

Bellingham, in Whatcom county, faces a difficult situation. It's water supply is threatened by growth. Not so much too many users, but growth around Lake Whatcom is polluting it.

Only about 5% of the lake is within the city's jurisdiction and the county is unwilling to curtail development in the remainder.

I came into this situation innocently, several years ago, because of my wife, a quiet and very effective proponent of doing good for its own sake. Watching and listening, I soon found myself helping.

Ultimately we came to the conclusion that unmanaged growth would only be stopped by forcing local government to accept the limitations a limited supply of water entailed.

This lead me to begin studying western water law, Washington's codes and significant cases.

This, together with a study of the GMA, ultimately brought me to a face off with the heads of every related county department, and two of Whatcom county's attorneys, in a conference room in the Whatcom county courthouse two years ago to argue the lawfulness of exempt wells.

That argument has turned into our ongoing struggle that began on Squaticum Mtn where nearly a thousand houses were proposed in the Lake Whatcom watershed.

The watershed was appropriate because it presented a unique situation where hydraulic continuity was simple to establish and understand.

We saw the opportunity to set a precedent for the rest of the county that where water was unavailable, development was prohibited.

The 1850's treaties with local tribes were amongst the earliest laws I reviewed. This led to many cases and the need to understand the Winters Doctrine and other related law.

With statehood, around 1900, the federal government turned over management of the land and water to the state, but reserved water to fulfill its obligations in treaties, and for other uses.

We can probably all agree that the state did not manage these resources as wisely as they should have, or with sufficient vigor.

State water laws and cases were interesting, and I developed a pretty good understanding of its principals.

I learned that by 1917 it was necessary to regulate the use of surface waters, and less than 30 years later it was necessary to further regulate the use of groundwater.

Since then its been something of a race for regulation to keep pace with population growth and associated residential development. And that entailed more than just regulating rights to the use of water.

Of course the most famous of these regulations is RCW 36.70A the growth management act.

While notably about land management, it has important things to say about protecting our waters and the critical areas that recharge and discharge them.

The Supreme Court noted the purposes of the Act:

discourage the conversion of undeveloped land into sprawling low density development,

protect the rural character of our counties,

and bar the expansion of urban services outside of areas designated for urban growth.

In addition to restricting exempt wells it is also important to oppose expansion of urban intensities of piped water in rural areas.

We mustn't forget that building codes require an adequate source of water for building and subdivision.

And always remember, where water isn't available for new users, no wells, exempt or otherwise can be drilled, nor can existing wells increase their withdrawals.

In 1971 the Water Resources Act [RCW 90.54] passed requiring:

1. rivers and streams have flows sufficient to preserve fish and the natural environment.

2. Lakes were to be protected and kept in their natural condition.

3. Withdrawals of water which would conflict with that were only to be authorized if it was absolutely clear that public interest required.

4. Notably, full recognition was to be given the natural interrelationship of surface and groundwaters.

In response, Ecology promulgated rules to implement the intent of the legislation. The purposes of those rules is set out in WAC 173-500-020. Important amongst them:

1. identify streams closed to future appropriation;
2. establish flows on perennial streams to provide for preservation of fish and other environmental values;
3. establish criteria for limits beyond which further appropriations may not be made.
4. curtail additional withdrawals of water when sufficient data is lacking for sound decisions;

Above all, Ecology acknowledged it would be guided by the declaration of fundamentals contained in the Water Resources Act.

In the 1980s Ecology did identify surface waters that needed to be closed. They are listed in WAC 173-501.

In the Lake Whatcom watershed, Ecology closed the lake and Whatcom Creek.

And more significantly, at WAC 173-501-070, they stated that, while single domestic uses shall generally be exempt from the provisions established in that chapter, “Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use.”

Subsequently, Ecology promulgated additional rules specifically to protect lakes and streams in the Methow basin. These are found at WAC 173-548-050.

Ecology determined, based on existing information, that there was no water available for further use and closed substantially all the basin's streams and lakes, and ground water hydraulically connected.

