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Presentation to the Agriculture, Water & Rural Economic Development Senate Full Committee Hearing, November 15, 2016 in Olympia

Good morning members of the Agriculture, Water & Rural Economic Development Committee, other elected officials and concerned citizens. I'm Jack Louws, Whatcom County Executive; I'm here today to speak on the specific issue of water related to GMA, as a result of the Supreme Court Decision Hirst v. Whatcom County.

The Washington Supreme Court ruling challenges the validity of Whatcom County's Comprehensive Plan and Development Regulations relating to the protection of water quality and quantity under the Growth Management Act and essentially gives more burden than actual solutions to counties in regards to upholding the goals of GMA.

The determination of legal and physical water that has long been a responsibility of the Department of Ecology --and decisions in regards to "waters of the state"-- should stay with the state; including -- and especially -- a decision on impairment on water rights, as outlined in the state's Water Code. Counties throughout the state do not have the resources or the expertise on this subject and will struggle to find the balance between two conflicting laws.

In a series of decisions over the past decade or more, the WA Supreme Court has clearly indicated that the state's current approach to water resource management is not adequately protecting instream flows. Their most recent decision in the Hirst v. Whatcom County case has now put (at a minimum) the 29 counties planning under the GMA in nominal charge of managing the state's water resources—when ***any*** county land use decision may affect those resources—and specifically requiring those counties to prohibit any development that proposes to use a "state permit exempt" well that would impair a state adopted instream flow rule in any way. At the same time, the Court has severely limited the options available to the state and local governments to mitigate that impairment (Foster Case 2015) — no matter how small or consequential.

We need the Legislature to establish reliable **statutory standards** regarding water resource _management_, _impairment_ and _mitigation_ to protect instream flows in-lieu of the **judicial standards** now in place that unfairly burden counties with managing the state's water resources while giving neither counties nor Ecology adequate tools to do so.

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The Supreme Court has put molecular instream flow impairment standards (Postema Case 2000) in place that require counties planning under the GMA to potentially prohibit any or all future land uses dependent upon a permit exempt groundwater withdrawal with even an infintesimal impact on an instream flow adopted by Ecology. We face that reality today in over 90% of Whatcom County's rural lands. Even when Ecology has determined that:

- permit exempt groundwater withdrawals account for less than 1% of all consumptive water use statewide; and
- exempting small groundwater withdrawals from the Ecology water right permitting process was, in part, because they are considered to be of *"de minimus"* or inconsequential impact to instream flows (except when specifically determined by Ecology in an adopted Instream Flow Rule, which was not the case in the Nooksack River Basin Instream Flow Rule).

Simply put, the punishment does not appear to fit the crime. It's like asking us to fix a broken clock and only giving us a hammer to do it with.

There have been arguments made that the Hirst case was never really about the protection of instream flows, it was about discouraging or stopping rural growth in counties planning under the GMA, and that the Court found limiting permit exempt groundwater withdrawals a convenient way to do that. Regardless of the rationale, the Court's decision puts counties (especially rural counties) squarely in jeopardy on two fronts:

- First, understanding the implications of the 29 different GMA counties suddenly being put in charge of managing the state's property—our groundwater resources; and
- Second, understanding and dealing with the potential economic, fiscal, and cultural impacts of significantly reduced future growth in rural areas statewide.

From a water resource management perspective, the Hirst decision neatly transferred the responsibility of determining a legal water source for county-issued land use permit decisions from Ecology to counties and then severely limited the counties' abilities to approve permit exempt wells as a legal source of water for most rural development. Counties and Ecology need guidance from the Legislature on their respective roles and responsibilities in determining legal water availability and protecting instream flows. This could include reinforcing Department of Ecology's mandated role in long- standing water law in Washington State and providing clear statutory standards **defining impairment** and the tools available to **mitigate** potential impairment of water rights.

