

# WA State Permit Exempt Well Woes

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# Mission

## Department of Ecology's Water Resources Program

We manage water resources to meet the needs of people and the natural environment, in partnership with Washington's communities

# Background - Chapter 90.03 RCW

- Created by the legislature in 1917
- Based on the prior appropriation doctrine
- Adjudication process
- Water right application & permit process
- Certificate process
- Surface water only
- No permit exemptions for surface water



# Background - Chapter 90.44 RCW

- Created in 1945 for Groundwater permitting
- Supplemental to Chapter 90.03 RCW
- Has a permit exemption:
  - ✓ Stockwatering - unlimited quantity
  - ✓ Lawn & non-commercial garden - up to ½ acre
  - ✓ Single & group domestic - up to 5,000 gpd
  - ✓ Industrial - up to 5,000 gpd

# Background - Chapter 90.22 RCW

- Created by the legislature in 1969
- Ecology shall, when requested by WDFW:
  - ✓ Protect fish, game, or other wildlife resources
  - ✓ Establish minimum flows or levels to protect the resource
  - ✓ Preserve water quality

# Background - Chapter 90.54 RCW

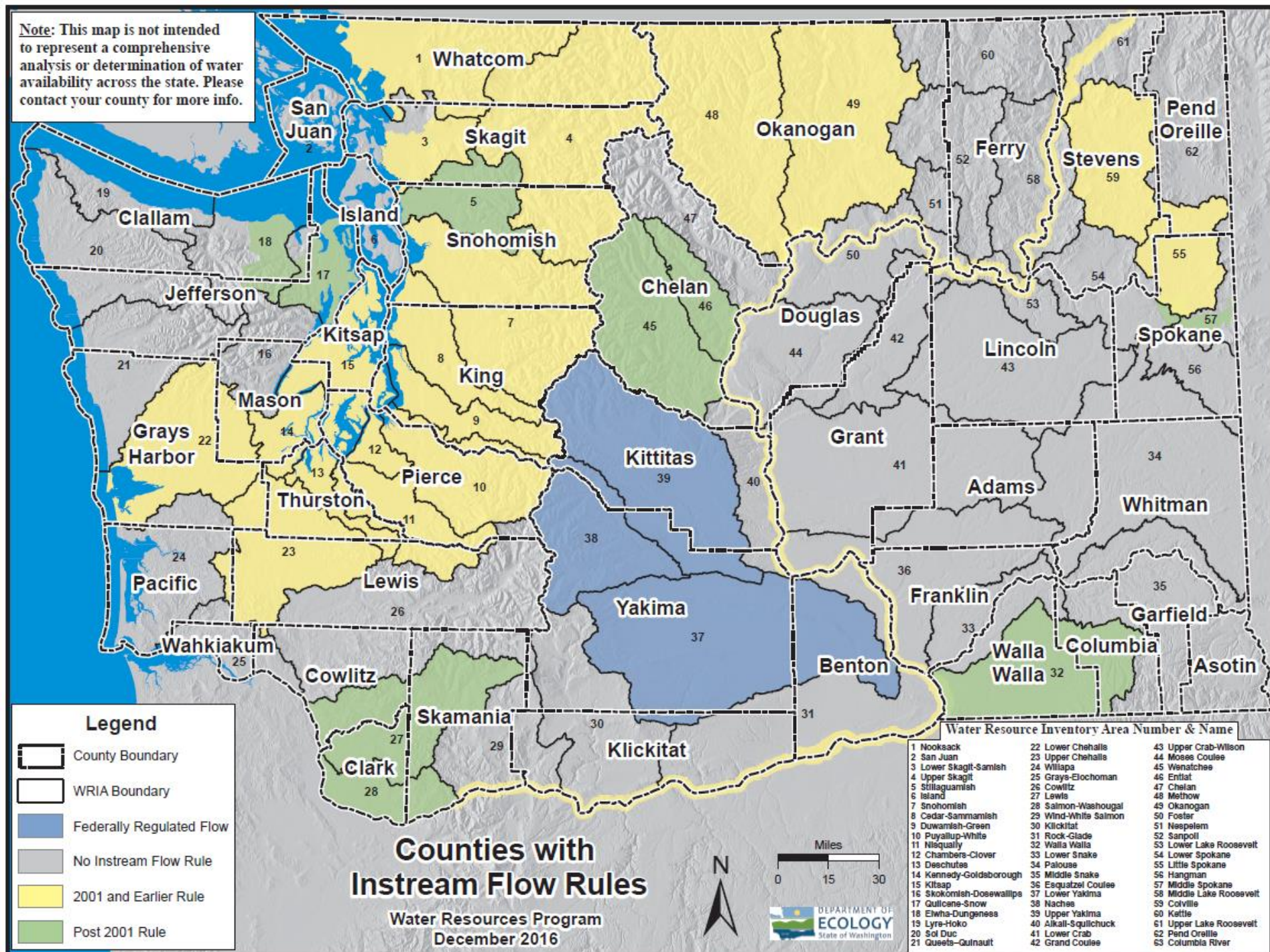
- Created by the legislature in 1971
- Ecology shall supply water in sufficient quantities to satisfy the following three water resource objectives:
  - ✓ Water for residential, commercial, and industrial needs
  - ✓ Water for productive fish populations
  - ✓ Water for productive agriculture
- *“Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values”*
- Ecology does this by adopting administrative codes (rules)

