

**DESIGN WITH NATURE:
HIRST V. WHATCOM COUNTY
AS AN ALTERNATIVE TO LAISSEZ FAIRE
WATER APPROPRIATION IN RURAL AREAS**



**JEAN O. MELIOUS
NOSSAMAN LLP
HUXLEY COLLEGE
OF THE ENVIRONMENT,
WESTERN WASHINGTON UNIVERSITY
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Hirst , in a nutshell:

- ◎ Ecology established instream flow requirements in Whatcom County.
- ◎ Instream flows are a water right that Ecology and the County should protect.
- ◎ The Growth Management Act says so.
- ◎ State water law says so.

Figure 6 Unofficial Closure Status of WRIA 1 Surface Waters Based on [Chapter 173-501 WAC](#)

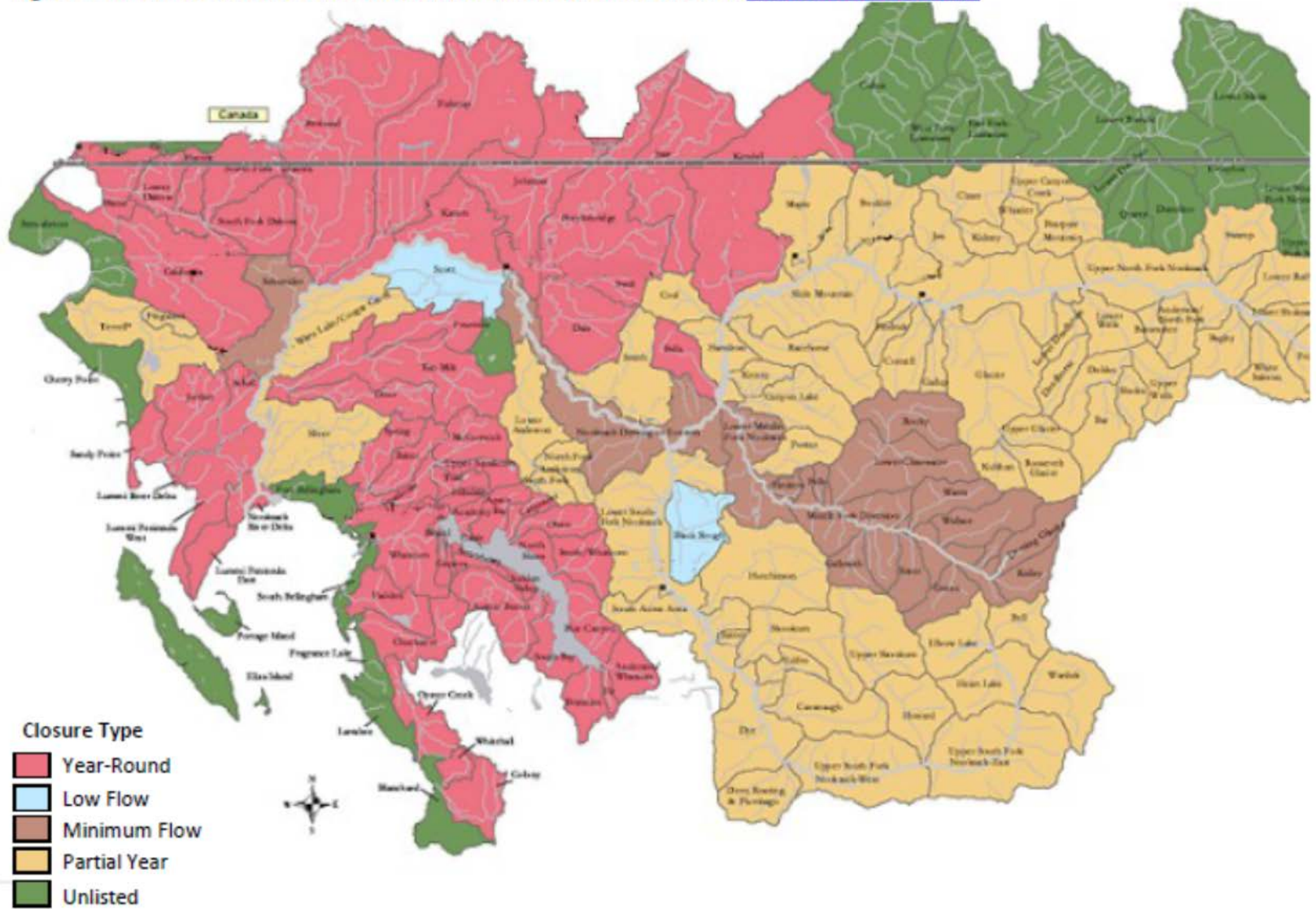


Exhibit C-683A.14 (WRIA 1 State of the Watershed Report, 2010, at 10.)

