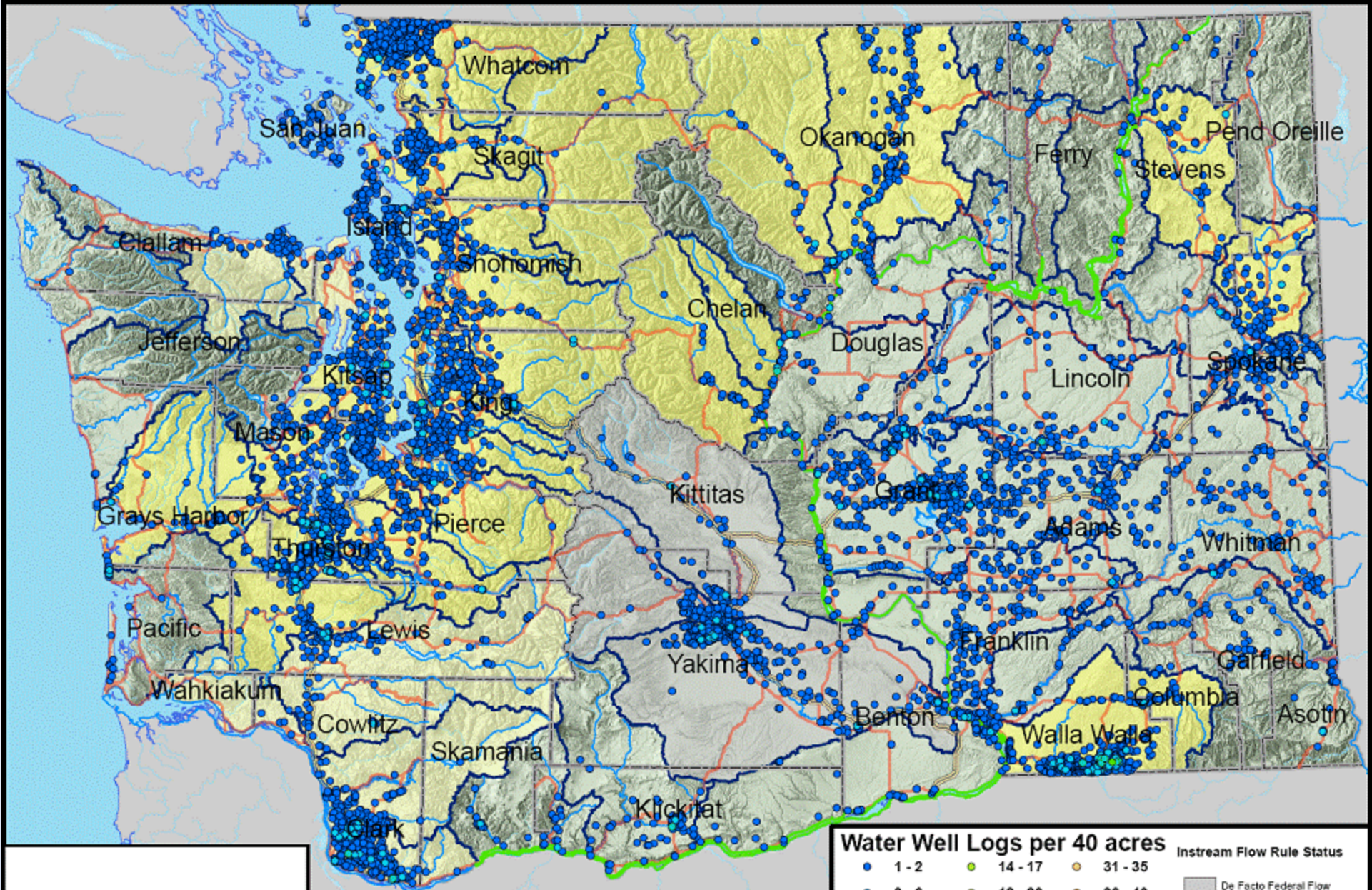
Instream Flow Rule Status

- De Facto Federal Flow
- Existing Rule
- Rule in Process
- Columbia River Instream Flow

