

WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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No. 733150-1

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RICHARD A. FOX AND MARNIE B. FOX, husband and wife,

Appellants,

vs.

SKAGIT COUNTY, a municipal corporation, SKAGIT COUNTY BOARD OF HEALTH, an RCW 70.05 local board of health, DALE PERNULA, DIRECTOR of the SKAGIT COUNTY PLANNING AND DEVELOPMENT SERVICES, and JENNIFER KINGSLEY, DIRECTOR of the SKAGIT COUNTY BOARD OF HEATH AKA SKAGIT COUNTY PUBLIC HEALTH DEPARTMENT,

Respondents,

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Respondent-Intervenors.

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AMICUS CURIAE BRIEF OF  
THE CENTER FOR ENVIRONMENTAL LAW & POLICY

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STATE OF WASHINGTON  
COURT OF APPEALS  
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L. Binder, *Preparing for Climate Change in the U.S. Pacific Northwest*,  
15 *Hastings W.-N.W. J. Env. L. & Pol’y* 183 (2009) . . . 10

#### GOVERNMENT PUBLICATIONS

Puget Sound Partnership, *2014/15 Action Agenda for Puget Sound* (2014).  
Available at [http://www.psp.wa.gov/2014\\_action\\_agenda\\_download.php](http://www.psp.wa.gov/2014_action_agenda_download.php) .  
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Washington Department of Ecology, *Responsiveness Summary and  
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Washington Department of Ecology, *Permit-Exempt Domestic Well Use in  
Washington State* (2015). Available at  
<https://fortress.wa.gov/ecy/publications/SummaryPages/1511006.html>  
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Washington Department of Ecology, *Instream Flow Rules* (undated).  
Available at <http://www.ecy.wa.gov/programs/wr/instream-flows/isfrul.html>. . . . 10

Washington Department of Ecology, *Preparing for a Changing Climate: Washington State's Integrated Climate Response Strategy* (2012).  
Available at  
[http://www.ecy.wa.gov/climatechange/ipa\\_responsestrategy.htm#REPORT](http://www.ecy.wa.gov/climatechange/ipa_responsestrategy.htm#REPORT)  
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## **I. Introduction**

The Center for Environmental Law & Policy respectfully offers the following arguments regarding Washington's water resources statutes, cases, and regulations, for the benefit of the Court in evaluating appellant Fox's theories regarding "correlative" or "common-law" rights to use of groundwater, which are wholly unsupported by Washington law.

## **II. Identity and Interests of Amicus Curiae**

Amicus curiae Center for Environmental Law & Policy (CELP) is a membership-based, non-profit corporation with a mission to protect and restore the quantity of water flowing in Washington's freshwater resources, i.e. its rivers and aquifers, to ensure protection of public values in those waters, including fish and wildlife habitat, drinking water supply, water quality, recreational use, and aesthetic enjoyment.

CELP accomplishes its mission by advocating for responsible allocation of water rights, either by permit or permit-exempt processes, and promoting adoption and protection of instream flow rules. The Skagit Instream Flow Rule for Water Resource Inventory Areas (WRIAs) 3 and 4 is an instream rule in which CELP has an interest. *See* Ch. 173-503 WAC. In particular, the Skagit rule expressly incorporates provisions of the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum

Flows Act, Ch. 90.22 RCW, which authorize the Department of Ecology to establish “minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.” RCW 90.22.010. The values called out in these statutes are the same values CELP seeks to promote, including through the filing of an amicus brief in this matter that directs the Court to consideration of the potentially very broad implications of appellants’ unfounded legal theories.

### **III. Statement of the Case**

CELP concurs with and adopts the statement of the case as set forth in the Response Briefs of Intervenor Swinomish Indian Tribal Community (“Tribe’s Brief”) and Intervenor Department of Ecology (“Ecology’s Brief”).