# Instream Flow Protections

- Instream flow protections are established under state law through Washington Administrative Code (WAC)
  - ✓ After adoption - follows prior appropriation doctrine
  - ✓ Instream Flow (ISF) rights are NOT quantified Tribal rights; those rights are established through a different process
- Important to maintain and preserve instream flow protection authority



**Note:** This map is not intended to represent a comprehensive analysis or determination of water availability across the state. Please contact your county for more info.



# What is causing our woes?

- 5 Washington State Supreme Court decisions:
  - ✓ Postema v. Pollution Control Hearings Board
  - ✓ Kittitas Co. v. Eastern Washington Growth Management Hearings Board
  - ✓ Swinomish v. Department of Ecology
  - ✓ Foster v. Department of Ecology & City of Yelm
  - ✓ Whatcom County v. Hirst, Futurewise, et al

# Other factors

- Tribal fishing rights (29 federally-recognized Native American tribes in WA) - the Boldt decision
- Endangered salmonids
- Many fully appropriated basins
- Altered hydrology
- Strong environmental activism
- Legislative impasse

# Postema (2000)

- Prior to *Postema*, ISF rules regulated Ecology's permitting of surface water and groundwater in direct (or significant) hydraulic continuity
- Under *Postema*, the Supreme Court ruled that even *de minimus* (one molecule) impairment to instream flows could not be permitted by Ecology
  - ✓ We know there is some degree of connection between most surface and groundwater
  - ✓ This implicates all new uses

# *Kittitas (2011)*

- Court found that Kittitas County had a GMA obligation to protect water resources in development regulations
  - ✓ The County's regulations were not compliant with GMA because its subdivision regulation allowed "daisy chaining" of subdivisions using multiple exempt wells evading limits imposed by the *Campbell and Gwinn* Supreme Court decision
  - ✓ Yakima River Basin has been fully appropriated since 1905

# *Swinomish (2013)*

- WAC 173-503 for the Skagit River was adopted in 2001, it was challenged by Skagit County, and modified by Ecology based on a negotiated agreement
- Amended WAC adopted in 2006 “carved out” reservations for future uses from the instream flows using “Overriding Considerations of the Public Interest” (OCPI)
- Court ruled that Ecology cannot allow impairment to ISF with OCPI justification for reservations for future uses
  - ✓ Seven other watersheds with ISF rules have reservations of water for future use
  - ✓ New ISF rules require full offset to impairment

# ***Foster (2015)***

- A permit approval for the City of Yelm was appealed because of a claim of impairment
- Ecology had approved the permit, which included both “water for water” and “out of kind” mitigation
  - ✓ Seasonal (irrigation water right) mitigating municipal use
  - ✓ Small (calculable) impairment to flows part of the year
- Supreme Court ruled that “legal impairment” to flows was not addressed by mitigation for the biological impacts
  - ✓ Creates strict “in-kind”, “in-place”, “in-time” standard no matter what biological benefits of the mitigation may be