■ WRIA Boundary ■ County Boundary

N
 0 25 50 Miles

WASHINGTON STATE
 Department of Ecology
 October 2007



1970

Water Well Logs per 40 acres

● 1 - 2	● 14 - 17	● 31 - 35
● 3 - 6	● 18 - 20	● 36 - 40
● 7 - 10	● 21 - 25	● 41 - 55
● 11 - 13	● 26 - 30	● 56 - 77

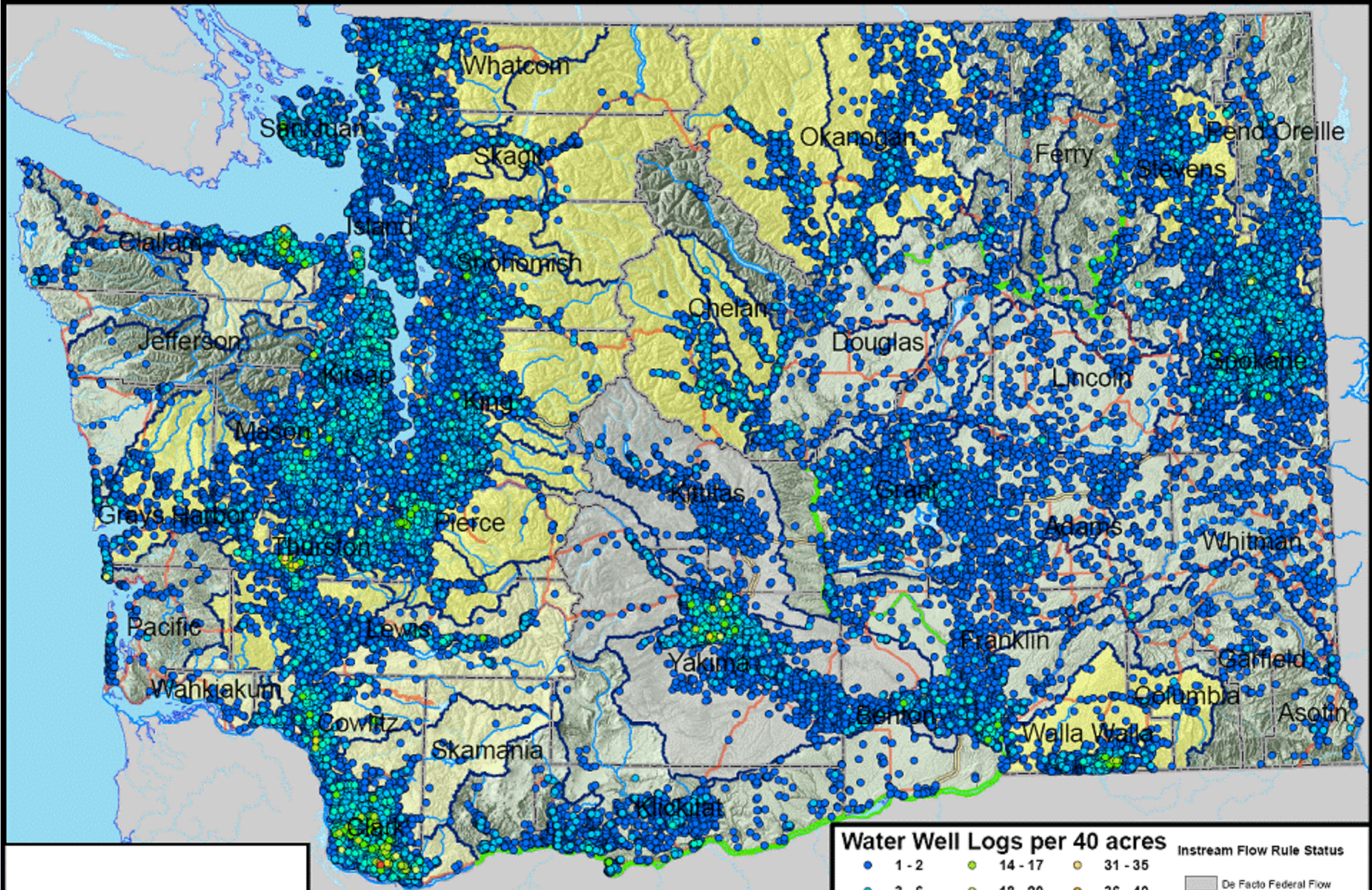
Instream Flow Rule Status

- De Facto Federal Flow
- Existing Rule
- Rule in Process
- Columbia River Instream Flow

