

Getting Your Feet Wet: Everything Planners Need to Know About Recent Developments in Water Law

Presented by:

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Overview:

Background

1. Water Law Basics
2. The Interrelationship Between Land Use and Water Law

Summary of Developments in the Law:

1. Permit-Exempt Wells
2. Timing and Content of Water Commitments
3. Municipal Water Rights

Disclaimer (the fine print)

Background

Basic Principles of Washington Water Law

- Stems from doctrine of prior appropriation:
 - right to water can be established only by putting water to beneficial use; and
 - first such use in time is the first such use in right.
- Codified in “Water Code”
 - Surface Water Code (Chapter 90.03 RCW);
 - Groundwater Code (Chapter 90.44 RCW);
 - Water Resources Act (Chapter 90.54 RCW);
 - Laws governing water rights registration and relinquishment (Chapter 90.14 RCW).

Background

Basic Principles of Washington Water Law (cont.)

- Ecology regulates water rights through system of permits, certificates, and claims
- Attributes of a water right:
 - Quantity
 - Place of Use
 - Point of Withdrawal
 - Purpose of Use
- Statute allows applicants to apply to Ecology to change of some of these attributes

Background

Basic Principles of Washington Water Law (cont.)

“Use it or lose it.”

- Statutory Relinquishment
 - A water right that is not used, in whole or in part, for five consecutive years is subject to relinquishment
 - Several statutory exceptions and exemptions exist.
RCW 90.14.140
- Common Law Abandonment
 - Water right may also be lost, even when exempt from relinquishment, if the right is not used and there is an intent to abandon

Background

The Interrelationship Between Land Use and Water Law

- Water resources and land use/development are connected:

“Growth and prosperity have significantly increased the competition for this limited resource.” RCW 90.54.090.

Background

The Interrelationship Between Land Use and Water Law

Administrative and regulatory challenges:

- Statutory/Regulatory “Fragmentation”:
 - Different statutory authority.
 - State regulates water permitting program while local governments regulate land use.
- Jurisdictional Issues:
Geographic boundaries not coexistent with watershed boundaries

Background

The Interrelationship Between Land Use and Water Law

Water Code coordinates with land use regulatory efforts

- RCW 90.54.090: Local jurisdictions “shall whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter” of the water code.
- RCW 90.54.130: “The department of ecology may recommend land use management policy modifications it finds appropriate for the further protection of ground and surface water resources in this state.”

Background

The Interrelationship Between Land Use and Water Law

Land use statutes seek to ensure sufficient water for development proposal:

- Subdivision Statute – RCW 58.17.110, .150
“Appropriate provisions” must be made for potable water supplies
- Building Permit – RCW 19.27.097
Prior to issuance of building permit, applicant must provide “evidence of an adequate water supply”
- SEPA, RCW 43.21C

Background

The Interrelationship Between Land Use and Water Law

Growth Management Act, RCW 36.70A, incorporates water considerations into long range planning:

- Planning must address water resources:
 - RCW 36.70A.020. Planning goals. “Protect and enhance the state’s high quality of life, including . . . availability of water.”
 - RCW 36.70A.070. Comprehensive Plans “shall provide for protection of the quality and quantity of groundwater used for public water supplies.”

Background

The Interrelationship Between Land Use and Water Law

Growth Management Act, RCW 36.70A, incorporates water considerations into long range planning:

- Rural area planning:
 - Development regulations in the rural areas protect “rural character,” including protecting “surface and groundwater resources.” RCW 36.70A.070(5)
 - “Rural character” is defined as development that is consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. RCW 36.70A.030

PART II: Developments in the Law

1. Permit-Exempt Wells
2. Timing and Content of Water Commitments
3. Municipal Water Rights

Developments in the Law

Permit-Exempt Wells

- The Groundwater Code prohibits withdrawal of groundwater without a permit, but specifically exempts withdrawals “for single or group domestic uses in an amount not exceeding five thousand gallons a day.” RCW 90.44.050.
- In recent years, residential developers in particular have used permit-exempt wells for water supply in areas where neither municipal supply nor new water rights are available. As competition for waters increased in these areas, litigation has arisen concerning the scope of the permit-exempt well statute.

Developments in the Law

Permit-Exempt Wells

Current issues regarding permit-exempt wells stem from *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P. 3d 4 (2002).

- Developer of a 16 lot subdivision claimed an exemption for a well on each of the 16 lots.
- Ecology sought declaratory relief that the exemption applies to withdrawals for the entire subdivision, cumulatively.
- The Court agreed and held that a 16-lot residential development was entitled to a single 5,000 permit-exempt withdrawal.