Various estimates of agricultural use/users without water rights

- ◎ “Over 50% of ag water use in violation of some aspect of water code.”
 - Presentation, Whatcom Water Supply: Searching for Certainty in Uncertain Times, 2013 (Farm Friends)
- ◎ “60% of irrigation non-permitted”
 - Farm Flash E-News, Jan. 2012 (Farm Friends)

Public water systems without water rights

- ◎ "From the review of compiled public water system information, it appears that **326 public water systems do not have water rights.**"
 - 2013 WRIA 1 Groundwater Data Assessment, p. 91: Link from <http://wria1project.whatcomcounty.org/Resource-Library/Studies-And-Reports/61.aspx>

Excessive rural development – previous compliance orders

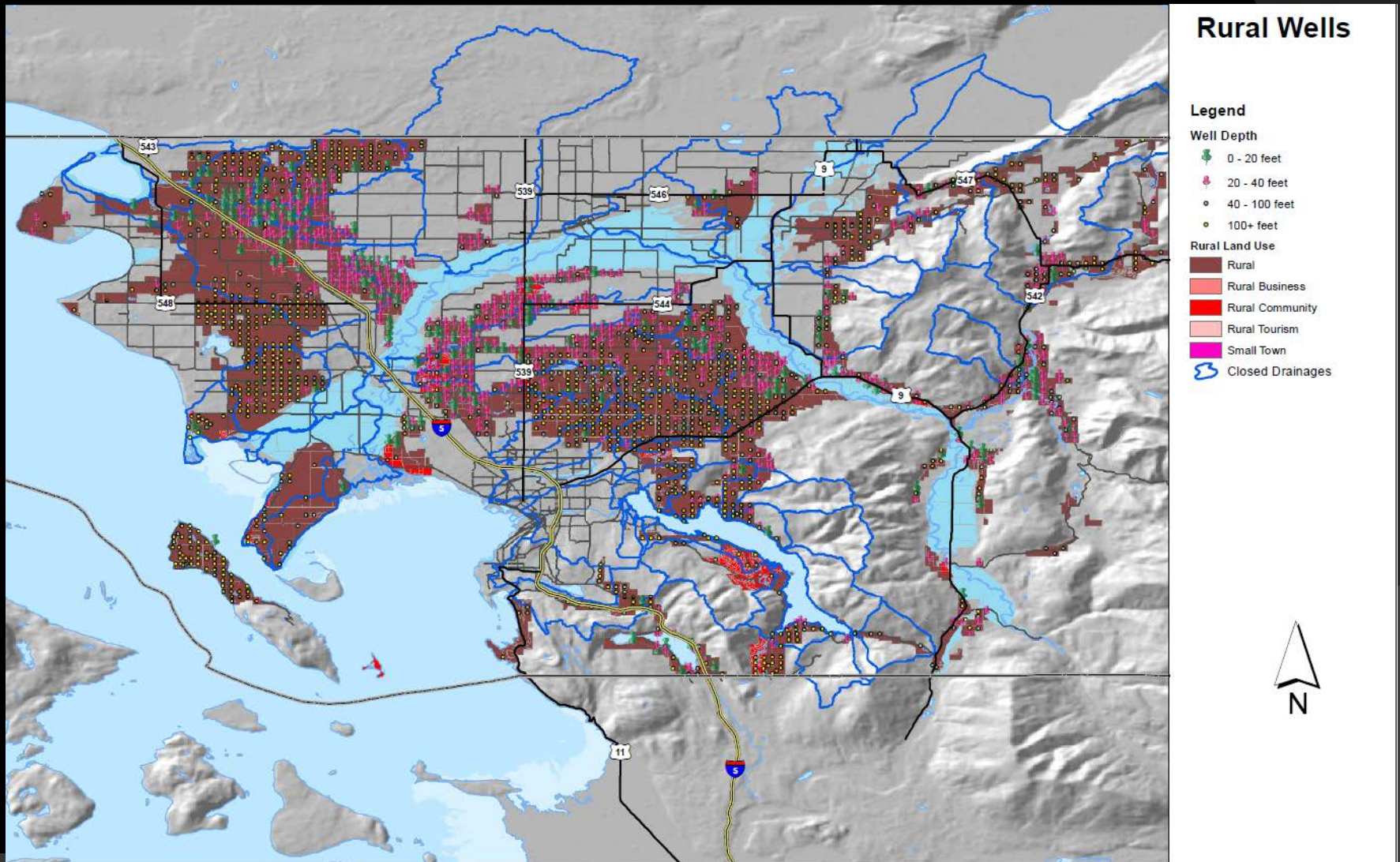
7 for only 2,651 additional people by 2029. Hirst's unrebutted evidence demonstrates that
1 vacant lots in existing rural areas can accommodate 33,696 additional people, where only
2 2,651 are expected and the parcels created by the County's LAMIRD designations alone
3 result in the potential for an increase in population of 4,512. Hirst argues, and the Board
4 agrees, that the County has not planned to ensure that its comprehensive plan and
5 development regulations, considered together, allocate rural population consistent with the
6 Comprehensive Plan's population allocation. The additional residential development allowed
7 in the County LAMIRDs conflicts with the goal of locating most population increases in
8 UGAs and encourages sprawl.
9