■ WRIA Boundary ■ County Boundary

N
 0 25 50 Miles

Department of Ecology
 October 2007



1990

Water Well Logs per 40 acres

● 1 - 2	● 14 - 17	● 31 - 35
● 3 - 6	● 18 - 20	● 36 - 40
● 7 - 10	● 21 - 25	● 41 - 55
● 11 - 13	● 26 - 30	● 56 - 77

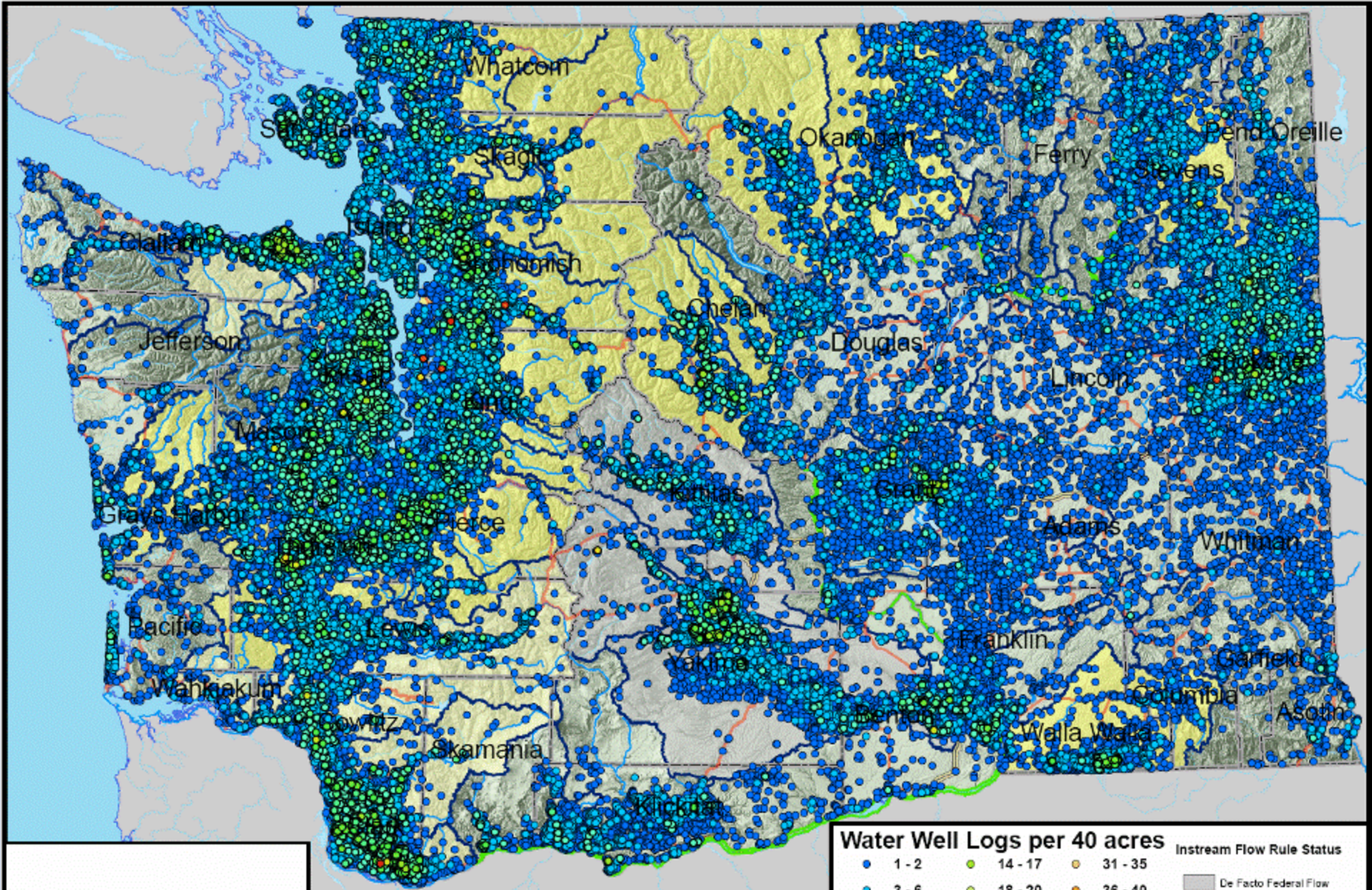
Instream Flow Rule Status

- De Facto Federal Flow
- Existing Rule
- Rule in Process
- Columbia River Instream Flow

■ WRIA Boundary ■ County Boundary

N
 0 25 50 Miles

WASHINGTON STATE
 Department of Ecology
 October 2007



2007

Water Well Logs per 40 acres

● 1 - 2	● 14 - 17	● 31 - 35
● 3 - 6	● 18 - 20	● 36 - 40
● 7 - 10	● 21 - 25	● 41 - 55
● 11 - 13	● 26 - 30	● 56 - 77

Instream Flow Rule Status

- De Facto Federal Flow
- Existing Rule
- Rule in Process
- Columbia River Instream Flow

■ WRIA Boundary ■ County Boundary

N
 0 25 50 Miles

WASHINGTON STATE
 Department of Ecology
 October 2007



Permit to Withdraw (RCW 90.44.050)

- After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter. . .



Legislative History (RCW 90.44.050)

- Partial list of prior attempts to amend RCW 90.44.050: S.B. 5494, 54th Leg., Reg. Sess. (Wash. 1995); S.B. 5593, 54th Leg., Reg. Sess. (Wash. 1995); H.B. 1685, 54th Leg., Reg. Sess. (Wash. 1995); S.B. 5827, 54th Leg., Reg. Sess. (Wash. 1995); H.B. 1772, 54th Leg., Reg. Sess. (Wash. 1995); S.S.B. 5517, 54th Leg., Reg. Sess. (Wash. 1995); S.S.B. 6698, 54th Leg., Reg. Sess. (Wash. 1996); S.B. 5275, 55th Leg., Reg. Sess. (Wash. 1997); H.B. 2396, 55th Leg., Reg. Sess. (Wash. 1998); H.B. 3106, 55th Leg., Reg. Sess. (Wash. 1998); H.B. 1314, 56th Leg., Reg. Sess. (Wash. 1999); S.B. 5289, 56th Leg., Reg. Sess. (Wash. 1999).



Kittitas County Rulemaking