### **IV. Argument**

#### **A. Introduction**

Appellants Richard and Marnie Fox (“Fox”) ask the Court to accept numerous propositions regarding domestic use of groundwater. Among Fox’s arguments is the claim that there is a “riparian-like” or “correlative” right to use groundwater as an incident of property ownership. This concept is wholly at odds with Washington law and with

the well-established prior appropriation scheme for water use in our state. Fox also argues that use of a permit-exempt well as provided by RCW 90.44.050, without more, shows an adequate supply of water for purposes of satisfying the building permit requirement of RCW 19.27.097. This, too, is inconsistent with Washington's scheme for water resource protection.

Finally, Fox argues (again without basis in law) that permit-exempt domestic groundwater use is immune from the prior appropriations system and essentially has super-priority over all other uses of water, including protection of the state's water resources.

Taken together, the implication of Fox's theories is that there can be no regulation whatsoever of permit-exempt groundwater use. This would destroy the state's ability to regulate rural water use, with enormous potential consequences for water resource protection statewide, and would complicate Washington's response to climate change.

**B. Relevant provisions of Washington's water resource protection scheme**

Washington law provides a comprehensive scheme for regulation of water use. The statutes and case law governing water use are extensively discussed in the Tribe's Brief and in Ecology's Brief. CELP joins generally in the Tribe's and Ecology's analysis, as explained below.



**1. Washington’s surface and groundwater resources belong to the public.**

The Water Code, enacted by the Legislature in 1917, expressly declares “all waters within the state” to be public. RCW 90.03.010; *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997) (citing *Ecology v. Bureau of Reclamation*, 118 Wn.2d 761, 766, 827 P.2d 275 (1992)); *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wn.2d 464, 476, 918 P.2d 923 (1996). The Groundwater Code, RCW 90.44.010 et seq., was enacted in 1945 for the purpose of extending state supervision to groundwater, and declares that “all natural groundwaters of the state” are public. RCW 90.44.010; RCW 90.44.040.

Both pre- and post-Water Code cases agree there is generally no private right to ownership of water; rather, a *right to use water* may be acquired. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 252, 241 P.3d 1220 (2010) (“[g]enerally speaking, there is no private right to own the waters that flow across Washington State”); *Rigney v. Tacoma Light & Power*, 9 Wash. 576, 583, 38 P. 147 (1894) (user has no property in the water itself, but a “simple usufruct while it passes along”).

**2. The Legislature has mandated establishment of instream flows in order to protect instream resources.**

The Legislature has repeatedly authorized or directed that instream flows be established, and that sufficient water must be maintained in rivers

and streams to protect the water resource and the environmental, aesthetic, and recreational values associated with the public waters. Preservation of water sufficient to provide for fish and wildlife (i.e., protection of habitat) has consistently been included in these statutes.<sup>1</sup>

**3. Permit-exempt wells are subject to the prior appropriations system, and may not impair existing instream flows.**

Under the prior appropriations doctrine, perfected permit-exempt uses of water are a water right like any other, and may not legally be allowed to impair a more senior right, including a senior instream flow.<sup>2</sup> Despite this, the widespread use of permit-exempt wells poses a threat to instream flows due to unregulated withdrawals of water that is in hydraulic continuity with streams and rivers

**C. Instream flows are threatened by permit-exempt withdrawals.**

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<sup>1</sup> RCW 90.22.010 (Ecology may establish minimum water flows or levels ... for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values); RCW 77.57.020 (it is the policy of the State that “flow of water sufficient to support game fish and food fish” be maintained at all times); RCW 90.54.020(3)(a) (rivers and streams “shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values. . .” (emphasis added). Once instream flows are established by regulation, no right to divert water which conflicts with these flows may be granted. RCW 90.22.030.

