

MITIGATING FOR DEVELOPMENT

EXEMPT WELL AND WATER ALLOCATION MITIGATION LEGISLATION IN WASHINGTON STATE

THE “*HIRST-FOSTER FIX*”

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INTRODUCTION

Decisions by the Washington State Supreme Court identified restrictions on how water may be put to use in light of laws developed to protect the benefits of environmentally adequate instream flows. On January 18, 2018, the Washington State legislature passed Engrossed Substitute Senate Bill (ESSB) 6091 to address two water resource allocation issues recently ruled upon by the Court: 1) exempt wells (the *Hirst* issue); and 2) options to mitigate for impacts from new water allocations (the *Foster* issue). Both are intimately related to impairment of instream flows.

This article: provides pertinent legal background; presents an overview of the substance of the ESSB 6091; examines the new law’s potential impacts on various stakeholders; and discusses how well ESSB 6091 addresses the problems it aims to ameliorate.

In general terms, ESSB 6091 addresses:

Part 1: Building Applications & Exempt Wells (“*Hirst Fix*”) — Building applications utilizing exempt wells filed prior to passage of ESSB 6091 may be approved. Newer applications may be approved with some additional requirements (e.g., fees and more stringent water use caps) until modified instream flow rules are in place as developed under Part 2.

Part 2: Instream Flow Rule Updates — Processes are established to amend existing instream flow rules (Section 202(1), 203(1)).

Part 3: Stream Flow Enhancement (“*Foster Fix*”) — A Task Force is convened to recommend options for out-of-kind mitigation of instream flow impacts from new water right allocations. The Task Force must first meet by June 30, 2018 and provide recommendations by November 15, 2019 (Section 301(7)(a)).

It could be said that ESSB 6091 delivers permission to continue groundwater development using a “credit card” backed by future mitigation and promises of future streamflow enhancement.

BACKGROUND

Washington’s water resources allocation administration has grown increasingly protective of fish habitat and instream flows over the past couple of decades. The following Washington State Supreme Court decisions are particularly relevant to understanding the genesis and intent of ESSB 6091:

Postema (October 2000): This case established an absolute standard of one-molecule impairment for impacts on instream flows that are not being met — i.e., there is no “de minimus” impact allowance (*Postema v. PCHB*, 11 P.3d 726, (2000)).

Swinomish (October 2013): This case denied the Washington State Department of Ecology (Ecology) the discretion to retroactively establish, by rule amendment, reservations for future water use (such as for exempt wells). This discretion was denied due to the failure to adequately protect instream flows (*Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013)). See Moon, *TWR* #116 for additional information.

Foster (October 2015): This decision required “drop-for-drop” mitigation. *Foster* re-affirmed that instream flows adopted in a rule must be protected from impairment. This case involved Ecology’s decision that conditioned the City of Yelm’s water right permit on an extensive mitigation package. The proposed mitigation included offsetting the total quantity of new water use through both: 1) water-for-water mitigation (“in-kind”) and 2) “out-of-kind mitigation” — i.e., mitigating for small impairments occurring during the spring and fall with habitat improvements. Having found that public benefits arising from the mitigation package would far outweigh any adverse impacts on stream flows, Ecology had applied a state allowance for “overriding considerations of public interest” (OCPI) to approve the application. The Court said the permit would impair minimum instream flow water rights despite the mitigation proposed and therefore violated water law (*Foster v. Dept. of Ecology, City of Yelm and WA PCHB*, Case No. 90386-7 (2015); *Foster v. Yelm*, 362 P.3d 959 (2015)). See Moon, *TWR* #141 for additional information.

Hirst (October 2016): The Court ruled that Whatcom County failed to comply with Washington State’s Growth Management Act requirements to protect water resources. The ruling required the county to make an independent decision about legal water availability (*Whatcom County v. Hirst, Futurewise et al.*, Case No. 91475-3, 381 P.3d 1 (2016)). See Dickison & Haensly, *TWR* #155 and Moon, *TWR* #153.

Mitigation Legislation

Instream Flow Protection

Legislative “Fix”

Out-of-Kind Mitigation

Impairment Standard

Retroactive Reservation

Drop-for-Drop Mitigation

“OCPI”

Legal Availability

Mitigation Legislation

Legal Availability

Hirst Responses

Limited Staff

“WRIAs”

“Exempt Wells”

Mitigation Constrained

Grandfathering Exempt Wells

Prior Appropriation Applies

While the *Hirst* decision applies only to Whatcom County, the precedent has been interpreted to be applicable to all entities operating under the Growth Management Act (GMA), including counties and cities. The term “counties” in this article is used to refer to all GMA entities for the sake of brevity and because counties are the most broadly impacted by the *Hirst* decision.

In upholding the stricture against impairment to pre-existing water rights, *Hirst* did not introduce any new realities in water law. It confirmed counties’ responsibility for determining the *legal availability* of water, specifically in regard to issuing building permits based on water supply from exempt wells. “Legal Availability” is the determination that there is water available for a new appropriation based on an examination of all existing water rights with a view to protection of those rights — including instream flow rights.

In the issuance of building permits, counties have routinely accepted a determination of the *physical availability* of water as sufficient to issue a water availability certificate for the installation of a well. *Hirst* confirmed counties’ duties to determine the *legal availability* of water before issuing building permits.