- September 2007 petition from water right holders in Kittitas County sought moratorium on new groundwater wells in Kittitas County.
- April 7, 2008, Ecology and Kittitas County signed a MOA to complete comprehensive groundwater study and a permanent groundwater management rule.
- Third emergency rule adopted in March 2009. WAC 173-539A.
 - Attempted to craft rule to allow use of less than 5,000 gpd.
- On July 16, 2009, Ecology issued an emergency closure rule that allowed new appropriations of groundwater in two cases:
 - Uses determined to be water budget neutral pursuant to this rule under WAC 173-539A-050; and
 - Uses of groundwater for a structure for which a building permit application vested prior to July 16, 2009.

Exempt Well Cases

- *Dept. of Ecology v. Campbell & Gwynn*, 146 Wn.2d 1 (2002). Holds that limitation of 5,000 gpd for “group domestic use” precludes use of multiple exempt wells to serve planned development.
- *Joo Il Kim v. Pollution Control Hearings Bd.* 115 Wn. App. 157 (2003). Holds that a commercial greenhouse is the “agricultural industry” and may therefore use up to 5,000 gpd under exempt well provision for industrial use.
- *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 256 P.3d 1193 (2011). Held that compliance with the state’s Growth Management Act (GMA) requires counties to adopt development regulations that do not allow developers to circumvent the permit exempt groundwater statute with multiple smaller subdivision applications.
- *Five Corners Family Farmers v. State of Washington*, 173, Wash.2d 296, 268 P.3d. 892 (2011). Held in favor of a feedlot that was using more than 400,000 gpd, concluding that no limit on stock water use is imposed under the permit exempt groundwater statute.