Even with these actions, as Hirst persuasively documents, the County still can accommodate virtually all of its projected population increase in its rural lands, contrary to the GMA goal of promoting compact urban development and reducing sprawl.⁸² The

33,696 additional people =

- ◎ More people than live in **all** of Whatcom County's cities, excluding Bellingham (Lynden, Ferndale, Blaine, Everson, Sumas, and Nooksack)
- ◎ Nobody would suggest that the County and Ecology should simply ignore water supply and water rights for all of these cities
- ◎ Permit-exempt wells no longer serve only isolated rural farmsteads

Evidence before the Hearings Board: Rural Wells in Closed Areas Since 1997



Wells depicted include only those after July 1, 1997 within lands designated in the Rural element of the Whatcom County Comprehensive Plan

Sumas-Blaine Aquifer Nitrate Contamination Summary
<https://fortress.wa.gov/ecy/publications/publications/1203026.pdf>

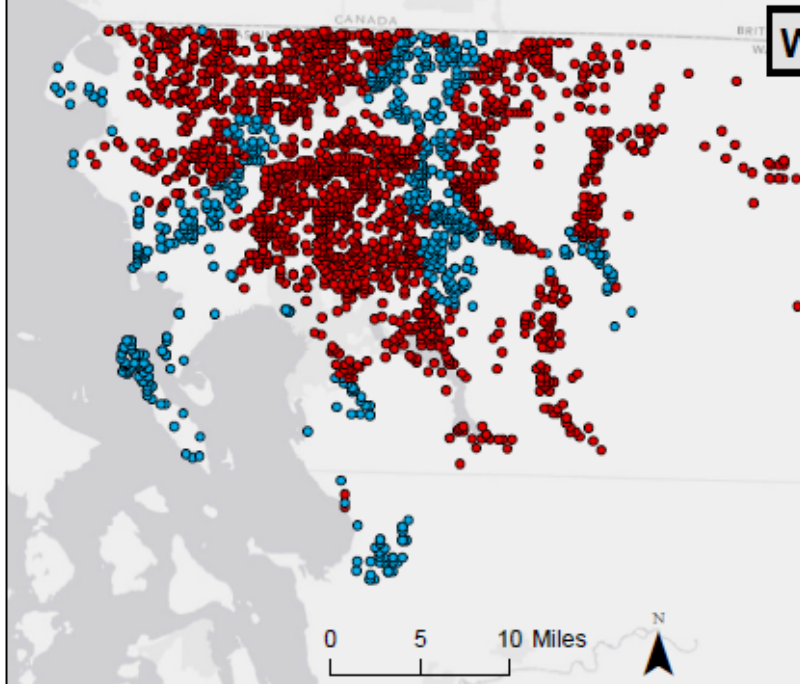
Well Log Data: http://www.ecy.wa.gov/gis_a/gis/welllogs.zip

WR1A 1 Surface Water Closures shown in Figure 6 of the 2010 State of the Watershed Report, citing Chapter 173-501 WAC