This included the right to use water established through permit procedures, and ground water withdrawals otherwise exempted from permit under RCW 90.44.050. [so called “exempt wells”]

No wells were to be constructed for any purposes, including wells exempt from permitting unless very limited and stringent conditions were met, and construction of the well was approved in writing.

These rules clearly follow from one of the cornerstones of water law, that no right to use water can be granted where no water is available for appropriation.

After learning all of this, I shared it with elected officials struggling to protect their water supply, and Bellingham approached Ecology and asked them why they hadn't similarly closed the Lake Whatcom basin.

Here's why we thought they had to.

Some years ago, in the Okanagon, the Hubbard brothers challenged Ecology's position that the brothers' right to water to irrigate their orchards was subject to the periodic closures of the Okanagon river because they intended to use groundwater tributary to the river.

After protracted litigation, the law was established that where Ecology has restricted the use of surface waters, the use of groundwaters in hydraulic continuity with those surface waters are subject to the same restrictions.

John Postema subsequently argued that it couldn't have been the legislature's intent to prohibit groundwater withdrawal where it would disaffect surface waters because exempt wells were allowed and they would necessarily have some, if only minimal, affect on surface waters hydraulically connected.

In response, the Washington State Supreme Court stated that legislative exemptions from the permitting system do not redefine water law. Even molecular affects were to be avoided.

The fact that one could take water without first obtaining a permit could never vest a right to its continued use where no water was available for new users.

So we reasoned, Lake Whatcom is tributary to Whatcom Creek.

The groundwaters that feed the streams, and the aquifers that recharge them and supply the lake, are all naturally interrelated.

How could Ecology disagree then that all the waters in the watershed, above and below ground, that run to Lake Whatcom are also tributary to, in hydraulic continuity with, Whatcom Creek?

Since Whatcom Creek is closed to new withdrawals, even “otherwise exempted single domestic use,” and we know from the Hubbard rule that groundwater in hydraulic continuity with the creek is then subject to the same restrictions, why aren't so called exempt wells in the watershed prohibited?

So, “based on existing information” and given the precedent of the Methow rules, why would Ecology allow new wells in the Lake Whatcom watershed?

Well, that question was actually put to them, and their answer was that the prohibition of new withdrawals, including otherwise exempted single domestic use, only applied to surface withdrawals.

Well the burden is on Ecology, to show the watershed is not tributary to the lake. And if they have insufficient data to rule that the groundwater in the watershed doesn't feed the lake, then they may not approve more withdrawals until sufficient data is available.

WAC 173-501-050, in keeping with Hubbard, says “ If department investigations determine that there is significant hydraulic continuity between surface water and the proposed ground water resource, any water right permit or certificate issued shall be subject to the same conditions as the affected surface waters.”

Ecology stated, “In areas where we can show clear hydraulic continuity with flow-impaired streams it seems clear that the Water Code and WAC 173-501 authorizes the regulation of groundwater, which would include denying building permits relying on domestic exempt wells.”

But that again ignores their guiding principal to “curtail additional withdrawals of water when sufficient data is lacking for sound decisions,”

Ecology needs to show that hydraulic continuity does not exist before allowing new withdrawals.

And consistent with that position, WAC 173-501-050 says only if department investigations determine that withdrawal of ground water would not interfere with stream flow can applications to appropriate public ground waters be approved.

The burden is on Ecology to determine that withdrawals are not in hydraulic continuity with closed surface waters, or deny new withdrawals.

This is not the end of Ecology's misfeasance.

Because the lake and the creek are closed, even wells that were earlier granted a water right are restricted.

No withdrawal for new users is allowed, and Ecology has a responsibility, guided as they are by the fundamentals of the Water Resources Act, to curtail withdrawals where a right has not vested.

Why?

This takes us to Skagit county, and the experience of one George Theodoratus. Mr. Theodoratus applied for and received a right to use water for a prospective development near the Skagit river, up by Concrete.

