



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

(Originally published in the Spring 2002 issue of Washington WaterWatch)

A Landmark Decision on Non-permitted Wells

The Washington Supreme Court recently issued a decision that will have a far-reaching impact on the way subdivision developers provide adequate water supplies for future development.

When Washington's Groundwater Code was adopted in 1945, the State decided certain small-scale water users did not need to obtain a groundwater use permit. This "exempt well provision" allows for residential use of an amount less than five thousand gallons a day, among other exemptions. Hundreds of thousands of exempt wells currently exist in Washington, and thousands more are drilled each year. These wells typically do not have meters to measure how much water is being used. As a result, the State does not have a good picture of how many exempt wells exist or how much water they use.

What did the Supreme Court Decide?

In *Department of Ecology v. Campbell & Gwinn*, the Court overturned a Yakima County Superior Court decision and determined that the exempt well provision did not allow the developer in this case, Campbell & Gwinn, to drill multiple exempt wells for a 20-lot subdivision because the wells would collectively withdraw more than the specified limit of 5,000 gallons per day.

As clarified by the Court, the exempt well provision is intended to relieve *small-scale* domestic (residential) water users from permitting requirements and is limited to 5,000 gallons a day, whether intended for single or group domestic uses. An essential element of the Court's decision was its conclusion that wells drilled by a developer to service a subdivision constitute a single "group domestic use" rather than a series of individual uses. According to the Court, **a developer building a subdivision qualifies for one exemption for multiple residences and may not drill multiple wells for a single development when those wells will cumulatively withdraw more than 5,000 gallons per day.**

What is the extent of the Supreme Court's decision?

This decision impacts both existing and future development. Existing subdivisions that use more than 5,000 gallons per day, for which a developer drilled multiple wells without a water right, are not 'grandfathered in': they are illegal. Also, planned and future development clearly *cannot* rely on the exemption to serve subdivisions that require more than 5,000 gallons of water per day for their residents without a water right or without buying water from an established water supplier.

Contrary to popular perception, the Court did not 'close a loophole' in current law that had previously allowed developers to drill multiple exempt wells for large subdivisions. Instead, it clarified that such a loophole never existed: developers who built large subdivisions relying on exempt wells have not just been skirting the law - they've been breaking it.

What is CELP's Strategy in response to the Court's decision?

This decision represents a victory for the streams and rivers in Washington! Developers have used this exemption to build large-scale developments without the necessary review of impacts on other water users and the environment that occurs with state approval of new water rights. As competition for this ever-dwindling resource increases, the safeguards that come with issuing water permits are more important than ever.

CELP *will* aggressively challenge any new developments that plan to rely on exempt wells to serve subdivisions with more than 5,000 gallons of water per day. Developments that have already been built or are under construction but not yet complete are also liable for illegally using water, and as our resources allow we will consider challenging these as well.

We are committed to ensuring a legacy of flowing rivers for future generations to enjoy, and to ensure that we can responsibly meet the water needs of a growing society. Exempt wells were never intended to allow for large-scale development without any review of environmental impacts. Limiting the use of exempt wells for large-scale development, and requiring that current exempt uses be measured to assess their impacts, is vital to effectively managing our most precious resource - water.

(Note: as we go to print, Campbell and Gwinn are asking the Court to reconsider their decision because, they say, the Legislature consistently refused to amend the Ground Water Code in the way the Supreme Court interpreted the Ground Water Code. They argue that the Court shouldn't be allowed to "achieve by judicial fiat what a decade's worth of effort at the Legislature failed to accomplish." Campbell and Gwinn also asked the Court to clarify whether the decision is retroactive in application to existing developments. The Department of Ecology opposed the request.)