# Hirst (2016)

- When issuing building permits, counties must ensure that new permit exempt uses do not legally impair instream flows and stream closures
- There is a GMA responsibility even when ISF rule does not specifically regulate permit exempt uses
- Counties have an independent responsibility in making water availability determinations
- Same standard for impairment that follows from previous court rulings (i.e., *Postema*)

# The fundamental challenge

- Webster defines “impair” as
  - ✓ To diminish in function, ability, or quality
  - ✓ To weaken or make worse
- Supreme Court made distinction between legal impairment vs. ecological harm
- While all new uses do not cause ecological harm, there is no legal mechanism to address impairment (one molecule standard)

# On the ground impacts

- Instream flows set at levels that are not typically achieved every day of the year
  - ✓ Statutory directive - retain base flows necessary for habitat preservation (and other values)
  - ✓ Any new year-round use legally impairs the adopted flows (however small)
  - ✓ Many ISF rules closed all smaller streams
- Ecology has evaluated existing ISF rules and there are no cases where flows are being met all the time so that water can be available
  - ✓ This does not mean streams and rivers are ecologically impaired

# Implications to counties

- Counties cannot rely on whether an ISF rule addressed permit exempt uses or not
- Counties have an obligation under Hirst to ensure each building permit they issue does not legally impair ISF



# Options for counties

- Rely on house-by-house hydrogeologic evaluation
  - ✓ Applicants must show no (not even *de minimus*) impairment
  - ✓ \$5k-\$25k to complete
  - ✓ Does not boost stream flows or improve fish habitat
- Conduct watershed hydrogeologic studies (modeling)
  - ✓ Likely to show that in most areas there is some degree of hydrologic connection
  - ✓ Counties would spend a lot of money to tell us what we already know (in general)
  - ✓ Does not boost stream flows or improve fish habitat
- Develop mitigation banks (i.e., “Water Banks”)

# Other approaches



**King County**  
**Department of Permitting and Environmental Review**  
35030 SE Douglas St. #210  
Shoquistmire, WA 98055-9266  
**206-296-6600** TTY 711  
www.kingcounty.gov

## **Special Notice** **Private “Exempt” Wells** (Unincorporated Areas Only)

### **Building and Land Use Permits with Private Wells:**

Information provided by this Special Notice may impact the application and approval of any development permits, administered by King County Department of Permitting and Environmental Review (DPER), involving the use of private well water. Landowners should be aware that any permit approval by DPER is not a determination that water is legally available for property development and, their ability to develop property when relying on private (“exempt”) wells as the water source may be limited by a recent court decision.

### **Court Decision:**

On October 6, 2016, the Washington State Supreme Court issued a ruling in the case of Whatcom County v. Hirst, Futurewise, et al. As outlined in that decision, development permit applications that propose to use a private well water supply (in a basin that is closed or partially closed to surface water withdrawals by the Department of Ecology) must demonstrate that groundwater withdrawal will not impair a senior water right, including instream flows established in the DOE Water Resource Inventory Areas (WIRA). This is referred to as a showing of “legal water availability.”

### **Private Exempt Wells and Existing Wells:**

This ruling applies to “permit-exempt” wells as determined by RCW 90.44.050. Exempt-wells are typically used for single family residences using not more than 5,000 gallon of water per day. They may also be used for irrigation of small lawns and gardens, industry and stock watering. In light of the Hirst decision, proposals to make use of exempt wells may require a showing of legal water availability.

Approved residences currently served by existing wells are not impacted. Modifications to the existing residence and accessory buildings are allowed on condition a new well is not required.

### **Applicant and Owner Considerations:**

Landowners should be advised that the presence of a well on a property does not necessarily constitute a right to use groundwater for a specific purpose. King County DPER advises landowners to investigate their right to use water prior to drilling a well for use as a residential or commercial water source. Further information on groundwater rights, wells and drainage basin information (WIRA) is provided by the Washington State Department of Ecology. You may also consider consulting with a hydrogeologist to further study any particular site.