<sup>2</sup> *Swinomish Indian Tribal Community v. Ecology*, 178 571, 598, 311 P.3d 6 (2013) (no provision for permit-exempt wells to “jump to the head of the line”); *Dep’t of Ecology v. Campbell & Gwinn*, 141 Wn.2d 1, 9, 43 P.3d 4 (2002) (permit-exempt water treated as any other perfected water right); see also Tribe’s Brief at 29 n. 12.

Neither the exact number of permit-exempt wells in Washington nor how much water is withdrawn by each is known with any certainty. As of 2001, Ecology estimated that there were from 500,000 to 750,000 such wells in the state.<sup>3</sup> Of these, Ecology stated that it could identify approximately 250,000. *Id.* While Ecology has authority to require metering of withdrawals under RCW 90.44.050, it has not generally done so<sup>4</sup>, and the actual amount of water withdrawn from these wells can only be estimated.

Although the precise number of permit-exempt wells in the state is unknown, it is clear that their use has increased dramatically in recent years, and that permit-exempt groundwater use represents a substantial fraction of domestic water use. In a 2015 report, Ecology estimated that between 2008 and 2014 approximately 17,200 new permit-exempt wells were drilled statewide.<sup>5</sup> This report also found that public water supply systems accounted for about 4.6% of consumptive water use in

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<sup>3</sup> Nathan Bracken, *Exempt Well Issues in the West*, 40 Environmental Law 141 at 202 (2010).

<sup>4</sup> Ecology has authority under RCW 90.44.050 to require metering of exempt wells, and has issued regulations regarding methodology for metering water use. WAC Chapter 173-173. However, Ecology has not generally exercised this authority, citing resource constraints and the large number of exempt wells. *See Washington Department of Ecology, Responsiveness Summary and Concise Explanatory Statement, Chapter 173-173 WAC, Requirements for Measuring and Reporting Water Use* (2001) at 25. Available at <https://fortress.wa.gov/ecy/publications/SummaryPages/0111016.html> (last viewed October 7, 2015)

<sup>5</sup> Washington Department of Ecology, *Permit-Exempt Domestic Well Use in Washington State* (2015) at 8. Available at <https://fortress.wa.gov/ecy/publications/SummaryPages/1511006.html> (last viewed October 6, 2015).

Washington, while permit-exempt wells made up about 0.9% of such use (put another way, based on Ecology's reported numbers, permit-exempt wells would represent about 16% of the total municipal and domestic water use).<sup>6</sup>

The dramatic increase in permit-exempt wells is also apparent when single watersheds are examined. Between 1980 and 2012, estimates of exempt well numbers in the Skagit and Samish watersheds increased from 1080 to 7232.<sup>7</sup> In the Nooksack watershed, the estimated number of exempt wells increased from 3294 to 12,195, with 77% of the new wells located in basins that are closed by regulation to water withdrawals.<sup>8</sup>

Even within a basin, distribution of permit-exempt wells, and their likely impact on streamflow, varies greatly. For example, in the Skagit River basin, Ecology estimates that permit-exempt well density ranges from 0.1 well per square mile in the Finney Creek and Illabot Creek sub-basins to 37 wells per square mile in the Fisher Creek sub-basin.<sup>9</sup> The impact of permit-exempt wells is of particular concern in relatively small

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<sup>6</sup> *Id.* at 12. The data in the Department of Ecology study was for the four-month irrigation season, and is skewed by the large fraction of the state's water use represented by irrigation. *Id.* The absolute percentage of water use represented by permit-exempt wells and public water supply systems (both year-round uses) on a full-year basis is therefore likely to be somewhat higher.

<sup>7</sup> Northwest Indian Fisheries Commission, *State of Our Watersheds* (2012) at 296. Available at <http://maps.nwifc.org:8080/sow2012/> (last viewed October 7, 2015).

<sup>8</sup> *Id.* at 80. Ecology has by rule closed certain basins in the Nooksack watershed to new water withdrawals. WAC 173-501-040.