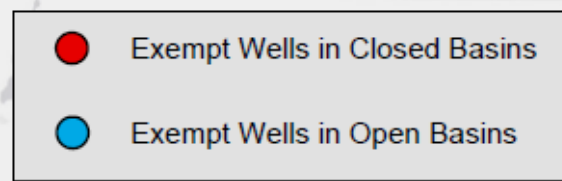
0 5 10 Miles

WRIA 1 Exempt Well Development

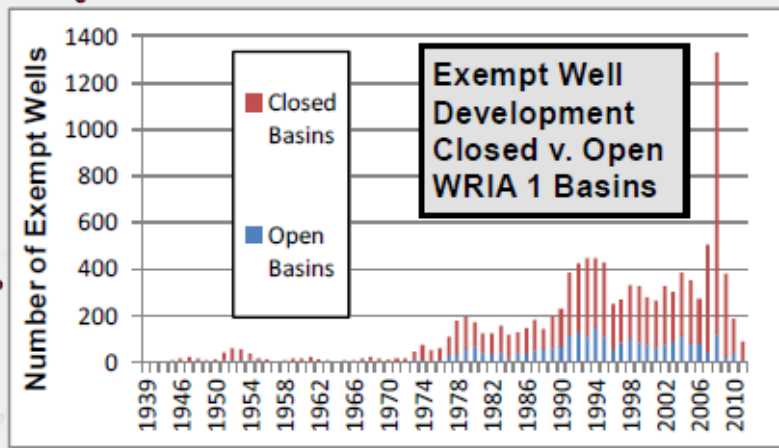
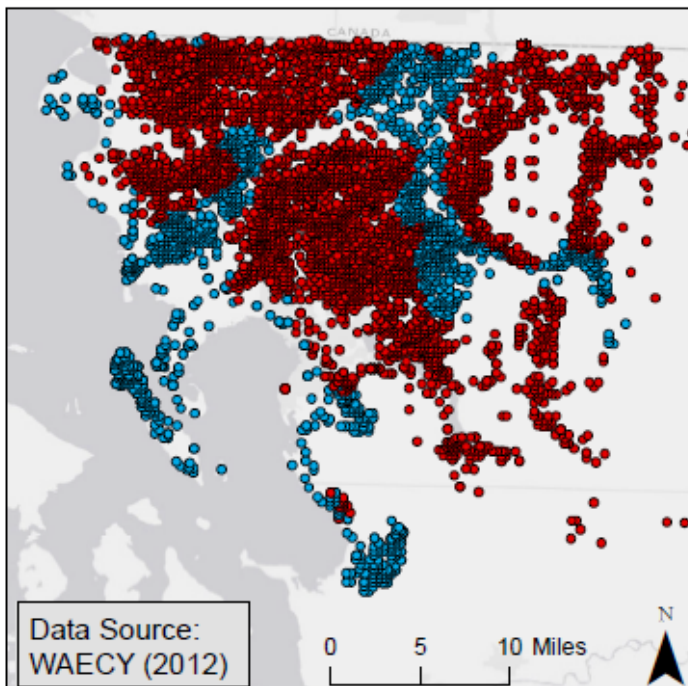
1986



The number of exempt wells has expanded 270% since 1986, from an estimated 3,294 wells to an estimated 12,195 wells. The majority of this increase (77%) occurred in basins either seasonally closed or closed year-round to water withdrawal.



2011



Data Source: WAECY (2012)

Northwest Indian Fisheries, State of Our Watershed, 2012 (Lummi Nation chapter)

How did this happen?

- ◎ In part, because of the mistaken (but widely shared) perception that land ownership always provides water rights (“*Hirst* violates our property rights!”)

Rules of law – but not widely understood

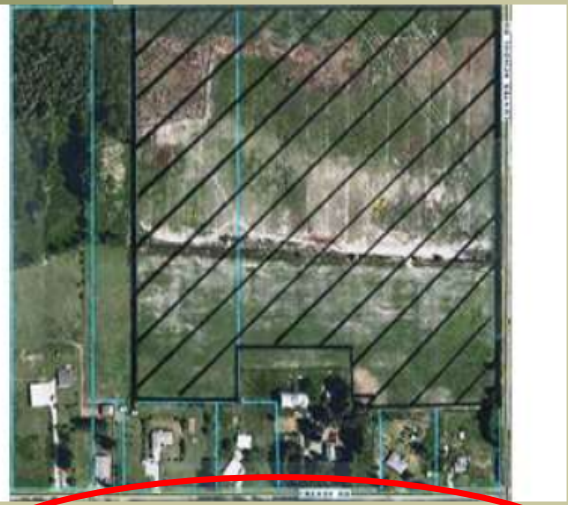
- ◎ 1917: Washington State Surface Water Code
- ◎ 1945: Washington State Groundwater Code
- ◎ 1949: Washington legislation allowed denials of water right applications when further appropriations might result in lowering the flow of water below that necessary to support fish
- ◎ 1969: Washington Minimum Flows and Levels Act
- ◎ 1971: Legislation clarified that instream water uses are “beneficial water uses”

y, Washington Land For Sale - 27.59 Acres

Previous Next Return to Results Save Property Email to a friend Share Listing

Custer, Whatcom County, Washington Land For Sale - 27.59 Acres

PHOTOS



BLUEBERRY LAND! PENDING! 27.59 acres for blueberries. Year-round creek running through the middle of the property. A pond could be dug that would give irrigation water for farming. NOW \$399,960

- Email Ron De Boer
Click for phone number
Visit website

Property type: Land
Parcel Size: 27.59 Acres
Price: \$399,960
MLS or other ID: 520521

Check your free credit score

- Agent: Ron De Boer
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"A pond could be dug that would give irrigation water for farming."