Developments in the Law

Permit-Exempt Wells

Questions remaining after *Campbell & Gwinn*:

- When does land development activity constitute a single project or group domestic use for purposes of the groundwater permit exemption?
- Who is primarily responsible for evaluating proposals that rely on permit-exempt wells to satisfy their water needs? Ecology or local jurisdictions?

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
Supreme Court No. 84187-0

- Does the failure to adopt regulations requiring an applicant to disclose property in common ownership (because of concerns regarding multiple permit-exempt wells) violate the GMA?
- Does the County have obligation or the authority to adopt development regulations that require evaluation of an applicant's reliance on permit-exempt wells?

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
EWGMHB No. 07-1-0015 (FDO Mar. 21, 2008)

Growth Board determines County has authority:

- “The DOE has authority over exempt wells, but the County has authority over land use decisions and planning, which serves to support and supplement DOE’s regulations. Although DOE is the ultimate authority on just how a permit for an exempt well is obtained, the County still controls its own ground/surface water and the GMA requires protection of those resources.”

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
EWGMHB No. 07-1-0015 (FDO Mar. 21, 2008)

Growth Board holds:

- The failure to adopt regulations requiring developers to file a single application violates GMA.
- County can't rely on SEPA review of subdivision application – “SEPA can supplement, but it cannot substitute for GMA regulations, which require measures to control rural development to protect water resources.”

Developments in the Law

Permit-Exempt Wells

*Kittitas County Conservation, et al. v. Kittitas County, et al.,
Central Washington Home Builders v. EWGMHB, Kittitas County
Superior Court No. 08-2-00195-7*

On appeal, Superior Court says Growth Board does not have jurisdiction:

- “[R]uling that Chapter 16.04 of the Kittitas County Code violates the GMA by allowing too many exempt wells appears to go beyond the authority of the review parameters of the Board. The Department of Ecology pursuant to Chapter 90.44 RCW regulates ground water, not a Growth Management Board.”

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
Supreme Court No. 84187-0

Currently pending before Supreme Court.

- County argues that “[u]nder no circumstances does a county have any role or authority in regulating either a permitted or an exempt appropriation” because the authority is defined in title 90 RCW “and no such county authority or role is present.”
- BIAW argues more generally that Growth Board does not have jurisdiction to determine whether county code violates the Water Code or is inconsistent with *Campbell & Gwinn*.

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
Supreme Court No. 84187-0

- Kittitas County Conservation, et al., argued that GMA expressly authorizes regulation of land use to protect water quality: “RCW 90.03 and 90.44 regulate certain specific water-related actions, while the GMA regulates land use. Although each mandates protection of water quality, each addresses a distinctly different subject.”
- Similarly, Ecology, in its amicus, argued that the County’s role is complementary to Ecology’s, noting that their regulatory activities do not preclude the other.

Developments in the Law

Permit-Exempt Wells

Kittitas County Conservation, et al. v. Kittitas County, et al.,
Supreme Court No. 84187-0

Stay tuned... Supreme Court's decision may provide helpful guidance on:

- Extent of Growth Board's authority in interpreting compliance with water provisions
- Extent of local government's role in the permit-exempt well issue.

Developments in the Law

Permit-Exempt Wells

Watershed Basin Regulations

Ecology has utilized watershed basin regulations as a regulatory mechanism to manage groundwater uses, including permit-exempt wells.

- Take the form of instream flow rules, stream closures, and reservations of water.

Specific case studies include Kittitas County and Skagit County.

Developments in the Law

Permit-Exempt Wells

Take Home Points

- **Jurisdictions:** There is increasing pressure on jurisdictions to play a more active role in the review of plans to provide water to development.
- **Developers:** Developers should be prepared for this heightened scrutiny of water issues during the review of their development applications.

Developments in the Law

Water Commitments

- Statutes governing water supply to specific projects all suggest that some level of proof of water supply is necessary at various stages in a development project. RCW 58.17.110; RCW 58.17.150; RCW 19.27.097.
- Question:
 - When is demonstration of adequate water supply required?
 - What level of proof is required?

Developments in the Law

Water Commitments

JZ Knight v. City of Yelm,
Thurston County Superior Court No. 08-2-00489-6

- Petitioner appealed five preliminary plat approvals on grounds that the developments lacked appropriate provisions for potable water supply.
- At the time of preliminary plat approval, the City did not have adequate water quantity to serve the developments.
- The preliminary plat approvals included a condition that required the applicant to provide a potable water supply adequate to serve the development at final plat approval “and/or” prior to the issuance of any building permit.