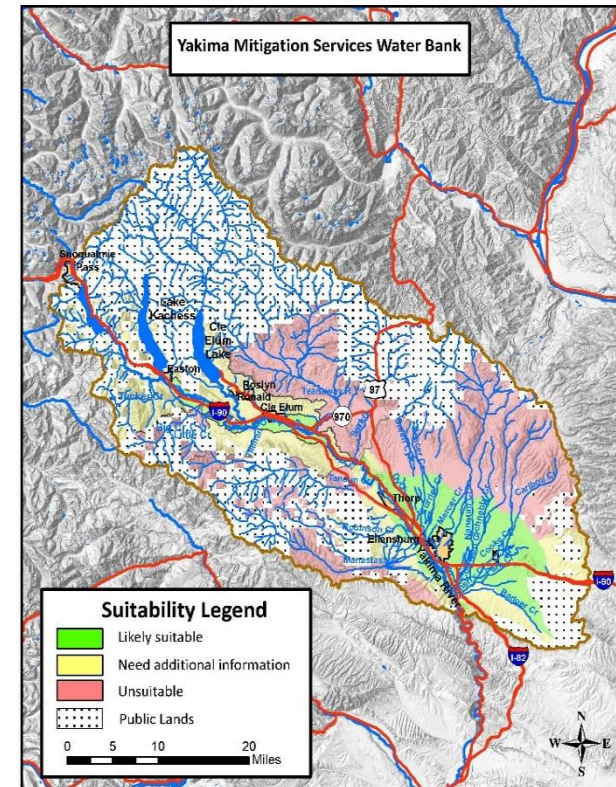
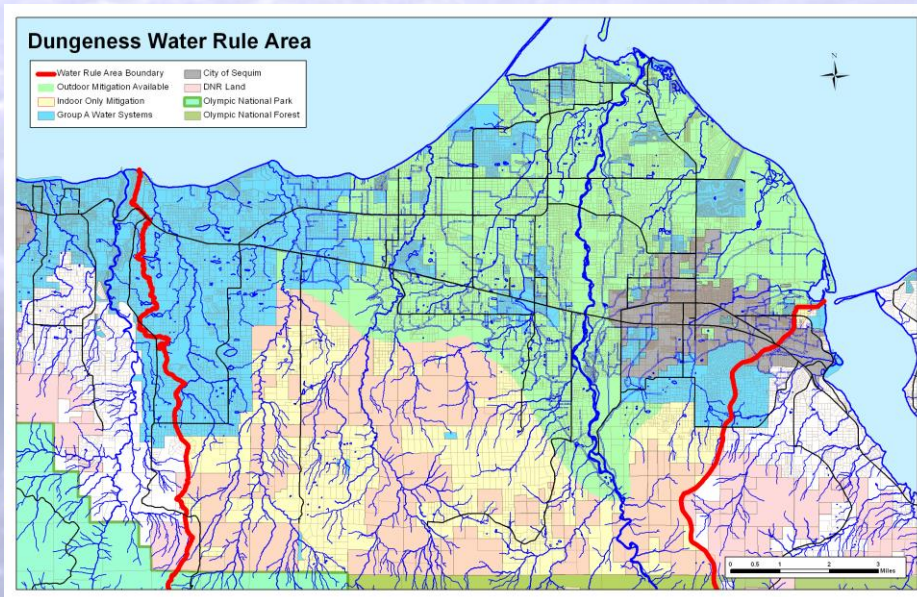
### **King County’s Role:**

King County government is assessing the ramifications of this case on issuance of building permits, subdivisions, and other development permits that utilize exempt wells. Because the Growth Management Hearings Board did not invalidate the County’s development regulations (and the Supreme Court declined to reverse the Board’s decision on that issue), King County DPER will continue to take in building permit applications, subdivision applications, and other development permit applications in the interim. Public Health will likewise continue to accept and review well applications only for setback, bacteria, arsenic, PH, and flow. However, King County does not make any warranties regarding water rights for proposed development. The property owner and/or applicant is responsible for establishing and maintaining a legal water source. A Notice of Intent (NOI) to Drill a Well is not a permit, certificate, or application for a water right. Your Notice of Intent does not represent approval or permission to use water from the well.

- Some counties are issuing building permits and telling the applicants that the building permit approval is not a determination of legal water availability
- Does this comply with Hirst?
- What risk does this approach place on the County? The landowner?