<sup>9</sup> *Permit-Exempt Domestic Well Use in Washington State* at 16.

watersheds, where wells are clustered near small streams or tributaries.<sup>10</sup> Evidence in this case indicates just such a problem with Fox's proposed use of a permit-exempt well.<sup>11</sup>

The uncertainty in numbers of permit-exempt wells, their locations, and lack of measurement of the amount of water actually withdrawn produces substantial difficulties in understanding and managing their net impact on streamflows.<sup>12</sup> The free-for-all system urged by Fox would exacerbate this problem and pose even greater risks to the statewide system of water resource management.

**D. Fox asks that the court establish a “super-priority” for permit-exempt wells.**

Fox not only attempts to place permit-exempt wells outside the priority system<sup>13</sup>, but suggests that a water right established through use of such a well would actually be superior to any other class of right. Fox asserts that permit-exempt withdrawals are somehow not subject to “the generalized priority principles of RCW 90.03.010.” Reply at 15. This is followed by the statement that “the general principle that withdrawals that are exempt from permitting are subject to first in time first in right” is

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<sup>10</sup> *Id.* at 25.

<sup>11</sup> Fox's property is located very near both Red Cabin and Mannser Creeks, both of which experience very low flows in summer. CP 445-46; CP 451.

<sup>12</sup> *Exempt Well Issues in the West* at 201-202

<sup>13</sup> For a thorough analysis of why the priority system applies to permit-exempt wells, see Section IV.C of the Tribe's Brief and section IV.B of Ecology's Brief.

“applicable especially to other groundwater withdrawals junior to the exempt right” as well as to “other surface water appropriations also junior [to the exempt right].” *Id.* at 16.

Taken together (and ignoring the fundamental inconsistency of a permit-exempt right simultaneously being within *and* without the prior appropriations system), these assertions amount to a claim that a permit-exempt right is included in the prior appropriations scheme only where it is a *senior* right, and priority may simply be ignored where the permit-exempt right is *junior* to other water rights (for example, to an instream flow rule).

The implication of Fox’s argument is that no senior right, instream flow rule, or any other class of water right would *ever* have priority over a right derived from a permit-exempt well. Under this interpretation, permit-exempt wells in hydraulic continuity with closed basins or streams with unmet instream flows would be allowed to withdraw water – down to the last drop. This is contrary to both the statutory scheme and to Washington case law.<sup>14</sup>

By exempting a potentially very large amount of water use from the priority scheme, Fox’s proposed interpretation of the law would

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<sup>14</sup> *Swinomish*, 178 Wn.2d at 598 (no provision for permit-exempt wells to “jump to the head of the line”); *Campbell & Gwinn*, 141 Wn.2d at 9 (permit-exempt water treated as any other perfected water right); see also Tribe’s Brief at 29 n. 12.

hamstring Ecology's ability to regulate water use and to fulfill its statutory mandate to "retain[ streams] with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values. . ." RCW 90.54.020(3)(a).

**E. Unrestricted permit-exempt withdrawals of water would increase Washington's vulnerability to climate change.**

Uncontrolled use of permit-exempt wells is also incompatible with the need to prepare for the effects of climate change. Washington State is already experiencing a warmer and drier climate, and predictions are that summer streamflows will be further reduced in future years.<sup>15</sup>

Unfettered development of permit-exempt wells would place even more pressure on streams. As a practical matter, once permit-exempt water use for residential development has begun, it is very difficult to curtail.<sup>16</sup> The result would be an inevitable, progressive reduction in streamflows and degradation of habitat, which Ecology would be essentially powerless to halt.

In order to prepare for climate change effects, the Legislature has

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<sup>15</sup> L. Binder, *Preparing for Climate Change in the U.S. Pacific Northwest*, 15 Hastings W.-N.W. J. Env. L. & Pol'y 183, 184-85 (2009). Ecology has recognized that "shrinking snow packs and other effects of climate change" affect water resource management to protect instream flows. Washington Department of Ecology, *Instream Flow Rules* (undated, accessed 9/3/15), available at <http://www.ecy.wa.gov/programs/wr/instream-flows/isfrul.html>.