Developments in the Law

Water Commitments

JZ Knight v. City of Yelm,
Thurston County Superior Court No. 08-2-00489-6

At the trial court:

- Preliminary plat approval may be conditioned upon a showing of appropriate conditions of water supply, before final plat approval.
- All the requirements in RCW 58.17.110, including a potable water supply, must be met by the time of final plat approval and could not be delayed until building permit stage.
- At final plat, the court would require “a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions.”

Developments in the Law

Water Commitments

JZ Knight v. City of Yelm,
Thurston County Superior Court No. 08-2-00489-6

On appeal:

- Court of appeals reversed on standing
- Pending before the Supreme Court
- Ultimately, the questions before the Court on appeal are on a narrower set of issues (standing and award of attorneys fees) and it is unlikely that the Court's decision will provide guidance on this issue.

Developments in the Law

Water Commitments

Other thoughts

But note, Ecology's brief in *Kittitas Conservation* case offers further thoughts about local government's obligation with respect to water supply commitments:

- According to Ecology, local governments have the obligation under GMA and other land use statutes to “make their best effort and exercise their best judgment to determine if appropriate and adequate water is physically and legally available to support the uses proposed under land use applications. To do so, local governments must consider water resources laws and facts as administered by Ecology...”

Developments in the Law

Water Commitments

Take Home Points

- No reported decision, yet, providing guidance on what proof of water is required and when.
- Superior court decision indicates that that proof of adequate water supply can be made a condition of approval, that must be satisfied at final plat stage.

Developments in the Law

Municipal Water Rights

- The 2003 Municipal Water Law (MWL) governs water rights held by “municipal water suppliers”:
 - Provides certainty and flexibility in the administration of municipal water rights
 - Requires municipal water suppliers to implement water use efficiency and conservation measures
- The MWL has a significant impact on land use planning for urbanizing areas and development, which are both typically premised on water supply from municipal water suppliers.
- Part of the broader policy debate over how to serve growing communities in light of scarce resources.

Developments in the Law

Municipal Water Rights

Lummi Indian Nation, et al., v. State of Washington, et al.,
170 Wn.2d 247, 241 P.3d 1220 (2010)

Facial Constitutional challenge to:

- “Pumps and Pipes” Provision, RCW 90.03.330(3);
- Definitions, RCW 90.03.015(3)-(4);
- Connection and Population Provisions, RCW 90.03.260;
- Place of Use Provision, RCW 90.03.386

Developments in the Law

Municipal Water Rights

Lummi Indian Nation, et al., v. State of Washington, et al.,
170 Wn.2d 247, 241 P.3d 1220 (2010)

Separation of Powers:

Plaintiffs argued that various provisions retroactively overrule Court's decision in *Theodoratus* or that the law makes "legislative determinations of adjudicative facts."

Substantive Due Process:

Plaintiffs argued that all challenged provisions retroactively expand municipal water rights to the detriment of junior water right holders

Procedural Due Process:

Plaintiffs argued that Place of Use Provision and Connection and Population Provisions eliminate procedural safeguards

Developments in the Law

Municipal Water Rights

Lummi Indian Nation, et al., v. State of Washington, et al.,
170 Wn.2d 247, 241 P.3d 1220 (2010)

Trial Court finds that the Definitions and the Pumps and Pipes provision violate separation of powers on their face because they retroactively contravene a decision of the Supreme Court.

All parties appealed and asked for direct review by the Supreme Court.

Developments in the Law

Municipal Water Rights

Lummi Indian Nation, et al., v. State of Washington, et al.,
170 Wn.2d 247, 241 P.3d 1220 (2010)

On appeal, Supreme Court in a unanimous decision upholds the MWL against all constitutional challenges:

- Plaintiffs had not met the high burden of proving a facial constitutional violation.
- Any alleged harm was too speculative and Plaintiffs' interests were too remote.

Developments in the Law

Municipal Water Rights

Lummi Indian Nation, et al., v. State of Washington, et al.,
170 Wn.2d 247, 241 P.3d 1220 (2010)

Potential remaining issues:

- Potential “as applied” challenges
- Timing of relinquishment
- Operation of the definition of Municipal Water Supplier with respect to relinquishment

Conclusion

- Evolving, fluid situation with more to come.
- Water supply/land use interface becoming increasingly contentious and significant.

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