The response of counties to the *Hirst* ruling varied, including:

- Requiring applicants to obtain professional opinions (Pierce and Spokane counties)
- Issuing building permits with disclaimers to “proceed at your own risk” (King and Snohomish counties)
- “Wait-and-see” approaches (Thurston and Lewis counties)
- Building moratoria (portions of Skagit and Kittitas counties)
- Offering water banking institutions for mitigation (portions of Clallam and Walla Walla counties)

Most counties are not well-equipped, either with appropriate staff or financial resources, to navigate the arcane complexities of water resource rules, statutes, policy and management — though some counties do have water resource staff with excellent capabilities.

Some counties span multiple Water Resource Inventory Areas (WRIAs) — the state’s geographical planning boundaries for water resources. A county spanning five or six WRIAs is not uncommon and such counties may face an equivalent number of different instream flow rules.

In 1945, the Legislature established the Groundwater Code, Chapter 90.44 RCW. In the code, they identified certain “small withdrawals” of groundwater as being “exempt” from the permitting process. These groundwater uses — including domestic, livestock, and some small-scale industrial uses — are commonly referred to as being “permit exempt” (hence “exempt wells”). Ecology has not actively managed exempt wells. This has left the guidance, administration, and enforcement of exempt wells to hover somewhat ambiguously between local and state agencies.

Regarding the *Foster* decision, it should be noted that the concept of flexible mitigation is widely implemented in Washington State in the management of natural resources other than water allocation. Such flexibility is evidenced in mitigation wetlands, wetland banking, and averaging of riparian buffers setbacks. Even in water allocation decisions, changing a seasonal consumptive irrigation right to year-round domestic was considered reasonable water resource management and broadly accepted. However, the Court decided in *Foster* that this approach wasn’t allowed because of shoulder season impacts, despite a comprehensive mitigation package including modeling, reclaimed water, riparian zone restoration, wetlands creation, and over-mitigation during critical salmonid life cycle periods. The water right denied in *Foster* was one by the City of Yelm in a package of ten water rights that were concurrently approved with a similar mitigation structure. No water right other than the City of Yelm’s water right was contested (due to the limited standing of the plaintiff) and all of the other involved water rights are now being exercised with out-of-kind mitigation.

ESSB 6091 PART 1 – RELIEF FOR COUNTIES (THE “HIRST FIX”)

The first part of ESSB 6091 relieves counties of determining the legal availability of water in the issuance of building permits and allows counties to rely on Ecology determinations. This part provides amnesty/grandfathering for all wells with respect to building permits and adequate water supply under the GMA. ESSB 6091 is carefully worded with respect to grandfathering exempt wells only in the context of GMA and building permits. It does not grandfather exempt wells with respect to the Prior Appropriation Doctrine. All water use is subject to this Doctrine, whether the use is established with permit exempt wells or with administratively-issued water right permits. This Doctrine includes the requirement to not impair “senior” (previously-issued) water rights, whether these are administratively-issued water rights, exempt wells, instream flows, or tribal water rights.

While the law provides immediate relief to GMA entities with respect to determining the legal availability of water from exempt wells, significant liability persists. It is unlikely that exempt wells will also be grandfathered within the context of prior appropriation through the amendment of instream flow rules described in Part 2 of the law (discussed below). Any such exemption would require a fundamental change in Washington State water law as concerns the seniority system under the Prior Appropriation Doctrine. Far too many constituencies have vested interests under the system (i.e., all existing water right holders) to make accomplishing such a change feasible.

Mitigation Legislation

Swinomish Ruling

Impacts Mitigation

Watershed Plans

ESSB 6091 Categories

Remaining Watersheds

This friction with established water law has the potential to encounter significant problems similar to those experienced in the Washington State’s Skagit Valley. An instream flow rule was passed in the Skagit Valley in 2001 without water reservations for future uses — including exempt wells. Ecology subsequently amended the rule in 2006 to include reservations, but the *Swinomish* case determined that the 2001 rule established the instream flow as a senior water right that could not be impaired. The Swinomish Tribe and Ecology subsequently agreed to not cut off or interrupt the use of almost 500 exempt wells installed after the 2006 instream flow rule while Ecology finds mitigation for the impacts of these wells.

It is predicted that impacts from all exempt wells installed under the purview of ESSB 6091 will require mitigation. Exactly who will fulfill this possible responsibility to mitigate impacts remains unknown. Based on the *Swinomish* precedent, amendment of instream flow rules under Part 2 of the legislation — to retroactively establish reservations — is unlikely to survive judicial review. Stream flow enhancement efforts in Part 3 of the legislation may provide mitigation (see discussion below). Ecology assumed mitigation responsibility in the *Swinomish* case, and the Swinomish Indian Tribe graciously granted time to Ecology to find a solution. However, future situations may not meet with the same patience, either on the part of tribes, environmentalists, or senior water right holders. Should no solution or mitigation be developed in Parts 2 or 3 of the legislation, homeowners may be denied the continued use of wells upon which GMA administrative entities have granted building permits. In such a case, homeowners may seek compensation or restitution.