<sup>16</sup> See *Campbell & Gwinn*, 146 Wn.2d at 17 ("after the fact" remedies are less effective than review before appropriation occurs).

directed that a group of agencies, including Ecology, must “develop an integrated climate change strategy.” RCW 43.21M.010. An Ecology document titled “Preparing for a Changing Climate: Washington State’s Integrated Climate Response Strategy” lists possible mechanisms to “build the resilience of natural systems to climate change,” including “manag[ing] freshwater withdrawals” and maintain[ing] and restor[ing] streamflows and lake levels.”<sup>17</sup> Allowing the unrestricted use of permit-exempt groundwater suggested by Fox is clearly incompatible with “managing freshwater withdrawals,” and would actually result in further impairing, not restoring, stream flows and lake levels.

Another key attribute of fish habitat is temperature. Both by causing warmer weather and by reducing streamflows, climate change is likely to adversely affect stream temperatures, which “will substantially reduce the quality and extent of freshwater salmon habitat” and “double and possibly quadruple” the duration of stream temperatures that cause thermal stress to salmon.<sup>18</sup>

In the context of climate change, the Puget Sound Partnership, the state agency in charge of Puget Sound recovery, has identified

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<sup>17</sup> *Department of Ecology, Preparing for a Changing Climate: Washington State’s Integrated Climate Response Strategy* (2012) at 75. Available at ([http://www.ecy.wa.gov/climatechange/ipa\\_responsestrategy.htm#REPORT](http://www.ecy.wa.gov/climatechange/ipa_responsestrategy.htm#REPORT) last viewed October 7, 2015).

<sup>18</sup> *Id.* at 105-6.



summertime stream temperatures and seasonal low flows as “key pressures limiting the productivity of salmon populations in freshwater environments.”<sup>19</sup> Puget Sound Partnership has also identified “monitoring of groundwater resources (including exempt wells) and use projections, and completion and implementation of groundwater management plans” as important goals in protection and restoration of freshwater resources.<sup>20</sup>

Further (and unpredictable) reductions in flow caused by unbridled permit-exempt water use have the potential to exacerbate temperature increases, and make adapting to changing climatic conditions even more difficult.

## **V. Conclusions**

Fox’s arguments are without merit. As discussed in the Tribe’s and Ecology’s briefs (the reasoning of which is hereby adopted by CELP), there is no support in statute or case law for the proposition that a “correlative” right to use groundwater remains available in Washington. All withdrawals of groundwater must comply with the Water Code and the Groundwater Code. Because permit-exempt wells are subject to the “first in time” system, they cannot be allowed to impair more senior rights.

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<sup>19</sup> Puget Sound Partnership, *2014/15 Action Agenda for Puget Sound* (2014) at 3A-42. Available at [http://www.psp.wa.gov/2014\\_action\\_agenda\\_download.php](http://www.psp.wa.gov/2014_action_agenda_download.php) (last viewed October 8, 2015)

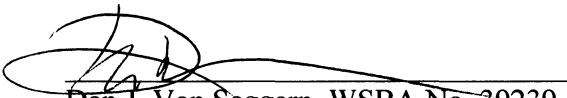
<sup>20</sup> *Id.* at 3A-59

The unbridled use of exempt water that Fox's arguments would allow, should he prevail, would have profound and serious consequences on habitat and wildlife, by making it more likely that instream flows would be compromised and more difficult to prevent such compromise by exempt well users. By increasing the pressure on streams (and likely reducing streamflows), Fox's theory would also complicate our state's response to climate change.

For the foregoing reasons, CELP respectfully requests that this court affirm the Superior Court's dismissal of this case.

Respectfully submitted this 8<sup>th</sup> day of October, 2015.

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