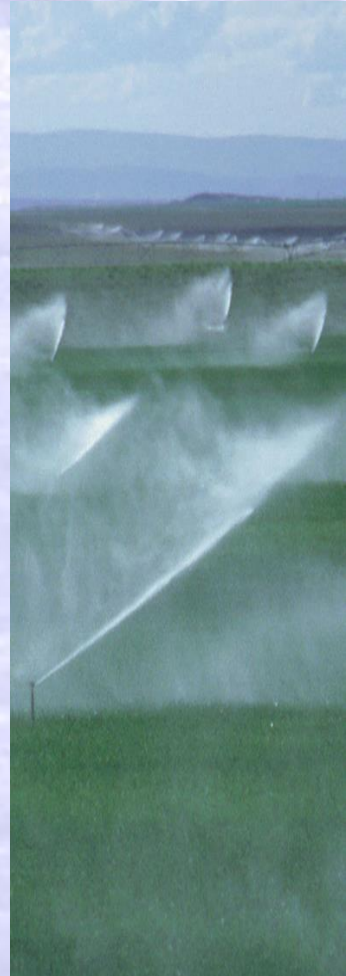
# Mitigation Banking

- Successes in specific areas with widespread irrigation systems & storage
- Had essential flexibility



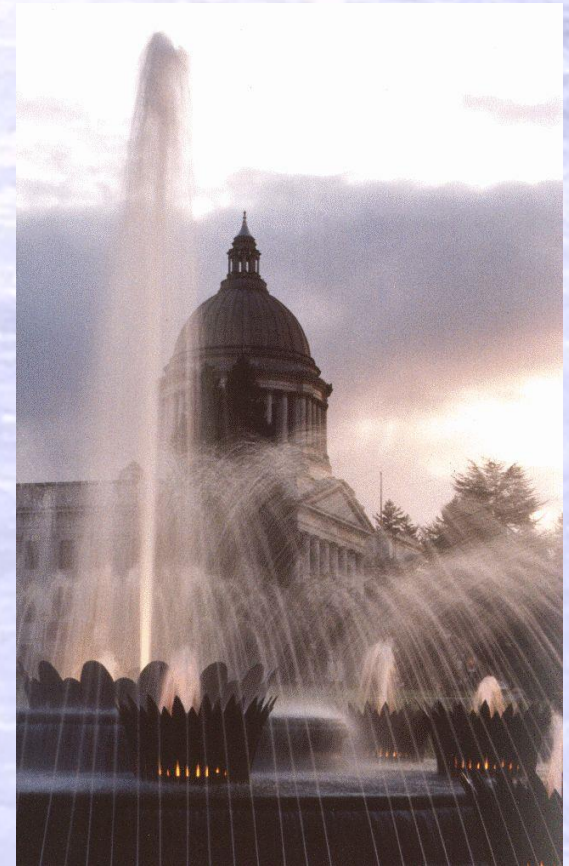
# Banking challenges

- Most banking relies on acquiring senior agricultural rights
  - ✓ Either fallow land or use conserved water
  - ✓ Not necessarily available where landowners build
  - ✓ Must address in-time, in-place impairment standard
  - ✓ Cannot be negotiated because of case law



# Uncertain path forward

- Split legislature - Senate (R), House (D)
- Legislature adjourned in July after 3 special sessions (193 days total)
- No permit-exempt well legislation passed
- Resulting in no 2017-2019 capital budget (\$4.2 billion worth of projects on hold & layoffs)
- Next regular session begins in January



## Rural property owners find there's no water at the pump | Sen. Jan Angel

Thu Apr 6th, 2017 10:59am • **OPINION**

Agriculture & Natural Resources

Housing & Transportation

Housing

## Opinions Still Clashing Over Hirst Decision

**Warnick: Failure of Hirst Bill A Huge Disappointment**

# War Of The Wells: Hirst Decision Draws Stealthy Demonstration To Washington Capitol

By JEANIE LINDSAY • FEB 28, 2017

**Local View: Anti-growth interests obstruct new jobs, affordable housing**

Bill aimed at helping rural land owners fails to pass key committee

OLYMPIA

WITH THOUSANDS SEEKING TO BUILD RURAL HOMES, WILL LEGISLATURE CUT OFF WATER FOR FISH?

 ADIEL KAPLAN February 13, 2017

# Thank you!



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