**Does it even matter?
After all, it's just a little water**



John and Karen Steensma,
Third Generation
Dairy Farmers from
Lynden, Washington – with
water rights from the 1920s



**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

JOHN AND KAREN STEENSMA,

Appellants,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY and BAYES BROTHERS,
LLC,

Respondents.

PCHB No. 11-053

ORDER GRANTING SUMMARY
JUDGMENT TO ECOLOGY

1

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9 The Applicant filed an application with Whatcom County Planning and Development
0 Services requesting preliminary approval for the development of Bertand Creek Estates. The
1 Applicant sought approval for a long subdivision, consisting of a cluster of nine lots and a
2 buildable reserve tract on an approximately 22-acre parcel. *Ignac Decl.*, ¶5 and Ex. 1.

New homes, up the street



Steensmas' Complaint to Pollution Control Hearings Board

2 By rule, the Department of Ecology set instream flow minimum requirements for Bertrand
3 Creek, requiring closure when the stream did not meet those minimum flows. In tape-recorded,
4 sworn testimony to the Whatcom County hearing examiner, the Steensmas and experts all testified
5 that the stream was not meeting those required minimum flows during summer months. The
6 stream contains habitat for endangered, threatened or endangered species, listed under Whatcom
7 County's critical areas ordinance and the Endangered Species Act. The experts also all testified and
8 there was no dispute that the proposed exempt well(s) for the Bertrand Creek Estates 10-lot
9 subdivision was hydraulically connected and up-gradient from Bertrand Creek. Expert testimony
10 verified that withdrawal of up to 5,000 gallons per day would deprive the aquifer and Bertrand Creek
11 of water that otherwise would flow into the creek during low-flow periods, thus exacerbating the
12 violation of instream flow requirements. The site contains an existing water right for irrigation

(Steensmas lost on summary judgment – Ecology not the decision-maker)

17 letter. However, even if the County relied heavily on the letter from Ecology in making its
18 decision regarding whether appropriate provisions had been made for potable water for the
19 subdivision, the County's reliance on Ecology cannot change the Legislature's choice that the
20 County is the appropriate entity to make the decision. Pursuant to RCW 58.17.110(2), and

Karen Steensma, 2013

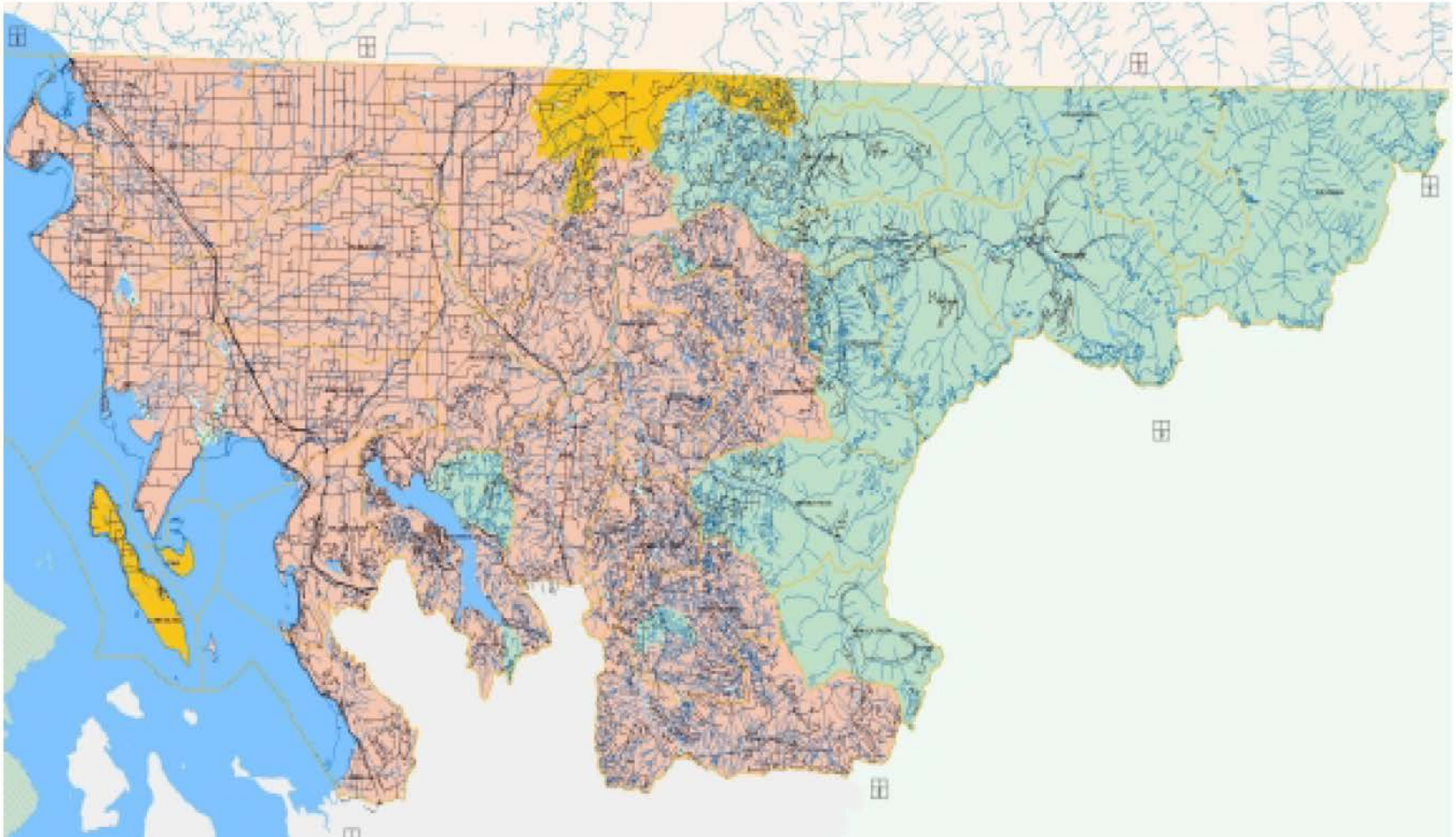
- ◎ We have had earlier and earlier "dry-up" of our well over the last 30 years as more and more exempt wells have gone in. We have to keep placing smaller and smaller nozzles on the irrigation equipment just to keep enough flow, and then eventually John just has to stop irrigating earlier than he should, because there isn't enough water. We most definitely do not have a bad well as this never occurred in the early years of the well.