Reservation and Mitigation Cases

- *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571 (2013), Supreme Court overturned 27 reservations established for future year-round out-of-stream uses in Skagit River Basin because exception for “overriding considerations of the public interest” (OCPI) does not authorize permanent impairment of senior instream flow.
- *Foster v. Ecology*, 184 Wn.2d 465 (2015), overturned water right permit issued to the City of Yelm because “in-kind” and “out-of-kind” mitigation did not address impairment of stream flows in the shoulder season and OCPI exception to priority of right cannot permanently impair senior water rights.

Active Public Interest

- Futurewise has, in its own words, worked for more than 25 years:
 - “to prevent sprawl in order to protect our State’s resources and make our urban areas livable for and available to all. Founded to help support implementation of the first-in-the-nation Growth Management Act, we focus on preventing the conversion of wildlife habitat, open space, farmland, and working forests to subdivisions and development, while directing most growth into our urbanized areas.”
 - <http://futurewise.org/>



Whatcom County v. Hirst, et al., No. 91475-3 (October 6, 2016)

Background: State regulation from 1985 sets minimum instream flow in the Nooksack River basin and closed the basin to new appropriations *except for permit exempt wells*. Petitioners challenged Whatcom County code provision that allowed building permits and subdivision approvals with water supplied from permit exempt wells where instream flows were not being met.

Issue: Do Whatcom County's comprehensive land use plan and development regulations protect the quality and availability of water as required under the state's Growth Management Act ("GMA," RCW 36.70A).

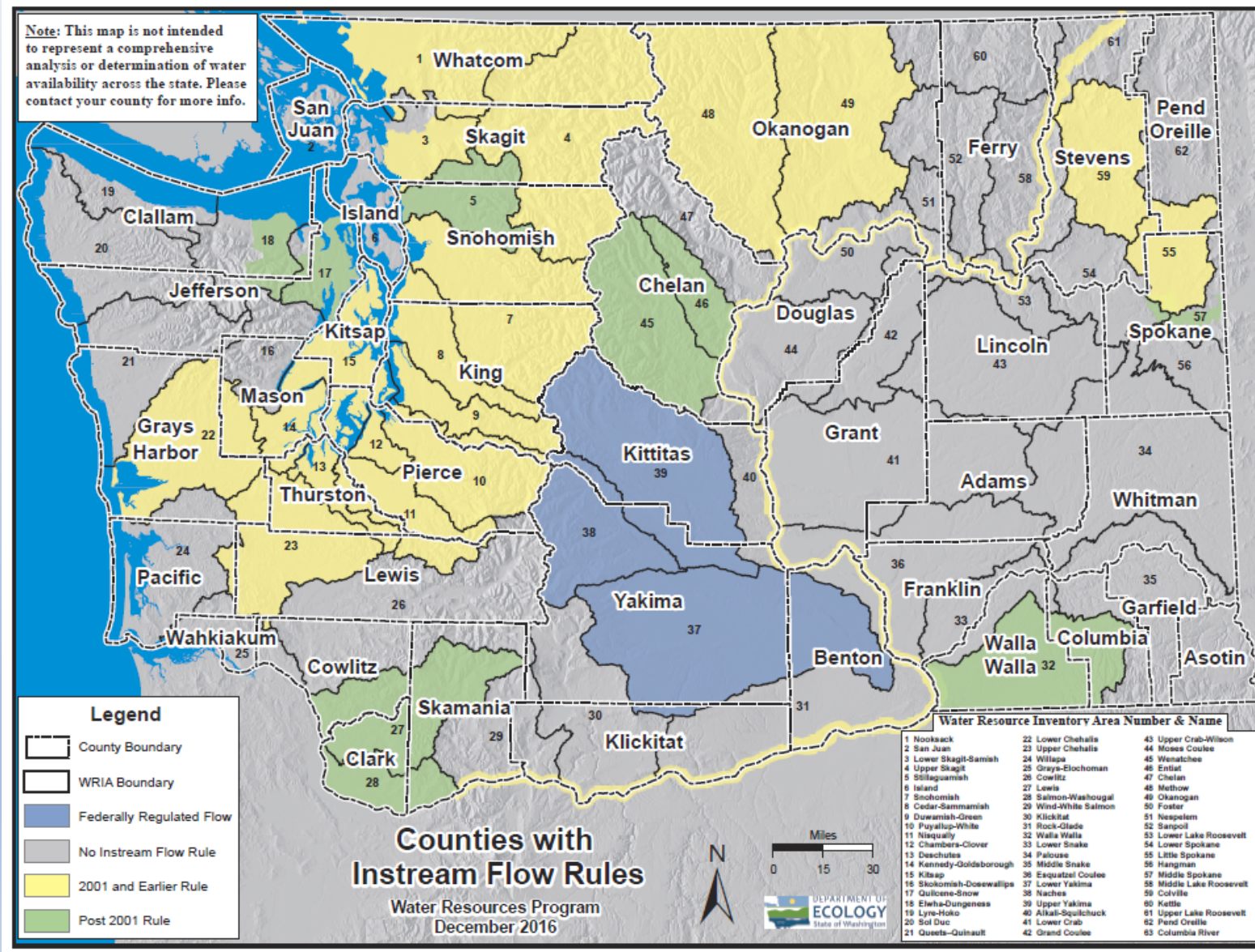
Holding: County comprehensive land use plan and development regulations cannot rely on regulatory or statutory permit exemption to demonstrate that water is legally available in closed basin where minimum instream flow is not being met.