But by the time he had his subdivision ready, and the pipes in to all the lots, Ecology had set instream flows for the river that necessitated closing it at least seasonally.

Theodoratus (along with most of the development lobby) went all the way to the state Supreme Court only to learn that to vest a right it was necessary to actually put the water to beneficial use (another cornerstone of water law)

Pipes in the ground were not enough. Theodoratus' right to water was limited to the amount actually being used before the river was restricted.

So, given the closures of surface waters around the state, how is it that water rights not yet put to beneficial use aren't restricted from increasing their withdrawals for new users where Ecology has insufficient information to rule out hydraulic continuity with restricted surface waters?

Another cornerstones of water law is equally important to the current situation in our lake's watershed and elsewhere.

No one can gain a right to use water where it would impair the rights of earlier users. First in time, first in right. The earlier right must be fully satisfied before latecomers can have anything.

Ecology recently determined that Lake Whatcom's water quality is impaired, and has required that further pollution of the lake be curtailed, and in fact that the maximum load of pollutants entering the lake be reduced to some 25% of the present level.

Again, this based on the law some 37 years ago to ban pollution that would disaffect the quality of our waters and prohibit withdrawals of water which would conflict with preservation of base flows and retaining lakes in their natural condition.

It should not be forgotten that over allocation of groundwater that leads to low stream flows and increased stream temperatures has been found by the PCHB to be a type of pollution.

So Ecology has these twin mandates to prohibit pollution and deny withdrawals where water is unavailable.

The reason Whatcom Creek was closed to protect salmon habitat. The lake was closed in order to preserve natural flows in the creek.

The Boldt decision, affirmed by the US Supreme Court, established that those treaties back in the 1850s, made before Washington statehood, ensure a right to sufficient water to preserve salmon everywhere, including Whatcom Creek, a right from time immemorial, clearly the earliest right, preceding all other rights to water.

In early 2007 Federal District Court Judge Martinez ruled, in a sub-proceeding based on Boldt's earlier ruling, that the state must remove or repair road culverts impeding fish migration and propagation.

While not the imposition of a broad affirmative duty to take all possible steps to protect fish runs sought by the tribes, the ruling established that where a specific activity damages fish habitat, the state, or any local government, may be restrained from continuing to harm that habitat.

And more importantly, where past actions have impaired fish habitat, remedial action will be required to restore it.

Road culverts are hardly the only activity that local governments have allowed to impair that natural habitat.

Little is more threatening to fish habitat than the changes wrought in our rivers and streams from over development in their watersheds, and overallocation of the waters that once recharged them.

Paper water rights hardly give anyone the right to drive a species to extinction.

Further dithering will someday bring an order similar to the Martinez ruling forcing restoration of stream flows and watershed habitat.

With Martinez's ruling, and a sufficient basis in fact, the tribes can ask the federal court to order a reasonable reduction in withdrawals.

They can ask that there be no new withdrawals until Ecology shows there is surplus water available, after the needs of fish have been satisfied.

They can demand that Ecology have sufficient scientific proof that hydraulic continuity does not exist between proposed groundwater withdrawals and salmon streams before they allow new wells.

They can shift the burden of proof.

In conclusion, the Growth Management Act linked county development responsibilities and the duty to protect groundwater with water availability issues.

RCW 19.27.097 requires proof of an adequate water supply prior to issuance of a building permit. Evidence must be in a form sufficient to prove there is an adequate supply for the foreseeable future.

In determining what constitutes proof, Attorney General's Opinion, No.17 from 1992 is directive to counties.

It determined that, at a minimum, the criteria adopted by a local health department must recognize the implications of the water rights statutes.

And consequently, any applicant for a building permit who claims that the water will come from a well must prove that water is available for appropriation and that they could gain a right to take it, whether or not they need a permit before withdrawing it.

Others needn't be forced to demonstrate impairment. The burden is on the latecomer to show availability.

For Whatcom and other counties to continue to accept unpermitted wells as evidence of an adequate water supply is more than an abuse of discretion.