ESSB 6091 PART 2 – DEALING WITH EXEMPT WELLS

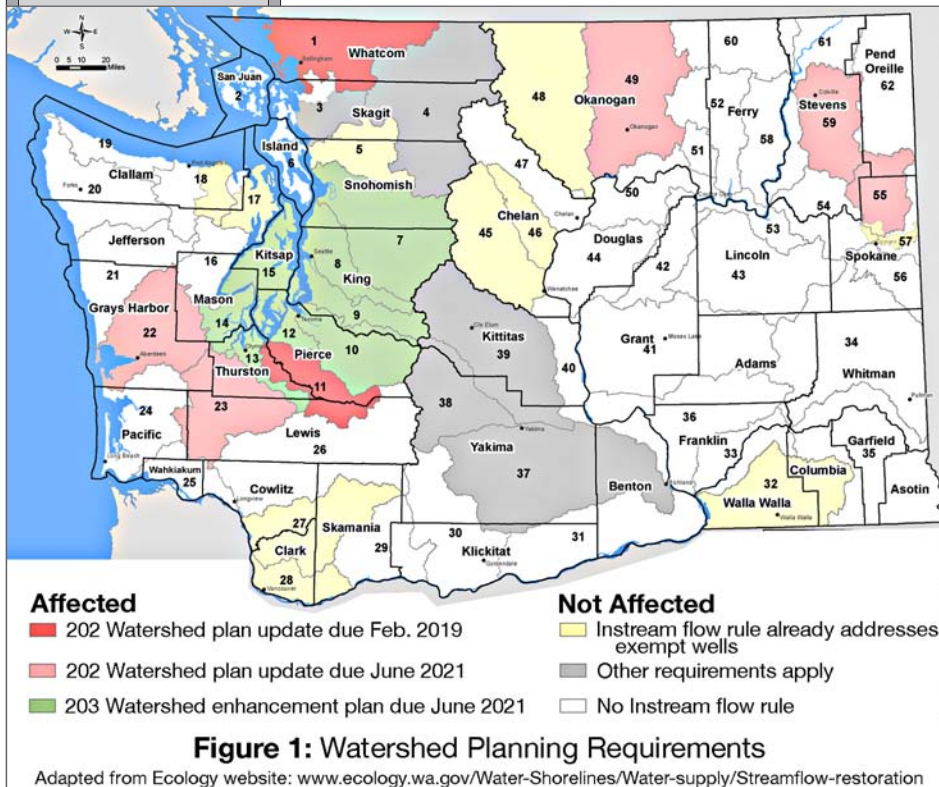
Many of the provisions set out in ESSB 6091 build upon the state’s watershed planning process. Washington State’s Watershed Planning Act (RCW 90.82) was established by the Legislature in 1997 to set a framework for developing local solutions to watershed issues in Washington. Between 1998 and 2012, 44 watershed-based planning groups developed plans and 33 groups adopted their plans. As planning was completed, the effort switched focus to watershed management.

ESSB 6091 primarily affects two categories of watersheds (Figure 1):

- Watersheds with instream flow rules that have a watershed plan (7 watersheds; Section 202 of the new law)
- Watersheds with instream flow rules that do not have a watershed plan (8 watersheds; Section 203 of the new law)

The remaining watersheds consist of:

- Watersheds without instream flow rules (32 watersheds; business as usual)
- Special watersheds: Skagit (WRIAs 3 and 4) and Yakima Basin (WRIAs 37, 38 and 39) (5 watersheds; with advanced on-going efforts to address exempt well issues)
- Watersheds with instream flows with reservations for exempt well use (10 watersheds)



ESSB 6091 assumes that watersheds without instream flow rules do not have a conflict between exempt well installation and maintenance of instream flows, so no action is required in these watersheds. Portions of WRIAs 3, 17, 18 and 57 (Lower Skagit, Snow-Quilcene, Dungeness and Upper Spokane) are included in this category. Exempt wells may be installed in these watersheds and determinations of water availability may continue as they have in the past by simple compliance with RCW 18.104 (Water Well Construction). For exempt wells in these watersheds, there will be only consideration of the physical availability of water and no requirement to consider the legal availability of water. There is no acknowledgement of the prior appropriation construct with respect to senior water rights. The potential to restrict instream flow impacts to protect endangered species is also not addressed in the new law.

Mitigation Legislation

Excluded Areas

Reserved Water Accounting

Amendment Schedule

Watershed Planning Units

The Skagit River Basin (WRIAs 3 and 4) is excluded from this new law presumably so as not to disrupt on-going efforts to address the conflict between exempt wells and instream flows as an outcome of the *Swinomish* case and agreements between Ecology and the Swinomish Tribe. Similarly, the Yakima River Basin is excluded from this new law because of: the approaching conclusion of the surface water rights adjudication; the near total control of instream flows by the federal Bureau of Reclamation; and well-advanced efforts to address groundwater availability. The Yakima Basin includes the Kittitas Valley, where numerous water right banks have been established over the past decade to provide drop-for-drop mitigation to mitigate for exempt well use.

Ten watersheds currently address exempt wells. These include reservations in the instream flow rule for future exempt well use and water banking. Continued accounting by counties of the degree to which reserved water has been allocated is required, consistent with the existing instream flow rule. Otherwise, no additional action is required under the new law.

The remaining watersheds to be addressed in Part 2 of the new law have instream flow rules and are divided into those with and without watershed plans (Table 1; Figure 1).