From 1986 to 2009, the Nooksack River failed to meet instream flows 72 percent of the time during the July-September flow period. (Source: NW Indian Fisheries Comm'n)

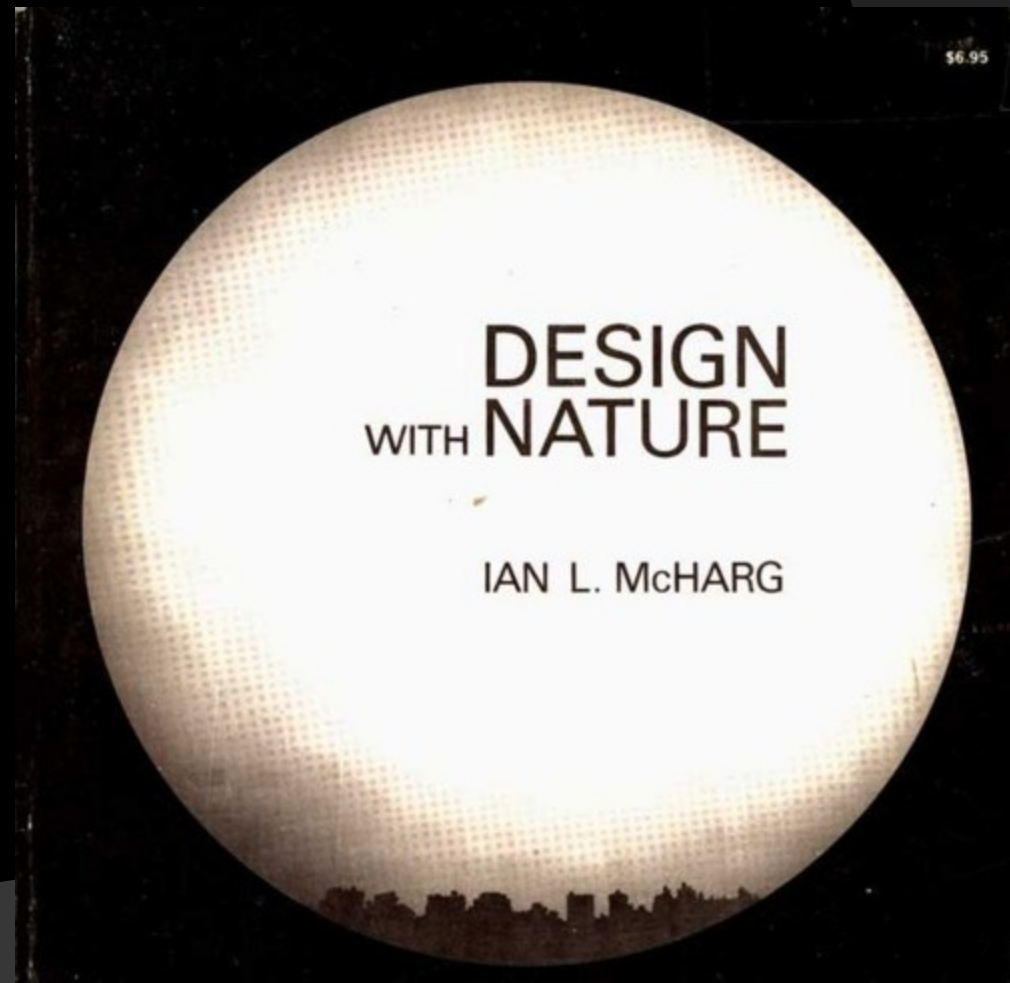
“[A]verage minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.” (Source: Dept. of Ecology, *Focus on Water Availability*)