Whatcom County Code

- Allowed subdivision or building permit applicants to rely on private well only when the proposed well site “does not fall within the boundaries of an area where [the Department of Ecology] has determined by rule that water for development does not exist.”
Ordinance No. 2012-032.

Water Resource Inventory Areas (WIRA)





Nooksack Rule (WAC 173-501)

- Adopted in 1985 under Water Resource Act (RCW 90.54), and Minimum Flows and Levels (RCW 90.22), to:
 - “retain perennial rivers, streams, and lakes in the Nooksack water resource inventory area 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.” WAC 173-501-020
- Establishes closure periods and minimum flows for Nooksack River and all tributaries
 - “Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available.” WAC 173-501-070 (2).



Growth Management Act (RCW 36.70A)

- Growth Management Hearings Board (GMHB)
 - There are three regional administrative boards (Eastern, Western, and Central Puget Sound) with quasi-judicial powers, sit in 3-member panels and have jurisdiction over local government legislation.
 - GMHB housed with the Environmental and Land Use Hearings Office (Pollution Control and Shorelines Hearings Boards).
 - GMA grants standing to petition for review before the GMHB to any person that participates in the public process to adopt or amend local codes.
 - Courts apply GMA standing to judicial review under APA.
 - Standard of Review – requires GMHB to defer to local government discretion in the absence of “clear error.”
 - Persons aggrieved by GMHB action may petition for judicial review under the state’s Administrative Procedures Act (APA, RCW 34.05).
 - APA standards of review are deferential to the agency.



Growth Management Act (*cont.*)

- GMA goals include: "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10).
- Counties must consider and address water resource issues in land use planning. Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd., 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) (counties must regulate to ensure land use is not inconsistent with available water resources).
- Comprehensive plan must "'provide for protection of the quality and quantity of groundwater used for public water supplies.'" RCW 36.70A.070(1).
- Rural land use regulation must "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development" and be "consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas." RCW 36.70A.030(15).

GMHB Findings and Conclusions in *Hirst*

- Board found substantial evidence of limited water availability in rural Whatcom County.
 - Under the Nooksack Rule, most of the County is closed to further appropriation seasonally or year round.
 - Avg. minimum instream flow in portions of the Nooksack Basin “are not met an average of 100 days a year.”
 - Since 1997, County has allowed 1,652 permit exempt wells have been drilled in otherwise closed basins.
 - The County knew in 1999 that the proliferation of rural, permit-exempt wells was creating 'difficulties for effective water resource management.
 - An additional 637 land use applications to be supplied by exempt wells pending in March, 2011.
- Board concluded that the comprehensive plan does not protect water availability
 - “The water supply provisions referenced [by the amended policies] do not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met.”