Recommendation		Watersheds	Affected Counties (minor)	New Interim Limits on Exempt Wells for Domestic Use Until New Regulations Adopted
Type	Due			
Watershed Plan Update “202” Watersheds (7) WATERSHEDS WITH watershed plans Watershed planning entity leads effort	Feb. 1, 2019 or Aug. 1, 2020 (Ecology Option)	WRIA 1 Nooksack	Whatcom (Skagit)	5,000 gpd 3,000 gpd average annual
		WRIA 11 Nisqually	Pierce, Thurston (Lewis)	
	June 30, 2021	WRIA 22 Lower Chehalis	Grays Harbor (Mason)	
		WRIA 23 Upper Chehalis	Lewis, Thurston, Grays Harbor (Pacific, Cowlitz, Jefferson)	
		WRIA 49 Okanogan	Okanogan	
		WRIA 55 Little Spokane	Spokane, Pend Oreille, Stevens	
		WRIA 59 Colville	Stevens (Pend Oreille)	
Watershed Restoration & Enhancement Plan “203” Watersheds (8) WATERSHEDS WITHOUT watershed plans Ecology leads effort Centered around Puget Sound	June 30, 2021 Ecology Recommendations	WRIA 7 Snohomish	Snohomish, King	5,000 gpd 950 gpd average annual 350 gpd during drought
		WRIA 8 Cedar-Sammamish		
		WRIA 9 Duwamish-Green	King	
		WRIA 10 Puyallup-White	Pierce, King	
		WRIA 12 Chambers-Clover	Pierce	
		WRIA 13 Deschutes	Thurston (Lewis)	
		WRIA 14 Kennedy-Goldsborough	Mason, Thurston	
		WRIA 15 Kitsap	Kitsap, Pierce, Mason, King	

The Watershed Planning Act’s watershed planning program allowed local stakeholders to develop water resource management solutions to be developed over four years. Watershed planning stakeholder groups — Planning Units — were constituted. These Planning Units consisted of the following required entities from within the watershed (initiating governments): all counties and all tribes with reservations within the watershed; and the largest city and largest non-municipal purveyor. Many additional entities were commonly included. A required component of watershed planning was the quantification of the amount of water available to inform water allocation decisions. Optional components included instream flow analysis, water quality analysis, and storage analysis — in part to address federal Clean Water Act and Endangered Species Act regulations. Ecology provided significant support in the form of technical, organizational, and financial support but was a non-voting member of these Planning Units.

Mitigation Legislation

Planning Approaches

New Law

Contradictory?

Instream Rights Protected

Additional Fix?

Mitigation Priorities

Net Benefit Determination

Consensus by the stakeholder group was required for adoption of a watershed plan, which some Planning Units accomplished. The success of watershed planning varied widely across the State and was not dependent upon whether a watershed plan was adopted. Some watersheds with adopted plans have been effective in implementing progressive water resource management (e.g., Wenatchee, WRIA 45), while others have not. Some watersheds that did not adopt a plan have implemented progressive water resource management solutions as a result of the watershed planning process (e.g., Kitsap, WRIA 15). Revising instream flow rules under Part 2 of the new law resurrects and closely parallels the watershed planning concept.

Exempt Wells & Instream Flow Rules

ESSB 6091 states (in both subsections 202(1) and 203(1)):

“Unless requirements are otherwise specified in the applicable rules adopted under this chapter or under chapter 90.22 or 90.54 RCW, potential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 through compliance with the requirements established in this section.”

The RCW chapters referenced above relate to statutes allowing the establishment of instream flow rules. These cited subsections appear contradictory because they simultaneously authorize potential impacts and impairments on instream flows while requiring consistency with established instream flow rules and prior appropriation constructs:

- 90.22.030 Existing water and storage rights — Right to divert or store water. The establishment of levels and flows pursuant to RCW 90.22.010 shall in no way affect existing water and storage rights and the use thereof...
- 90.22.060 Instream flow evaluations — Statewide list of priorities — Salmon impact. By December 31, 1993, the department of ecology shall, in cooperation with the Indian tribes, and the department of fish and wildlife, establish a statewide list of priorities for evaluation of instream flows. In establishing these priorities, the department shall consider the achievement of wild salmonid production as its primary goal.
- 90.54.920 Rights not impaired. (1) Nothing in this act shall affect or operate to impair any existing water rights.

Instream flows have been established as water rights within the prior appropriation construct, entailing the normal protection of the rights based on the seniority system (see *Swinomish*). If existing rights are fully protected, then amendment of instream flow rules will not be able to achieve any more than what was attempted in the Skagit instream flow rule amendment and later rejected by the *Swinomish* decision. If such proves to be the case, an additional legislative statutory “fix” will be required to attain the apparent intended objective of allowing out-of-kind mitigation.

Watersheds with Instream Flow Rules & Watershed Plans (Section 202)

There are seven watersheds falling within ESSB 6091 Section 202’s focus on watersheds operating under instream flow rules *which have adopted watershed plans*. The initiating governments of the watershed planning process, in collaboration with the Planning Unit and support available from Ecology, must update their plans to measure, protect and enhance salmonid habitat.