Figure 34. Map of land cover vegetation ratings for WRIA 1. Ratings are based on a WAU scale. “Good” areas are green, “poor” areas are salmon colored, and yellow areas denote regions lacking appropriate data.



Source: Smith, *Salmon and Steelhead Habitat Limiting Factors in WRIA 1, the Nooksack Basin* (WA State Conservation Comm'n, July 2002)

Is there a better way?





HISTORIC FEATURES VALUE



EXISTING FOREST QUALITY



MARSH QUALITY



BEACH QUALITY



STREAM QUALITY



WATER WILDLIFE VALUE



INTERTIDAL HABITAT VALUE



GEOLOGIC FEATURES VALUE



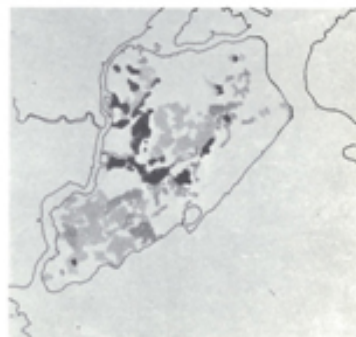
PHYSIOGRAPHIC FEATURES VALUE



SCENIC VALUE (LAND)



SCENIC VALUE (WATER)



ECOLOGICAL ASSOCIATIONS VALUE

Both the Water Resources Act and the GMA require accommodation of population growth in a way that protects water resources.



Hirst case: Growth Management Hearings Board Final Decision and Order, June 7, 2013

1	BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD	
2	WESTERN WASHINGTON REGION	
3	STATE OF WASHINGTON	
4		
5	ERIC HIRST, LAURA LEIGH BRAKKE,	Case No. 12-2-0013 FINAL DECISION AND ORDER
6	WENDY HARRIS, DAVID STALHEIM, AND	
7	FUTUREWISE	
8	Petitioners,	
9		
10	v.	
11	WHATCOM COUNTY,	
12		
13	Respondent.	
14		
15	SYNOPSIS	
16	Petitioners challenged Whatcom County Ordinance No. 2012-032 on rural land use	
17	planning. This case addresses whether the County Comprehensive Plan's Rural Element	
18	includes measures limiting rural development to protect rural character by protecting surface	
19	water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). The case also	
20		

From the Final Decision and Order-

- ⦿ “The question before the Board is whether Whatcom County has adopted measures that apply the GMA requirements about water **under the local circumstances here.**”
- ⦿ “Further, the question is whether *Kittitas County* requires the County to **change its other long-range planning (including residential density, LAMIRD designations, and other regulations such as lot coverage governing intensity of allowed usage) commensurate with water availability and water quality.**” FDO at 23 of 51.

FDO says: Design with Nature

intensity of rural development allowed under the County's plan. The record shows that the County has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls. As is discussed by state agency reports and the County's own Comprehensive Plan, the County may limit growth in areas where water availability is limited or water quality is jeopardized by stormwater runoff. It may reduce densities or intensities of uses, limit impervious surfaces to maximize stream recharge, impose low impact development standards throughout the Rural Area, require water conservation and reuse, or develop mitigation options. The County may consider measures based on the strategies proposed in the Puget Sound Action Agenda, the WRIA 1 process, WDFW's Land Use Planning Guide, Ecology's TMDL or instream-flow assessments, or other ongoing efforts. It may direct growth to urban rather than rural areas.