Judicial Review

- GMHB certified an order for direct review by the Court of Appeals, which reversed the GMHB; the Supreme Court then granted review.
- Issue framed by the Supreme Court as ‘what action must growth management planners and administrators take to ensure water availability under GMA?’
 - *Hirst, et al.*, asserted: “GMA requires local governments to determine legal availability of water as part of its land use decision.”
 - County asserted: it is entitled to rely on state law that allows private wells unless Ecology closes an area to such use.
- The Supreme Court concluded that:
 - GMA places an independent responsibility on counties to ensure water availability.
 - To the extent that there is a conflict between the GMA and the Nooksack Rule, the later-enacted GMA controls.

Supreme Court - Authority and Reasoning

- Since Nooksack Rule was adopted in 1985 "Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on surface waters. . . . 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." *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).
- Instream flows are protected water rights. Court has been protective of minimum instream flow rules and has rejected appropriations that interfere with senior instream flows. *E.g.*, *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6 (2013); *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015).
- An appropriator's right to use water from a permit-exempt withdrawal is subject to senior water rights, including the minimum flows established by Ecology. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at 598.
- "Read as a whole, it is clear that the GMA holds counties 'responsible for land use decisions that affect groundwater resources.'" *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011).



Authority and Reasoning (*cont.*)

- GMA places specific requirements on local governments when approving building permits or authorizing subdivisions.
 - RCW 19.27.097(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.
 - RCW 58.17.110(2) – A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies
- Majority concludes that “adequate” means physically *and* legally available. *Kittitas County*, 172 Wn.2d at 179-80.
- Dissent concludes that “adequate” means physically available.

Authority and Reasoning (*cont.*)

- “The County's deference to the Nooksack Rule as a substitute for an actual determination of water availability expressly allows permit exempt appropriations to interfere with established minimum flows because the Nooksack Rule exempts these appropriations from minimum flow requirements.”
- “Indeed, the County knew in 1999 that the proliferation of rural, permit-exempt wells was creating 'difficulties for effective water resource management.' The County cannot reasonably rely on this regulation to satisfy its responsibility under the GMA to protect water availability.”
- “[t]he County's reliance on the Nooksack Rule turns the GMA goal of directing growth to urban areas upside down. The County's comprehensive plan allows the unchecked growth of single domestic dwellings relying on permit-exempt wells in rural areas; this is precisely the ‘uncoordinated and unplanned growth’ that the legislature found 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.” RCW 36.70A.010.

Dissent

- In *Kittitas County*, we assumed the validity of permit-exempt wells, without requiring a further showing of no water rights impairment. 172 Wn.2d at 180. Thus, our decision in *Kittitas County* does not support the majority's imposition of additional burdens on building permit applicants and local jurisdictions.
- It is not "incongruous" to limit *Postema's* holding to the facts of that case. By transposing a rule adopted for permitted wells into the permit exempt context, the majority ignores the distinction between these types of withdrawals.
- RCW 19.27.097 contains separate requirements for GMA and non-GMA counties . . . This court should not interpret a statute so as to give people in some counties greater protection for their water right than others, especially when the result is to foster piecemeal decision-making regarding water use. (10/40 WA counties are not fully planning under GMA)
- Majority fails to harmonize GMA and the Water Resources Act, which requires the Department of Ecology, "through the adoption of appropriate rules ... to develop and implement ... a *comprehensive* state water resources program which will provide a process for making decisions on future water resource allocation and use." RCW 90.54.040(1).
- "I would interpret RCW 19.29.097 to align with the WRA. Allowing counties to integrate the Department of Ecology's water determinations into their comprehensive plans and rely on them when reviewing building permit applications promotes the integrated, comprehensive management the legislature envisioned. It also promotes consistent water management throughout a basin, recognizing that basins cross county lines."
- The majority's holding amounts to a policy decision that GMA counties should not issue building permits that rely on permit-exempt groundwater withdrawals. This is not a policy decision we are at liberty to make.