At a minimum, the updated plans must offset impacts from domestic exempt wells, according to the following prioritization:

1. Avoid impacts: Drop-for-drop mitigation, in-time, in-place and in kind. This may be in the form of water right banking, reclaimed water projects, and storage projects (conventional above-ground, off-channel, and Aquifer Storage and Recovery (ASR)). This meets the status quo of required mitigation that is sometimes referred to as “finding the unfindable.”
2. Minimize impacts: Ecology has stated that their policy with regards to meeting these criteria will be flow mitigation within the same WRIA. This may consist of drop-for-drop mitigation that may not completely offset impacts, augmented by improving flows in other streams in the WRIA.
3. Provide net environmental benefits: Out-of-kind mitigation. This may include mitigating critical limiting habitat factors to offset streamflow impacts.

These same criteria are echoed in ESSB 6091 Section 203 and in the development alternative mitigation plans as addressed in Part 3. Ecology must determine that the updated plan results in a net environmental benefit over a 20-year projection of exempt well installations. Addressing potential impacts arising from sources other than domestic exempt wells, including exempt wells for other purposes and administratively issued allocations, is addressed in Part 3 – the *Foster* “Fix”.

Correction to “Mitigating for Development”

The following replaces page 17 of The Water Report #169.

The cause of this correction is due to a distinction of average annual limits between wells and connections.
The conclusions that the new annual limits have minimal impact on protection streamflows remain valid.

Mitigation Legislation

Exemption Specifics

Cumulative Withdrawal Limits

Average Annual Limits (Overlay)

The 5,000 gallons per day (gpd) limitation applies only to domestic and industrial uses and specifically differentiates between domestic use and irrigation of a half acre. The discrete exempt well limit for irrigation is unlimited with respect to quantity but limited to irrigation of one-half acre. Irrigation duties generally vary across Washington State between 1.5-4 acre-feet per acre and so irrigation of a half acre would generally equate to a maximum of 2 acre-feet per year (afy). There is no limit to the quantity of water for stockwatering. Recent Ecology policy appears to conflate the domestic and irrigation uses of exempt wells. An argument could be provided to maintain separation of the two uses, which may allow irrigation of greater than a half acre as long as it doesn't exceed the daily usages caps and the appropriate average annual cap (Table 2). These uses are exclusive to each other. For instance, one interpretation of RCW 90.44.050, notwithstanding Ecology's most recent policy statement, is that an exempt well may not be used for domestic use and irrigation of a half acre. This raises the question of whether multiple exempt wells may be installed on a property to serve the different uses defined in RCW 90.44.050. *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.2d 4 (2002), determined that multiple exempt wells may not be installed to serve a housing development if the cumulative withdrawal quantity exceeded

5,000 gpd. The policy outcome of that decision was to allow up to six houses per exempt well, based on the guidance of the time from the Washington Department of Health (DOH) of 840 gpd being required per household (5,000 gpd divided by 840 gpd/household = 6 households). This court decision consequently became known as the “6-pack” rule. The DOH guidance has since been recognized as being conservatively large and current policy allows up to 15 residential connections per exempt well, which equates to 333 gpd per residence.

ESSB 6091 adds additional *average annual limits per connection* for domestic use of 3,000 gpd per connection in the Section 202 watersheds and 950 gpd per connection in the Section 203 watersheds. Additional exterior irrigation is allowed for fire protection, and exempt well use in the Section 203 watersheds is reduced to 350 gpd per connection during a drought emergency order.

Table 2 compares permitted quantities with actual use average annual and instantaneous quantities to present a range of potential impacts on streamflows depending on the degree of hydraulic continuity as a function of the geological setting. The metric of potential withdrawal from 500 wells is presented to provide the context of the current level of potential mitigation needed in the Skagit Basin for legacy exempt wells installed after the instream flow rule was established in 2006 that now need mitigation. Because actual use patterns are well below the new per connection limits, the new limits will likely have no effect on exempt well use.

Table 2: Representative Exempt Well Domestic Water Use Estimates.

	Qualification	Daily Use (gpd)	500 Wells or Connections (cfs)
PERMITTED EXEMPT WELL USE LIMIT			
RCW 90.44.050	Daily maximum per well.	5,000	3.9
ESSB 6091 (per connection; multiple connections limited by RCW 90.44.050)			
Section 202 Watersheds	Average annual.	3,000	2.3
Section 203 Watersheds		950	0.74
	Under declared drought conditions.	350	0.27
SINGLE RESIDENCE / CONNECTION ACTUAL USE PATTERNS (assuming 2.6 people per residence per US 2010 census)			
<u>Average Annual</u>			
Interior	60 gpdpc	156	0.12
Exterior (W. WA)	15% of interior	23	0.02
Total (W. WA.)		179	0.14
Exterior (E. WA.)	100% of interior	156	0.12
Total (E. WA.)		312	0.24
<u>Peak Monthly</u>			
Interior	60 gpdpc	156	0.12
Total with Exterior	W. WA.	Interior x 2.5 peaking factor ^a	390
	E. WA.	Interior x 6 peaking factor ^b	936

a – Golder, 2014. Skagit County Exempt Well Metering Program – 2012-2013.
b – Golder, 2003. Little Spokane (WRIA 55) and Middle Spokane (WRIA 57) Watershed Planning Phase II – Level 1 Assessment; Data Compilation and Preliminary Analysis.