The County shouldn't have to go it alone. As the Supreme Court said:

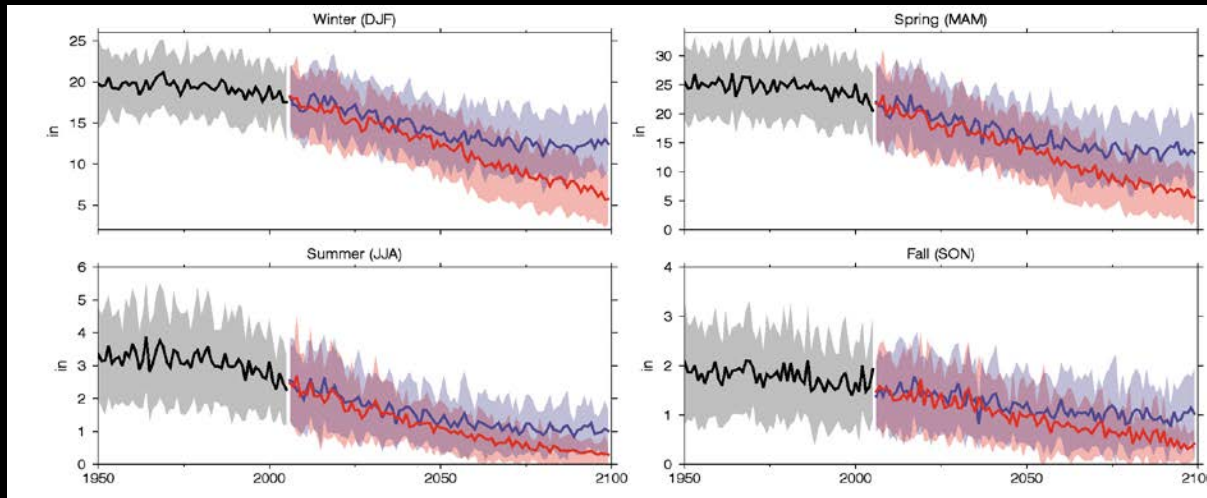
- ◎ “The GMA is a mandate to government at all levels – municipalities, counties, regional authorities, special purpose districts, and state agencies – to engage in coordinated planning and cooperative implementation.”

Why Bother

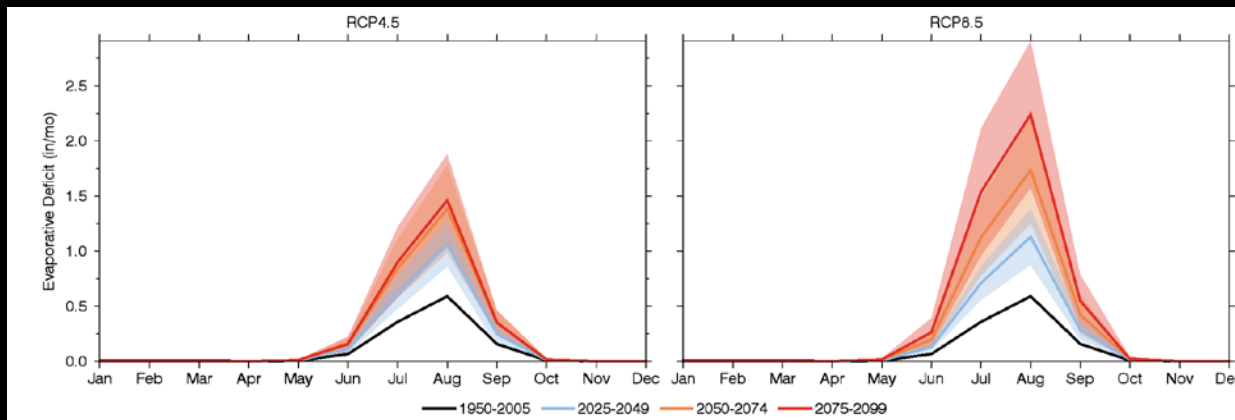
- ⦿ There is no question that Whatcom County has “plenty of water” – ***on average.***
- ⦿ There is no question that exempt wells use a low ***percentage*** of water in the County.
- ⦿ Neither of these statements addresses several ***critical factors***:
WHEN and ***WHERE*** is water available;
WHO and ***WHAT*** (people, businesses, and species) may be harmed by “queue-jumpers”

This year's likely legislative question:
Would it be good policy to donate senior water rights to private property owners?

- ◎ Should junior permit-exempt wells have the privilege to take water away from:
 - **Farmers**, like the Steensmas, and
 - The public's water right in **instream flows**?
- ◎ Should new development relying on permit-exempt wells always have preference over these senior rights?



Water Balance: Snow Water Equivalent, Whatcom County (USGS)



Water Balance: Evaporative Deficit, Whatcom County (USGS)