The Department of Ecology has recently released a report on Mitigation Options for Impacts of New Permit-Exempt Groundwater Withdrawals (August 2016) and the legislature has funded work to explore these options. Mitigation is offsetting water use to neutralize impact on protected water bodies. For example, offsetting the adverse impacts of a new withdrawal with an equal quantity of water from a water right that is senior to the instream flow rule (In Whatcom's case this might be the City of Bellingham, PUD No. 1, etc.). Water banks are used for mitigation in some parts of the state, but this option is not available everywhere. As discussed earlier, recent Supreme Court cases have reduced our ability to find mitigation solutions. This is because mitigation of the legal injury (or impairment) to the senior instream flow water right must be water-for-water, in-place, in-time, and for the same duration as the proposed water use (most often in perpetuity). This means separate water banks in the 44 sub basins within the WRIA 1 - Nooksack Basin. This makes larger scale water bank and mitigation options (which are likely the best in everyone's interest) legally infeasible even though likely the best in everyone's interest.

These options need to be further explored and guidance from the Legislature on legal and practicable solutions.

<u>From a growth management perspective</u>, the Hirst decision gives more burden than actual solutions for counties to uphold the often conflicting goals of the GMA. Counties need the Legislature to examine realistic and practical changes to the GMA regarding:

- counties' requirements to adopt "measures to protect rural character", including clarifying county and Ecology roles in "protecting surface water and groundwater resources" and the;
- identifying "safe harbors" for county actions under GMA and how the application of "local circumstances" affords more or less discretion to a County's actions; and
- appropriate strategies going forward for cities and counties to plan for the provision of potable water to accommodate future growth in potentially different areas of water availability or service levels, including:
    - urban growth areas (...to actually encourage urban growth)
    - rural areas served by existing public water systems; and
    - rural areas outside of public water system service areas.

Whatcom County supports the goals of GMA but at the same time we are interested in thoughtful, realistic and strategic modifications that are practical changes to the law.

I am here today to urge the Agriculture, Water & Rural Economic Development Committee and other members of the legislature to get behind common sense legislation that provides the practical solutions the counties and cities need to adequately manage growth and water resources.

In summary, our three suggestions for your consideration today are:

1. Refine language in GMA to reinforce Department of Ecology's mandated role in long- standing water law in Washington State, and enhance DOE's funding to provide state-wide solutions.
2. Fund counties and cities to plan under GMA to ensure positive outcomes for our future.
3. Work with WSAC, your elected leaders in your districts, and all interested parties to make GMA stronger while protecting water resources for our combined benefit for the next generation.

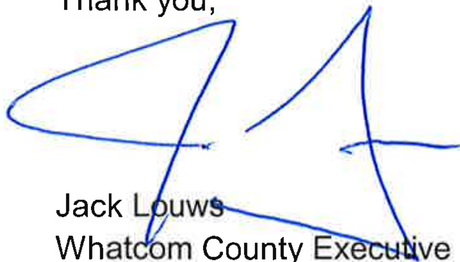
It's time for the Legislature to have a serious conversation about these issues and establish clear and reliable statutory guidance for counties and Ecology regarding water resource and growth management planning. We stand ready to be a part of that conversation.

We have presented to you the legislative and regulatory impact of the ruling, however, in the real world this has a direct and urgent personal impact on those who in good faith bought property and in many cases were on the verge of obtaining their paperwork to move forward with building a home. Now, for the foreseeable future they cannot, and there is no time line for when it might be possible to do so.

Our Council passed on October 25, an emergency moratorium on the acceptance and processing of applications and permits for subdivisions, building permits and discretionary permits that rely on permit-exempt wells for water supply in closed basins. An interim ordinance to replace the emergency one will be before Council on November 22. We anticipate it will be adopted.

We are hearing from individuals on a regular basis who are frustrated and who have spent precious dollars to achieve their personal goals. We would ask that this issue be given the utmost priority for a resolution that will allow our citizens to move forward with their lives.

Thank you,



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