Mitigation Legislation

Streamflow Impoundment?

Metering Costs

Interior Use v. Exterior Use

Ecology Discretion

Enforcement v. Incentives

Out-of-Kind Mitigation

Foster Mitigation

ESSB 6091 does not impose effective additional constraints on representative average single domestic residential use. It may constrain isolated egregious use if such use has been monitored by metering and subjected to enforcement. This regimen will have minimal effect on improving streamflows because the overall impact on instream flows from exempt use is a function of the overall average usage — not isolated individual egregious uses. The 350 gpd limitation imposed under the drought conditions in the 203 watersheds will have minimal benefit to instream flow protection because, while it may restrict isolated egregious use, it is unlikely to affect average use over significant time periods. In reality, the new limitations are expected to have little effect on altering water use or protecting instream flows.

Metering

ESSB 6091 requires Ecology to initiate two pilot metering projects: one in the Dungeness watershed and another in the Upper Yakima watershed (i.e., Kittitas Valley). The cost for these projects is to be borne by Ecology. The estimated cost of meter provision and installation is estimated at about \$1,000 per well. Metering is already required in these areas as a function of water banking activities, so the only ongoing difference may be to transfer the cost of metering from water users to Ecology.

There is much data documenting domestic water use patterns in Washington State, including, among many more sources:

- Dungeness water bank data
- Kittitas water bank data
- Carpenter-Fisher metering study (Golder, 2014, Skagit County Exempt Well Metering Program - 2012-2013)
- King County water use data
- Chumstick-Mission water use analysis (AMEC, 2009)
- Compilations by the United States Geological Survey (Land and Welch, 2015)

A constant of these studies is that people generally use the about same amount for interior water use — i.e., to drink, cook, clean. These activities consistently result in the use of 40-60 gallons per day per capita with little geographical variation. The principal average variation is exterior use, which generally ranges from an additional 15% on the wet west side of the State to an additional 100% on the dry east side of the State on an annual basis. If the purpose of a metering study is to characterize water use relating to individual or exempt wells, effort might better be spent mining the existing information rather than collecting additional data.

The State has the right to “...require...information as to the means for and the quantity of that withdrawal...” (RCW 90.44.050). Therefore, metering is more of a discretionary policy decision than a question of Ecology’s authority to require it.

Enforcement may be of limited value because there are probably few exempt wells that exceed legal limits. Moreover, implementing an enforcement program is costly and more likely to trigger adverse reactions from exempt well owners. A better use of metering is to raise the awareness of individual water users of their water use patterns and water resource management. This combined with incentive programs (e.g., distribution of subsidized low-flow fixtures) and public outreach may be more effective in reducing water use and thereby minimizing instream flow impacts.

PART 3 – ALTERNATIVE MITIGATION OPTIONS – THE “FOSTER FIX”

ESSB 6091 Part 3 addresses the *Foster* issue of out-of-kind mitigation to offset impacts of new appropriations as they relate to instream flows and fish habitat. Unlike the rest of this new law, Part 3 is not restricted to exempt wells, but is relevant to all future water allocations. Out-of-kind mitigation is an alternative to drop-for-drop mitigation and considers, among other options:

- Shifting reduction of flows from critical low flow periods to flood periods (e.g., from summer to winter)
- Over-mitigation during habitat critical times (e.g., increasing instream flows in the late summer by more than the impacts)
- Habitat improvements such as: riparian and wetland restoration; increasing buffers; conservation easements; instream enhancements (large woody debris recruitment and engineered log jam installation); and upland habitat restoration

As additional background on the *Foster* issue, the Cities of Yelm, Lacey, and Olympia jointly advanced a water rights application package consisting of ten water right applications. Only the City of Yelm’s water right was appealed. The comprehensive application package, developed over approximately 20 years with extensive technical work, communications with a broad stakeholder base including tribes and vetting with sister State agencies (Fish & Wildlife and Natural Resources), included:

- Acquisition and retirement of a senior irrigation water right to provide full mitigation of the impacts on an annual basis, plus over-mitigation during the irrigation season and the critical low flow late summer season
- Riparian habitat and wetland restoration
- Groundwater recharge of reclaimed water to augment instream flows