Response - Whatcom County

- Whatcom County Council adopted Emergency Ordinance 2016-048 on October 25, 2016. This ordinance placed an emergency moratorium prohibiting the filing, acceptance, and processing of new applications for project permits for uses that rely on permit-exempt groundwater withdrawals for water supply on property located within a closed or partially closed basin.
- Interim Ordinance 2016-066, which took effect on December 18, 2016, amends WCC 24.11.060 to require the County Health Department to verify legal availability of water prior to the issuance of permits in the form of:
 - A water right permit from the Department of Ecology; A letter from an approved public water purveyor with sufficient water rights, stating the ability to provide water; Documentation that water can be supplied by a rainwater catchment system approved by the Whatcom County Health Department, per Department of Ecology Policy 1017, or
 - For a permit-exempt well per RCW 90.44.050,
 - documentation that the well site is located in the Samish River watershed, or in Point Roberts, Eliza Island, or Lummi Island, as shown in Figure 24.11.060, or
 - A study prepared by a qualified hydrogeologist licensed in the State of Washington demonstrating a proposed groundwater withdrawal would not impair a senior water right, including instream flows established in Chapter 173-501 WAC where applicable, or
 - A mitigation plan prepared by a qualified hydrogeologist licensed in the State of Washington, and approved by Whatcom County.
- <http://www.whatcomcounty.us/2487/Exempt-WellWater-Information>



Response - Department of Ecology

- The court has said that water is not legally available if a new well would impact a protected river or stream, or an existing senior water right. If your county determines that water is not legally available for your new use, the county would not be able to approve your building permit, even if you have already drilled a well.
- It is unclear how the decision affects areas of the state where there are no instream flow rules. Counties are working to review the decision and what it means for them.
- If you want to use a well – Ecology recommends you start by talking with your county. Each county is interpreting and applying the court case differently.
 - Some counties have issued temporary laws restricting building that relies on groundwater wells.
 - Some areas of the state remain unaffected by the court decision. This may change over time as counties begin to enact new ordinances.
- <http://www.ecy.wa.gov/programs/wr/nwro/hirst.html>



Response – Other Counties

- Spokane County – Interim Ordinance Nov 1, 2016; second Interim Ordinance January 10, 2017, requiring building permit applicants located in area subject to instream flow rule to provide a mitigation certificate issued by Dept. of Ecology. Under WAC 173-557-060(4).
- Okanogan County – Ordinance 2016-5, requires open record hearing, limited to parties that receive notice or can establish “a direct interest;” for closed basins applicant has burden of showing lawful and physically available water.
- Pierce County – Effective November 1, 2016, new policy requires applicants for building permit or subdivision approval to satisfy existing review requirements and provide hydrogeological study by licensed hydrogeologist to show proposed use will not impact or impair senior rights, including state promulgated instream flows and closures.

Washington Legislature

- Multiple Bills proposed to address *Hirst* and *Foster*.
 - Senate Bill 5024 – codifies *Hirst*
 - Senate Bill 5239 – amends GMA, including RCW 19.27.097 and RCW 58.17.110, to clarify that land use permits may be based upon water resource management rules
 - Other Bills – HB 1348, HB 1349
 - Proposed (not yet dropped) – allows land use permitting in reliance on water resource rules; imposes fee remitted to Ecology for data collection; allows/requires broader mitigation where instream flows exist and exempt wells are or are likely to cause significant adverse impact to fish.



Issues

- Are exempt wells a water rights issue or a land use issue?
- What must other GMA counties do?
- What must non-GMA counties do?
- What about land owner right to drill well?
- What is the limit of County authority to determine availability?
 - Court said 1991 GMA controls conflict with the 1985 Nooksack Rule.
 - What about rules adopted after 1991?
 - Does Counties' duty to determine availability supersede instream flow rules.
- What effect will closure of exempt wells have on market price of existing rights?

Presenter

Peter G. Scott, Law Offices, PLLC
682 Ferguson Ave., Suite 4
Bozeman Montana 59718
(406) 585-3295

peter@scott-law.com





To ask the presenter a question click on **[question]**, type in your question, and click on the **[send]** button.





Thank you for joining us.

Visit our website at: www.ngwa.org for additional information and for other educational opportunities.