<p>Mitigation Legislation</p> <p>Shoulder Season Impacts</p> <p>Instream Rule Intent</p> <p>Strict Standard</p> <p>Evaluating Task Force</p> <p>Schedule & Process</p> <p>Pilot Projects</p> <p>Yelm Resubmission</p> <p>Recurring Priorities</p> <p>Concept Limitations</p>	<p>The Washington Supreme Court (Court), in <i>Foster</i>, denied the City of Yelm’s water right. However, the remaining nine water rights in the joint application were approved. These water rights were not challenged and are currently being exercised on a similar basis to what was proposed for the Yelm water right (i.e., out-of-kind mitigation with net environmental benefit) denied in <i>Foster</i>.</p> <p>Even though stream flows during critical late summer habitat conditions would be increased as a result of the proposed mitigation package, residual impacts to instream flow remained in the shoulder seasons according to instream flow rules (e.g., April and October). The Court determined in the <i>Foster</i> decision that no marginal impact in the shoulder seasons was allowed regardless of how much out-of-kind mitigation was provided and regardless of the net benefit to aquatic habitat on the basis of the instream flow rule.</p> <p>The intent of the instream flow rule, based on RCW 90.22.010 (1969), is to protect fish, game, aesthetics, and recreational values. It is interesting that out-of-stream consumptive use is not mentioned, presumably because that was not a concern at that time. RCW 90.54.010 (1971) expands the concerns to include providing sufficient water for:</p> <ol style="list-style-type: none"> (1) Residential, commercial, and industrial needs; (2) Productive fish populations; and (3) Productive agriculture. <p>The Court’s decision in <i>Foster</i> did not provide reasonable justification for upholding the instream flow rule on the basis of the intent of RCW 90.22 or 90.54 and denied the City of Yelm’s water right. It assumed that the instream flow regulation established an administratively-issued water right that must not be impaired regardless of the original intent of the law upon which it was established.</p> <p>Under ESSB 6091 Part 3, a Task Force is established to evaluate out-of-kind mitigation through a mitigation sequencing process and scoring system. The Task Force includes 12 voting members:</p> <ul style="list-style-type: none"> (4 members) State representatives of Democrats and Republicans from the Senate and House (4 members) Two representatives from each of the environmental and tribal communities (4 members) A representative from each of the farming community, Washington cities, municipal water purveyors, and business interests <p>The composition of the Task Force thus consists of an equal political balance between elected officials, stewards of the resource, and consumptive users. The Washington State Departments of Ecology, Agriculture and Natural Resources participate as non-voting representatives.</p> <p>The first meeting of the Task Force must occur by June 30, 2018 and must make recommendations to the legislature by November 15, 2019. This gives it less than 17 months to achieve agreement and provide its findings and recommendations. This is a tough timeline to bring together and achieve agreement among the diverse interests. Recommendations must be made by at least a 60% majority of the Task Force. Minority recommendations may be made with the support of at least five voting members (42%). Because eight votes are required to achieve a 60% majority (seven votes = 58%), there will only be a majority or a minority recommendation.</p> <p>Five pilot projects are identified to inform the Task Force and upon which Ecology must provide water allocation decisions (Section 301(8)). The criteria in the law are sufficiently strict so as to identify the following candidates:</p> <ul style="list-style-type: none"> • City of Port Orchard • City of Sumner • City of Yelm • Spanaway Water Company • Bertrand Watershed Improvement District <p>Some of these candidates already have well-developed alternative mitigation plans. The City of Yelm was the subject of the <i>Foster</i> case, and processing of their application under this new law is expected to consist of resubmitting their application supported by the original report of examination that was overturned by the Court. Ecology is empowered by this act to make allocation decisions for these five projects on the minimum basis of providing net environmental benefits. The recurring priority (<i>see</i> above list for Sections 202 and 203) for processing criteria in decreasing order of preference are: 1) Avoid Impacts; 2) Minimize Impacts; 3) Provide Net Environmental Benefits (out-of-kind mitigation).</p> <p>Out-of-kind mitigation is the crux of what is being tackled by the “<i>Foster</i> fix.” The issue can be presented as follows: salmonid habitat on a stream that is impaired with respect to multiple variables may realize a net environmental benefit when flow is reduced, if more critical habitat variables are addressed.</p> <p>There are two limitations on this concept, assuming the impacts and benefits can be adequately quantified. First, this approach may only work for initial (new) water right applications on a stream for which instream flow is not the limiting factor for salmonid habitat at the moment. If allocation decisions in a watershed are made using this construct, the more critical variables will be ameliorated and streamflows will become the critical variable. In this instance, trading streamflow for other improvements will not provide net environmental benefit. The line between whether streamflow or other variables are the more critical is fuzzy. It will be difficult for the Task Force to provide definite criteria. If implemented, this</p>
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Mitigation Legislation

Addressing Degradation

Streamflow Restoration

Demanding Schedule

Building Fee

Funding Split

15-Year Allocation Intent

County Relief

Uncertainties Remain

policy approach is most likely to leave significant discretion to Ecology. Any legislation coming out of Task Force recommendations will need to clearly provide the authority to Ecology for such discretion.

It is reasonable to assert that degraded habitat variables should be fixed by those responsible, rather than being available for use as a credit in the processing of water right allocations. Moreover, correction of degraded habitat through the water rights allocation process should not be an excuse for the failure of the effective implementation of critical areas ordinances under the Growth Management Act to protect riparian zones, correction of culverts to allow fish passage, and under the state’s Shoreline Management Act to restore habitat. However, habitat improvements through allocation decisions beyond what is otherwise regulated is reasonable. These may take the form of conservation and development easements, wetland banking, and expansion of riparian buffers.

ADMINISTRATION

Ecology plans to form a subsection within its Water Resources Section called Streamflow Restoration with approximately 27 employees. The administrative burden includes providing support to the 15 watersheds listed in Table 1, and the anticipated processing of amendments of up to 15 instream flow rules. Additionally, Ecology expects 5-10 projects to be generated in the coming biennium and possibly up to 100 projects operating in five years as funding for Stream Flow Enhancement becomes increasingly available.

This administrative burden and schedule is intense and will be difficult for Ecology to meet. Much of the work will be based on previous watershed planning work. Key to capitalizing on the previous work and making the most efficient use of both effort and funds will be institutional memory. Many personnel at Ecology and local (e.g., county) institutions are no longer available. The support of consultants is anticipated to be solicited, particularly those with watershed planning experience in the individual watersheds.

FUNDING

Funding is derived from two principal sources. First, a minimum fee of \$500 must be submitted with building applications to counties, of which \$150 is applied to county administrative costs and \$350 is deposited into a fund managed by Ecology to administer the law including watershed planning projects and watershed restoration and enhancement projects. These funds may only be spent for projects within WRIsAs from which they originate. These fees may be modified by rulemaking.

Ecology’s new Streamflow Restoration subsection will have an annual operational budget that is expected to average \$5 million (M) for the first five years, and \$3.75M has been requested for the 2018-2019 fiscal year. Ecology plans for \$50,000 to be provided to local entities leading WRIA efforts. Tribes will be provided \$25,000 for their engagement plus an additional \$15,000 for each additional WRIA they are involved with.

The Legislature expressed its intent to allocate \$300M over 15 years through capital budgets, averaging \$20M per year (Section 304). The first \$20M has already been appropriated within the capital budget passed as a result of passing ESSB 6091. These funds may be spent according to Ecology’s discretion and do not have to be spent in specific WRIsAs — though Ecology has stated that there will likely be a preference for the 15 watersheds with instream flow rules. By comparison, approximately \$85M was spent on watershed planning previously (1998-2010; an annual average of \$7M).

The structure for deciding how to distribute these funds has not yet been defined. A grant application process may be established similar to the watershed planning process. One criticism of the watershed planning process was poor control of funding. However, there is not a predefined dollar amount for various stages of effort under the new law as there was in the watershed planning process. Ecology may therefore have more discretion in the allocation of funds depending on guidelines they adopt.

SUMMARY/TAKE HOME

ESSB 6091 relieves counties of making a determination of the legal availability of water for exempt wells for single domestic residential use, as part of the process of issuing building permits — at least for the time being. It allows counties to rely on Ecology’s determinations on the legal availability of water. For the most part, it allows business to proceed as usual, in that exempt wells may continue to be installed and building permits issued. It also presents a stakeholder process to resolve the availability of water for exempt wells.

Uncertainties of the new legislation include:

- Whether the new law authorizes impacts and impairments by amendment of existing instream flow rules, or whether additional legislation is needed
- Funding: \$20M has already been appropriated
- Ability of stakeholders to find consensus
- Lack of firm timeline requirements, the lack of consequences if deadlines are not met, and the willingness of the SRF Board and Ecology to unilaterally impose solutions

**Mitigation
Legislation**

**Additional
Legislation**

**Addressing
Prior
Appropriation**

**Significant
Effort
Needed**

- Ecology’s evolving policy in response to the new law
- Potential law suits

Out-of-kind mitigation is the cornerstone of the *Hirst* and *Foster* “fixes.” Part 3 of the new law requires that a Task Force provide recommendations that would require additional legislative action to allow out-of-kind mitigation. Therefore, it is reasonable to assume that additional legislative action is also needed to allow out-of-kind mitigation as part of instream flow rule amendments under Part 2 of the new law (as opposed to such authorization being implicit in the new law).

Without legislative action that modifies the Prior Appropriation Doctrine, we remain stuck with the status quo. This is a difficult hurdle to overcome but one that must be dealt with in order to better manage water resources in Washington State — to accommodate rural water supply through exempt wells — and allow for appropriately mitigated new water uses while protecting aquatic habitat and our iconic salmon runs.

Success of the new law in providing better water resource management will require significant good faith effort from all parties. The new post-*Hirst* status quo reinstates the previous pre-*Hirst* status quo of installation of exempt wells while solutions are developed. Proponents of the status quo may see little incentive to work toward a solution because they have it all right now — notwithstanding the accumulating “mitigation debt” from exempt wells.

The State of Washington is offering support to avoid new litigation and a return to the uncertainty of the past year. The support available through the new law as administered by Ecology includes technical expertise, process facilitation, and funding assistance.

While ESSB 6091 has provided a temporary reprieve for counties, this *Hirst* “Fix” is better characterized as a “Patch” that will require concentrated and sustained effort by all stakeholders interested in a good outcome.

FOR ADDITIONAL INFORMATION:

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Ecology webpage regarding ESSB 6091:

www.ecology.wa.gov/Water-Shorelines/Water-supply/Streamflow-restoration

Ecology webpage regarding the *Hirst* case:

www.ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Case-law/Hirst-decision

Ecology webpage regarding the *Foster* case:

www.ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Case-law/Foster-decision

Chris Pitre is a principal owner of Coho Water Resources based in Seattle. His clients include the public and private sectors as well as tribes. He is a licensed geologist and hydrogeologist and a certified water rights examiner (Washington), with degrees in geology, chemistry (Carleton University) and hydrogeology (University of Waterloo). He has practiced hydrogeology and integrated water resources management in the Pacific Northwest since 1992, with two years (2011-2012) in Australia. He managed watershed planning projects in approximately a dozen watersheds across Washington State (2001-2010). His practice areas include: water rights; groundwater supply wells; watershed planning; wastewater management; reclaimed water; and expert witness services. He is currently involved in the installation of large municipal wells in the Yakima Valley and processing of a new water right application in a 203 watershed.